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1913 SESSION CASES.

CASES

DECIDED IN

THE COURT OF SESSION,

AND ALSO IN THE

COURT OF JUSTICIARY

AND

HOUSE OF LORDS,

FROM JULY 27, 1912, TO JULY 19, 1913.

REPORTED BY

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R. C. HENDERSON, W. A. RAMSAY, AND

R. A. LEE, ADVOCATES.

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DURING THE PERIOD OF THESE REPORTS.

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Lord MACKENZIE.

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ATKINSON, SHAW OF DUNFERMLINE, DE VILLIERS,

MERSEY, and MOULTON.

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ERRATA.

P. 289, line 4 of rubric, *between* "and" and "that," insert "directed."

P. 437, footnote¹, for "1 R. 202," read "1 R. 1202."

P. 446, footnote, line 7 from foot, for "ascertained," read "unascertained."

CASES

DECIDED IN

THE HOUSE OF LORDS.

1912-1913.

THE BRITISH GLANZSTOFF MANUFACTURING COMPANY, LIMITED, (Pursuers) Appellants.—*Lord-Adv. Ure—Hudson—D. Anderson.* No. 1.
THE GENERAL ACCIDENT, FIRE, AND LIFE ASSURANCE CORPORATION, LIMITED, (Defenders) Respondents.—*Atkin, K.C.—Constable, K.C.—Norrie Miller.* Oct. 28, 1912.
British Glanzstoff Manufacturing Co., Limited, v. General Accident, Fire, and Life Assurance Corporation, Limited.

Contract—Construction—Breach—Damages for delay—Measure of damages—Provision for liquidate damages for delay—Failure of contractor to complete contract—Completion of contract by other parties—Applicability of provision for liquidate damages.

A contract for the construction of certain works by a specified date contained a clause providing for liquidate damages at certain rates to be paid by the contractor for each week's delay beyond that date. A separate clause provided that, if the contractor should suspend the works, the employers might take possession of the plant and materials and engage others to complete the contract, and that, should the expenses thus properly incurred by the employers exceed the amount which would have been due to the contractor on completion of the work, the difference was to be paid by the latter to the former. The contractor became bankrupt and suspended the works, and the employers thereupon engaged other persons to complete them, but they were not completed until at least six weeks after the date specified in the original contract.

In an action of damages, at the instance of the employers, for the loss incurred by them through the failure of the contractor to fulfil his contract, the pursuers claimed, *inter alia*, damages for six weeks' delay at the rate specified in the liquidate damages clause.

Held (aff. judgment of the First Division) that, while the pursuers were entitled to sue for damages for breach of contract, they could not found on the liquidate damages clause, as that clause applied only where the contractor had himself completed the contract, and did not apply where the employers had finished the work under a separate clause of the contract containing its own remedy.

(In the Court of Session, Feb. 22, 1912—1912 S. C. 591.)

The pursuers appealed to the House of Lords.

The appeal was heard on 28th October 1912.

At the conclusion of the appellants' argument,—

LORD CHANCELLOR.—The question which arises on this appeal is as to the construction of a contract, which was entered into between the appellants and a firm of contractors, who have since got into difficulties. The point which is to be determined is whether a certain clause, which confers

Ld. Chancellor (Haldane).
Earl of Halsbury.
Ld. Atkinson.
Lord Shaw of Dunfermline.

Oct. 28, 1912. a right to liquidated damages, applies under the circumstances of the present case.

British Glanz-
stoff Manufac-
turing Co.,
Limited, v.
General Acci-
dent, Fire,
and Life,
Assurance
Corporation,
Limited.

Lord
Chancellor.

The respondents are an Insurance Company who, by a contract of guarantee, became cautioners for the carrying out by the contractors of their contract, and there is no question raised in this case that their contract covers the question at issue. What we have to determine is matter of pure construction. The contract between the original contractors and the appellants covers a number of contingencies, but the important clauses of it are clauses 24 to 26 inclusive. These clauses show that the bargain which the appellants made for themselves was that the contractors should be bound under certain penal clauses to do the work which they had undertaken to do, and that in addition to what was provided for by those clauses, the employer should have a special remedy, which was conferred by clause 26. As I read clause 26, it was this. It had previously been provided in the contract that if the contractors failed to carry out and complete the works within the time, they should be subject to certain penalties; and if on the other hand they anticipated their time, they should get certain advantages. But when we come to clause 26, there is this carefully guarded power which is given (on a certain default being made by the contractors, and certain notice being given to them) to the employer to enter and to complete the work either himself or through another contractor under the guidance of the architect, who is made the judge between the two parties, and whose duty it is to see that the employer does not put a larger burden upon the original contractors than could properly have been the case. The employer is bound by the opinion of the architect, who, on the completion of the works carried out after this taking possession and ousting of the original contractors, is to certify the amount of expense properly incurred. If by chance there has been an advantage in that the work has been more cheaply done than it would have been done under the original contract, then the original contractors, notwithstanding they have been in default, are to get the benefit. The reason is plain: this is a very exceptional remedy under which they are ousted from the contract. But if, on the other hand, the architect certifies that additional expenses have been incurred, then those are to be recovered.

Now that clause 26, as I read it, constitutes an enclave in the contract by itself providing for a special remedy. The general remedy is to be found under the earlier clauses, and among them the one which has raised the question with which we are here dealing. Clause 24 provides that "if the contractor fail to complete the works by the date named" in the previous clause, which is the 31st January 1910, "or within any extended time allowed by the architect," then the architect, if he certifies "that the works could reasonably have been completed by the said date, or within the said extended time," gives a certificate on which the contractor becomes liable to the payment of liquidated damages. The words are these: "The contractor shall pay or allow to the employer the sum of £250 sterling per week for the first four weeks, and £500 per week for all subsequent weeks, as liquidated and ascertained damages for every week beyond the said date or extended time, as the case may be, during which the works shall remain unfinished, except as provided by clause 23, and such damages may be

deducted by the employer from any moneys due to the contractor." In Oct. 28. 1912. this case the appellants claim these sums as liquidated damages from the Insurance Company, who guaranteed the performance by the contractors of their contract, and the question is whether, as the procedure which has followed on the default of the contractors has been directed under clause 26, and not under the other general clauses of the contract, this clause 24, which I have just read, applies. In my opinion it does not apply, and I think it does not apply for two reasons: first of all, that it is altogether inapt to the provisions made by clause 26, which contain a complete code of themselves; and secondly, because upon its construction I read it as meaning that if the contractors have actually completed the works, but have been late in completing the works, then, and in that case only, the clause applies. Under the circumstances in which this appeal comes before us the contractors have not completed the works; on the contrary, they have been ousted from the works by the employers under their powers given them by clause 26. I am therefore of the same opinion as the learned Judges in the Court of Session, who were unanimous in holding that clause 24 has no application to the present case, and I move your Lordships that the appeal be dismissed, with the usual consequences.

British Glanz-
stoff Manufac-
turing Co.,
Limited, v.
General Acci-
dent, Fire,
and Life
Assurance
Corporation,
Limited.

Lord
Chancellor.

EARL OF HALSBURY.—I am entirely of the same opinion, and I concur in the judgment which has been delivered.

LORD ATKINSON.—I concur.

LORD SHAW OF DUNFERMLINE.—In this action liquidated damages are asked against the original contractor named Brown. During the period stipulated in the contract for the completion of the works another contractor named Henshaw was called in, Brown having become bankrupt. The damages therefore here claimed are claimed as liquidated in respect of such number of weeks as is estimated to be the time which Brown would have taken to complete the contract had Henshaw not been called in. This problematical estimate seems to me, in its nature, inconsistent in principle with the very idea of pactional damages. Clause 24, in my judgment, gives no foundation for such a hypothetical claim. It only applies to the failure by Brown himself to complete his contract timeously, but it does not apply to a state of matters in which, under section 26 of the contract, a different remedy has been adopted under what is really a separate code.

I desire to add that there are two points in the judgment of Lord Macenzie¹ with which I wish to associate myself. These are as follows:—"The provision," says the learned Judge, "that the architect may allow an extension of time is of importance. The contract has been so innovated upon that no application to the architect for an extension of time by the original contractor is possible." On another point his Lordship says, and in this I also agree, "I am unable to see how the pursuers can charge Brown & Sons under a liquidate damages clause because they failed to complete the works by 31st January 1910, when, on Messrs Brown's bankruptcy, the pursuers made a contract with Henshaw & Sons to complete by 31st December 1909."

¹ 1912 S. C., at pp. 599 and 600.

Oct. 28, 1912. On the main ground I entirely agree with what my noble and learned friend on the woolsack has said, and I am glad in conclusion to know that the actual damages, if any have been incurred, can be proved in this suit, and, if proved, will be recovered.

British Glanz-
stoff Manufac-
turing Co.,
Limited, v.
General Acci-
dent, Fire,
and Life
Assurance
Corporation,
Limited.

ORDERED that the appeal be dismissed, with costs.

PRITCHARD, ENGLEFIELD, & Co.—HUME M'GREGOR & Co., S.S.C.—FRESHFIELDS—
SIMPSON & MARWICK, W.S.

No. 2. THE BRITISH LINEN BANK, (Pursuers) Respondents.—

Buckmaster, K.C.—Macmillan, K.C.

Oct. 29, 1912. THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF
British Linen Bank v. EDINBURGH, (Defenders) Appellants.—*Clyde, K.C.—Cooper, K.C.—
H. W. Beveridge.*

Magistrates of Edinburgh. *Loan—Local Government—Burgh—Stock Exchange—Issue of redeemable stock by a municipality—"Redeemable"—Edinburgh Corporation Stock Act, 1894 (57 and 58 Vict. cap. lvi.), sec. 5—Edinburgh Improvement and Tramways Act, 1896 (59 and 60 Vict. cap. cccxiv.), sec. 83.*

In 1897 the Corporation of Edinburgh, under powers conferred by Acts of Parliament, issued corporation stock, the certificates of which bore that the holders were the proprietors of a certain value "of Edinburgh Corporation Two and a half per cent Redeemable Stock, subject to the Acts of Parliament relating thereto. . . . Redeemable at par after Whitsunday 1927." The Act under which the issue in question was directly made was the Edinburgh Improvement and Tramways Act, 1896, which by section 83 authorised the issue of a new class of stock "redeemable at the option of the Corporation at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock."

Held on a construction of the statutes (*rev. judgment of the Extra Division*) that the Corporation were not bound, on the application of the holders, to redeem the stock at par at Whitsunday 1927, but had merely an option of so doing.

Ld. Chancellor (Haldane). (IN the Court of Session, Nov. 18, 1911—1912 S. C. 139.)

Earl of Halsbury.

Ld. Atkinson.

Lord Shaw of Dunfermline.

The defenders appealed to the House of Lords.

The appeal was heard on 28th and 29th October 1912.*

LORD CHANCELLOR.—This appeal raises a question of construction on a section in one of a series of private Acts, and, as is often the case in the

* The leading sections of the Acts under consideration are quoted in the report of the case in the Court of Session. In addition to the sections there cited reference was made to the Edinburgh Corporation Stock Act, 1894 (57 and 58 Vict. cap. lvi.), secs. 2, 8, 10, 15, 21, 41, and 55; City of Edinburgh Act, 1838 (1 and 2 Vict. cap. lv.), secs. 41, 44, 45; the Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. cap. cxxxii.), secs. 87, 88; the Local Authorities Loans (Scotland) Act, 1891 (54 and 55 Vict. cap. 34), sec. 22, 43; the Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), sec. 103.

In addition to the cases cited in the Court of Session the following were referred to:—*In re Joseph Stocks & Co., Limited*, [1912] 2 Ch. 134, at p. 140; *In re Southern Brazilian Rio Grande do Sul Railway Co.*, [1905] 2 Ch. 78; *Bodman v. Bodman*, [1891] 3 Ch. 135.

construction of a private Act of this kind, the relation to each other of the sections in the various Acts which have to be considered is attended with some obscurity. But although the question is an important one, and although in the view which I have to express I am differing from Judges, including Lord Kinnear, for whose opinion I have a very great respect, yet so fully and ably has the question been argued before us on both sides, and so unhesitating is the conclusion to which I have come, that I feel no difficulty in dealing with the case immediately on the conclusion of the argument.

Oct. 29, 1912.
British Linen Bank v. Magistrates of Edinburgh.
Lord Chancellor.

The pursuers in the action were the British Linen Bank, and they brought an action of declarator to have it established that, when a certain period should arrive, the Corporation of Edinburgh were bound to redeem the holdings of a certain stock. The stock was issued by the Corporation of Edinburgh, the appellants in this case, in 1897, under powers contained in an Act passed in the year previous. The British Linen Company were the allottees of a part of that stock, which was issued under a resolution passed by the Corporation of Edinburgh pursuant to the Act to which I have referred.

Now the whole question here is, whether the Corporation of Edinburgh are bound to redeem the stock which is held by the respondents after the expiration of a period of thirty years from 15th May 1897. Lord Sker-rington held that they were not, and dismissed the pursuers' action. On appeal to the Extra Division of the Court of Session the learned Judges who constituted that Extra Division took a different view.

The question is really a very narrow one; it turns upon the construction of a few words in the Act of 1896, and if those words were quite clear in themselves, and the Act in which they occur contained no reference to other Acts, it would be easy to deal with the question shortly. Section 83 provides that the Corporation, in addition to the powers which are contained in the previous Act of 1894, are now authorised to create and issue a new class of stock for any of their purposes "to bear any rate of dividend which the Corporation may fix, and all stock of such class shall be redeemable at the option of the Corporation at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock." If I were reading these words without any obligation to have regard to anything else, I should read the words "at one and the same period to be fixed by the Corporation" as referring to the expression "all stock," and as meaning that in whatever sections the main block of stock was issued the period of redemption was to be the same in all cases—one period for all the sections. But the great question which arises is as to the meaning of the word "redeemable." As I interpret the word it means redeemable at the option of the Corporation, the words which immediately follow "at the option of the Corporation" relating to the word "redeemable."

Now that, so far, might be simple enough, but it ceases to be simple if you proceed to import into the meaning of the words "stock and stockholder" the relation of debtor and creditor. To my mind the fundamental fallacy of the reasoning of the Court below is this, that the learned Judges have tried this question as if it could only be a question of the relation

Oct. 29, 1912. of debtor and creditor. Of course if you get the relation of debtor and creditor, then the word "redeemable" may come to have a very different significance from what it has here. A creditor is *prima facie* entitled at some time to get his money paid and his debt thus redeemed. But if the relation is not one of debtor and creditor the situation may well be very different.

British Linen
Bank v.
Magistrates
of Edinburgh.

Lord
Chancellor.

The mere desire to raise money does not by any means necessarily import that you resort to the establishment of the relation of debtor and creditor. In England when the Usury Acts were in force it was legally impossible to borrow money at more than a certain rate of interest. Consequently, in order to get money, impecunious persons whose credit was not good were in the habit of doing what was very extensively done, namely, selling annuities. Sometimes these annuities had attached to them an option of repurchase on the part of the seller of the annuity. But although this was a device for getting round the difficulty of borrowing money, it substantially avoided anything that was really in the nature of borrowing by substituting the sale of a perpetual annuity. I observe that the Corporation of Edinburgh in the earlier days of its history resorted to the same device. The first of the Acts to which our attention has been called is the Act of 1838, the purpose of which was to extricate the Corporation of Edinburgh out of some of its financial difficulties. From this Act it appears that at that time the Corporation of Edinburgh, in order to get over the difficulties which it had with its creditors, granted a number of annuities which were to satisfy those creditors. The only sections to which I need refer are sections 41 and 44, which show that the debts and obligations were to be "compounded by granting, free of all charges and deductions, to all and every person in right of such debts, bonds of annuity in the manner and form hereinafter provided," at the rate of 3 per cent, and then in section 44 these are described in the form of bonds of perpetual annuity.

That was at any rate one mode in which the Corporation of Edinburgh was enabled to raise money. Then under a later Act, the Act of 1879, there was conferred a power to raise money by mortgage, which shows the Corporation exercising the power of borrowing in its real form, that of borrowing by granting debtor and creditor obligations with security.

Now, in that state of things the Act of 1894, which is the first of the two Acts with which we have to deal, was passed. The Act of 1894 contains several sections which throw light upon the question with which we are concerned. First of all, the preamble refers to the annuities granted in favour of the city creditors in lieu and satisfaction of their debts. Then there is a definition of "statutory borrowing power" in section 2, which shows that the expression is meant to include almost every form of raising money, whether by borrowing or by creating annuities.

Then we come to section 5, which enables the Corporation of Edinburgh to create a stock which is to take the place of the older securities, and which is to be one of the modes, although I think not the only mode, by which for the future the Corporation is to be able to raise its money. It is said in section 5 that where the Corporation has any statutory borrowing power it is to be empowered to create "redeemable stock to be from time to time issued for such amount within the limit of the power" at a certain

price, to bear dividends as the Corporation should resolve, and to "become Oct. 29, 1912.
redeemable as hereinafter provided after the expiration of one and the same
period from the first creation of Corporation stock." Then subsection 3
says that "the resolution for the first creation of Corporation stock shall pro-
vide that such stock shall be redeemable at the option of the Corporation at
par after the expiration of a period to be fixed by the resolution not exceed-
ing sixty years from the first creation of the stock."

British Linen
Bank v.
Magistrates
of Edinburgh.
—
Lord
Chancellor.

Now, the reason why I read that section is because it throws light upon the situation in which the Corporation stood when the Act of 1896 was passed. It shows to my mind that the Corporation had powers of raising money by issuing what were strictly speaking perpetual annuities, redeemable in the sense of being repurchasable upon certain terms, being the terms which I have mentioned. The relation was not one of debtor and creditor, the relation was one of seller and buyer of these annuities; and that being so, the presumptions which seem to have weighed in the minds of the learned Judges of the Extra Division do not seem to me to apply to these transactions. Reading the words quite simply as I have stated them they are consistent, and I think only properly consistent, with the view I have stated, which is that "redemption" merely means optional repurchase.

The Act to which I have referred is by no means perfectly drawn, and section 21 in particular, which refers to stock "issued for the whole term limited for the continuance of any loan" or issued "for part only of that term," is a section which does not seem to fit in well with the earlier sections of the Act. But the learned counsel for the appellants drew our attention to the circumstance that this section had been imported by the draftsman out of a quite different Act, the Local Authorities Loans (Scotland) Act, 1891, of which it constitutes section 22, into the middle of this one, and that the reason why it seemed to fit ill was that its language belonged properly to a statute of another structure and dealing with a different kind of security. It may, I think, be possible to give a meaning to these words by reading them as applying to a case where part of the issue (all of which is to be redeemed at one time, if redeemed at all, by the Corporation in the exercise of its option) has been issued late, and has not got the whole term to run. It is possible in that case that there may have to be re-borrowing, and the not very happy wording of the section may be said to cover that case. But whether the section is properly worded or not, in my opinion there is nothing in the section which is sufficient to cut down what to my mind is the plain effect of the previous section, section 5; and I am confirmed in this view when I turn to section 41, which relates to the appointment of a judicial factor. In section 41 of the Act of 1894 a judicial factor is only appointed to recover the dividends; there is not a word about capital, or any suggestion that it is contemplated that there should be a capital sum due to a creditor which might have to be recovered; whereas if you turn to the Act of 1879, and equally if you turn to the general Act just referred to of 1891 which regulates borrowing in Scotland by local authorities, you find the power of the judicial factor there applied to the recovery of capital.

Having said so much, it seems to me that the question resolves itself into a very simple one. When I turn to the Act of 1896, section 83, which I

Oct. 29, 1912. have already read, and on which this question turns, it becomes, in the state of things which I have indicated, quite natural that the language should be what it is, and that the appellants should be able legitimately to rely upon it in support of their contention. If the relation is not one of debtor and creditor, but one of the seller and the buyer of annuities, then the words "and all stock of such class shall be redeemable at the option of the Corporation at one and the same period to be fixed by the Corporation, but not exceeding sixty years" would naturally import "repurchasable at the option of the Corporation."

British Linen
Bank v.
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of Edinburgh.

Lord
Chancellor.

I have come to the conclusion that this is the true view of the statute, and that under the circumstances the only result at which I can properly arrive is that the view of the Lord Ordinary was the correct view, and that this action ought to have been dismissed. This appeal must therefore be allowed; and I move your Lordships accordingly.

EARL OF HALSBURY.—I hesitate very much to add a single word to a discussion, which has now proceeded practically for two days, on the construction of three words. I speak with most unfeigned respect for the very distinguished Judges from whom this appeal comes, but I say that I have been unable to feel the difficulty with which some of them seem to have been possessed. So far as I am concerned, I am contented with a single sentence in the Lord Ordinary's judgment which seems to me to comprehend the whole case, and upon which the case turns. "Anyone," he says, "who alleges that a redeemable stock must be redeemed, is bound, in my opinion, to show the existence of the obligation upon which he founds, and this the pursuers have failed to do." I believe that that sentence comprehends the whole that it is necessary to say upon the matter, and I entirely concur with the motion which the Lord Chancellor has proposed.

LORD ATKINSON.—I concur.

LORD SHAW OF DUNFERMLINE.—I agree.

INTERLOCUTOR appealed against reversed.

W. A. CRUMP & SON—MACKENZIE & KERMACK, W.S.—BEVERIDGE, GREIG, & CO.—
SIR THOMAS HUNTER, W.S.

No. 3.

CHARLES FREELAND, (Claimant) Respondent.—*Moncrieff, K.C.*—*Fenton.*

Feb. 10, 1913. SUMMERLEE IRON COMPANY, LIMITED, (Respondents) Appellants.—*Munro, K.C.*—*H. W. Beveridge.*

Freeland v.
Summerlee
Iron Co.,
Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (3)—Act of Sederunt, 26th June 1907, (2)—Arbitration—Competency—"Question" as to duration of compensation.

The employers of a workman, who had been totally incapacitated by an accident, admitted liability under the Workmen's Compensation Act, tendered the amount of compensation due (as to which there was no dispute), and requested the workman to sign a receipt which contained this clause:—"At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week when application

for payment is made." The workman objected to this clause on the Feb. 10, 1913.
ground that he was entitled to have an unqualified admission of liability, refused to sign the receipt, and initiated arbitration proceedings. The
employers maintained that the arbitration was incompetent as no ques- Freeland v. Summerlee
tion had arisen between the parties. Iron Co., Limited.

Held (aff. judgment of the Second Division) that there was a question between the parties as to the duration of the compensation which had not been settled by agreement, and, accordingly, that the arbitration was competent.

Gourlay Brothers & Co. (Dundee), Limited, v. Sweeney, (1906) 8 F. 965, and *Payne v. N. Fortescue & Sons, Limited*, [1912] 3 K. B. 346, considered.

(In the Court of Session, July 5, 1912—1912 S. C. 1145.)

The Summerlee Iron Company, respondents in the Court of Session, appealed to the House of Lords.

The appeal was heard on 10th February 1913. Counsel for the appellants, in the course of their argument, referred to the undernoted case,¹ which was not cited in the Court of Session.

Ld. Chancellor
(Haldane).
Earl of
Halsbury.
Lord Kinnear.
Lord Shaw of
Dunfermline.

At the conclusion of the appellants' argument,—

LORD CHANCELLOR.—The question in this appeal arises under section 1, subsection 3, of the Workmen's Compensation Act, 1906, which provides for recourse to arbitration in a case of dispute in the following terms :—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act." It is to be observed that duration is specified as one of the matters about which a question may arise, and that is not the less true because the First Schedule, by paragraph 16, provides that from time to time there may be applications to review the amount of compensation. There may be a decision that the injury is *prima facie* of indefinite duration, that is to say, permanent; and what the Schedule does is to provide machinery for the review of that matter from time to time as the question arises.

In this case the respondent, who was a workman in the employment of the appellant company, sustained injury to his right eye in the course of his employment as a miner in their colliery, and he has been totally incapacitated since the date at which the injury was received. There is no doubt as to the amount which the appellants are liable to pay: it is agreed that it is 14s. 9d. a week in respect of total incapacity in accordance with the Act. But a question has been raised, which is the subject of these proceedings, as to whether there is a dispute under the Act as to the duration of the compensation. The appellants, admitting liability to the extent which I have indicated, tendered payment of compensation, but on terms only; they said to the respondent that he must sign a receipt in the following terms :—"At the first or any subsequent payment liability is

¹ *Payne v. N. Fortescue & Sons, Limited*, [1912] 3 K. B. 346.

Feb. 10, 1913. admitted only for the compensation to date of payment; further liability, if any, will be determined week by week when application for payment is made." The respondent objected to that on the ground that he was entitled to an admission of liability, embodied in an agreement so that he could have it recorded, or that he was entitled to arbitration, on the ground that a question had arisen as to duration. The Sheriff-substitute, while thinking there was no question, nevertheless properly stated a case for the opinion of the Court. The Second Division, taking a different view from his, laid it down as law that in this case there was a question, seeing that the contention of the appellants would have put the workman in the position of being *in petitorio*—that is to say that, without any *prima facie* right to continuance of payment in any subsequent proceedings, he would, if that contention was allowed to prevail, be deprived of the right to which he was entitled, viz., to have a question of the *prima facie* duration of his injury immediately determined, subject to the remedy which the appellants would have if they could discharge the burden which lay upon them on an application under paragraph 16 of the First Schedule.

Freeland v.
Summerlee
Iron Co.,
Limited.

Lord
Chancellor.

In that state of things the question comes before this House as to whether the decision of the Second Division was right, and reliance has been placed—I think not without apparent justification—by the learned counsel for the appellants on the case of *Payne v. N. Fortescue & Sons, Limited*,¹ a decision of the Court of Appeal in England upon a question which presented some analogy to the case before your Lordships.

I do not think it necessary to go in detail into the question whether *Payne v. N. Fortescue & Sons, Limited*,¹ was rightly decided. It is sufficient to say that there are observations in the judgment with which I do not find myself in agreement, and I cannot, in this appeal from the Court of Session, treat myself as bound by that decision. I therefore turn to the Act of Parliament itself as the only matter which concerns us here, and upon the construction of the section on which the argument turns, I am of opinion that there is a question as to duration, which arose in these proceedings, and which ought to have been decided, and upon which the respondent was entitled *in presentis* to have arbitration. I agree with the reasons for this conclusion given by Lord Salvesen in his judgment, and I cannot treat this case as disposed of by the principle laid down in general terms by Lord Pearson in the case of *Gourlay Brothers & Company (Dundee), Limited, v. Sweeney*.² The facts in the present case raise what, in my opinion, is a definite question.

Under these circumstances I agree with the decision of the learned Judges in the Second Division, and move your Lordships that the appeal be dismissed.

EARL OF HALSBURY.—I am of the same opinion.

LORD KINNEAR.—I am entirely of the same opinion.

LORD SHAW OF DUNFERMLINE.—I concur. The case of *Gourlay Brothers & Company (Dundee), Limited, v. Sweeney*² was cited to your Lord-

¹ [1912] 3 K. B. 346.

² (1906) 8 F. 965.

ships. I desire to add, if I may do so, a reference to that case. The Feb. 10, 1918. circumstances, which were narrated in the judgment of Lord Pearson, *Freeland v. Summerlee Iron Co., Limited.* were substantially these: that the employer of the workman had through- out, after the accident sustained by his employee, acknowledged liability; that he had paid compensation upon the amplest scale under which he would have been liable in law; that he continued that payment; and that he proposed to make no change in the relations so constituted. In those circumstances it was held that so long as a party has secured by private arrangement the full rights which he had either by statute or at common law, and no suggestion of a challenge of these rights by the persons so admittedly liable is made, it was not appropriate to institute proceedings under the statute, for giving him the very thing which he was then obtaining, and had throughout obtained. It is unnecessary to determine whether or not that case was properly decided; for I cannot hold that this House can consider the decision of Lord Pearson, to which I have referred, as assisting towards a conclusion in this case, the circumstances in which are so materially different and of a character so much more strongly in the direction of destroying the rights of, and the protection afforded to, the workman.

I desire particularly to add with regard to the case of *Payne v. N. Fortescue & Sons, Limited*,¹ that, like my noble and learned friend on the woolsack, I do not find myself in agreement with certain observations there made by the learned Judges. The circumstances of that case also do not equate with those of the present case. In the present case no payment has been made, and issue was at once taken for the determination of the rights of parties. The dates are significant. On 29th December this workman, totally incapacitated by reason of an injury to his eye, was offered by his employers a certain weekly payment on condition of granting this receipt. He declined, and on the following 5th January, no payment by the employer by that time having been made (and no payment has yet been made), he brought his application under the Workmen's Compensation Act. The whole question between the parties was stated timeously. The workman is in the position of having been injured; the employer is in the position of having declined to pay; and, with much respect to some observations which have been made in certain decided cases, the difference and dispute between the parties are not, as it humbly appears to me, confined in such a situation to the mere question of the duration of compensation.

There are three points, no doubt, as was properly stated, upon which arbitration can proceed. There is the point of liability itself; there is the point as to the amount; and there is the point as to duration. What are the conditions appended to the receipt tendered to this workman as conditions under which he was to be bound before he received any payment? They are thus expressed, namely, "At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week when application for payment is made." These conditions appear to me to amount fundamentally to a possible challenge upon each and all of those three points. As I view

¹ [1912] 3 K. B. 346.

Feb. 10, 1913. them, after one week had elapsed it was open to the employer, under the form of that receipt, substantially to challenge all liability whatsoever under the statute, also to challenge the amount, and also to challenge the duration. And therefore, here is a condition tendered as attached to this receipt which is a negation of all the very points which the workman is entitled to have secured, and secured in such a way that an agreement can be recorded.

Freeland v.
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Lord Shaw of
Dunfermline.

I do not proceed to the further question. The policy of the statute is that there must be something which both parties can look to; business could not be conducted unless both parties, employer as well as employed, were in the position of having something definitely fixed to which reference could be made in subsequent weeks, quarters, or years. It is quite true, as has been said by Lord Salvesen, that a workman accepting payment under such a receipt, if he sought to continue the situation which was thus established, but which the employers might wish to depart from or to change, would be put in *petitorio*. I do not find myself in any difference with the judgment of the Second Division, and I desire to say, for my own part, that there are passages in the judgment of Lord Salvesen, notably the second and third paragraphs of his judgment, which I entirely accept and respectfully adopt.

INTERLOCUTOR of the Second Division affirmed, and appeal dismissed.

DEACON & CO.—SIMPSON & MARWICK, W.S.—BEVERIDGE, GREIG, & CO.—
W. & J. BURNES, W.S.

No. 4. WILLIAM SCHULZE AND ANOTHER (Hugh Lees's Trustees) AND OTHERS,
(Pursuers) Appellants.—*William Schulze, Party.*

Feb. 17, 1913.

JOHN SANDERSON DUN AND OTHERS, (Defenders) Respondents.—

Lees's Trustees v. Dun.

D.-F. Dickson—Constable, K.C.—C. H. Brown.

Et c contra.

Trust—Liability of trustees—Negligence of original trustee—Action by assumed trustees—Alleged delay and contributory negligence of pursuers—Right to maintain action for behoof of beneficiaries—Mora—Personal objection.

One of the original trustees acting under a trust-disposition and settlement died in 1887, and in the same year two new trustees were assumed, one of whom was also a beneficiary under the trust. In 1909 these new trustees, suing in their capacity as trustees, brought an action against the representatives of the deceased trustee for recovery of funds which they alleged had been lost to the trust-estate through his negligence. The defenders pleaded that the pursuers were barred by *mora*, and by the fact that they had themselves been guilty of negligence which had contributed to the loss.

Held (aff. judgment of Second Division) that, as the pursuers were suing as trustees for behoof of the beneficiaries whom they represented, the plea of bar stated against them was unavailing.

Interest—Rate of interest—Rate where trustees personally liable.

Circumstances in which the representatives of a trustee, who were found liable to refund to the trust-estate a sum of money which had been lost through his negligence, were ordained to pay interest thereon at the rate of three and a half per cent.

(In the Court of Session, 4th November 1911—1912 S. C. 50.)

Feb. 17, 1913.

The pursuers appealed to the House of Lords against the interlocutor of the Second Division in so far as it awarded simple interest at the rate of three and a half per cent per annum instead of compound interest at the rate of five per cent.

Lees's Trustees v. Dun.

The defenders appealed against the interlocutor in so far as it held them liable to make good the loss to the trust-estate and found them liable in expenses.

Earl of Halsbury.
Lord Kinnear.
Lord Shaw of Dunfermline.
Lord Mersey.

The case was heard on 11th and 17th February 1913.

Argued for the appellants (Lees's Trustees);—Compound interest should have been awarded at the rate of five per cent from 31st May 1870.

Argued for the respondents (Dun and Others);—The plea of *mora*, or, as it was called in England, laches, should have been sustained. There was no rule of law, as Lord Salvesen appeared to think, that the plea of *mora* was not available to a trustee as a defence in an action against him for breach of trust, nor was there any logical reason why there should be such a rule. In the case of *In re Sharpe*¹ there was an expression of opinion by North, J., that directors, who are in the same position as trustees, might have successfully based their defence on this plea had it been established on the facts and had they been prejudiced by the delay. In *Liquidators of City of Glasgow Bank v. Mackinnon*,² where the action was against a director acting in a fiduciary capacity, the defence of *mora* was, *inter alia*, sustained. To support the plea of *mora* it was true that two things had to be proved. First, there must have been excessive delay in asserting a known right, and secondly, the position of the party against whom relief was sought must have been prejudiced.³ Both these essentials had been established in the present case. If this had been an English action a complete answer would have been found in the Trustee Act, 1888.⁴ The cases of *Metropolitan Bank v. Heiron*,⁵ *Moncrieff v. Waugh*,⁶ and *Smith v. Patrick*,⁷ were also referred to.—[The Earl of Halsbury intimated that their Lordships did not desire to hear the respondents' counsel upon the question of interest argued by the appellant Schulze, or to hear the latter upon the question argued by the respondents' counsel.]

EARL OF HALSBURY.—I am disposed to think that this matter may be very summarily disposed of. I am of opinion that the judgments of Lord Dundas and Lord Salvesen should be adhered to, and I am content with the reasons given by Lord Salvesen.

With regard to the question which has been suggested as to the amount of interest due, I am of opinion that it is absolutely unarguable, and I move your Lordships that both appeals be dismissed with costs.

LORD KINNEAR.—I agree entirely with the opinion expressed by the noble and learned Earl, and I have only to add that I at the same time

¹ [1892] 1 Ch. 154.

² (1882) 9 R. 535, at pp. 586, 599, 612.

³ *Assets Co., Limited, v. Bain's Trustees*, (1904) 6 F. 692, *per* Lord President Kinross, at p. 705; *Lindsay Petroleum Co. v. Hurd*, (1874) L. R., 5 P. C. 221, *per* Sir Barnes Peacock, at p. 239, approved by Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.*, (1878) 3 App. Cas. 1218, at p. 1279.

⁴ (51 and 52 Vict. cap. 59), sec. 8 (1) (b).

⁵ (1880) 5 Ex. D. 319.

⁶ (1859) 21 D. 216.

⁷ [1901] A. C. 282.

Feb. 17, 1913. agree with Lord Dundas that it is unnecessary to express an opinion upon many of the topics which were argued at the bar. It is not material to consider whether the defenders' pleas of *mora* and taciturnity or their counter-charge of negligence against the pursuers would have been valid if the latter had been suing in their own private right and interest, because, as the learned Judges very clearly point out, they are suing as trustees to recover trust moneys, and are entitled to call the defenders to account, even if they may be themselves accountable.

Lees's Trustees v. Dun. Lord Kinnear.

LORD SHAW OF DUNFERMLINE.—I also agree except to this extent, that I think it is unnecessary to make any pronouncement with regard to the larger portion of the observations in Lord Salvesen's judgment. For in my opinion the matter is brought to its proper and only issue in one of the concluding sentences of that learned Judge's opinion, when he says that he cannot see that Mr and Mrs Schulze's delay affords any defence against a claim which he thus to my mind properly characterises: "a claim by the beneficiaries whose rights are being maintained and can only be maintained by the trustees now in office." It appears to me that the beneficiaries' action so directed under the guidance and charge of the existing trustees is not open, upon the facts disclosed, to the defence of *mora*, and that that is the only point which we have to decide.

LORD MERSEY.—I agree entirely, and for the reasons pronounced by my noble and learned friend Lord Shaw.

INTERLOCUTOR appealed from affirmed, and appeal and cross-appeal dismissed, with costs.

HELDER, ROBERTS, WALTON, & GILES—ANDREW TOSH, S.S.C.—
JOHN KENNEDY, W.S.—RONALD & RITCHIE, S.S.C.

No. 5. JOHN RUSSELL, (Pursuer) Respondent.—*Munro, K.C.—M. P. Fraser—J. Ian Macpherson.*
April 3, 1913. STUBBS, LIMITED, (Defenders) Appellants.—*Morison, K.C.—M'Cardie.*
Russell v. Stubbs, Limited. *Reparation—Slander—Innuendo—Newspaper—Trade publication—List of decrees in absence—Erroneous entry—Imputation of insolvency.*

An issue of a trade journal known as *Stubbs' Weekly Gazette* contained a list headed "Extracts from the Court Books of Decrees in absence in the Small-Debt Courts. Note.—It is probable that some of the decrees have been sisted, settled, or paid; and in no case does publication of the decree imply inability to pay on the part of anyone named, or anything more than the fact that the entry published appeared in the Court books."

In an action of damages for slander against the proprietors of the journal at the instance of a tradesman, whose name was erroneously included in the list in respect of a decree for £9, 19s. 6d., the facts being that the debt had been paid and the action dismissed, the Lord Ordinary approved of an issue in which the pursuer innuendosed the entry as falsely and calumniously representing that he was unable to pay his debts.

Held (rev. judgment of the Second Division) that the entry, when read in conjunction with the explanatory note, would not bear the innuendo suggested, and that the issue fell to be disallowed.

Crabbe & Robertson v. Stubbs, Limited, (1895) 22 R. 860, and *Hunter & Co. v. Stubbs, Limited*, (1903) 5 F. 920, considered.

(In the Court of Session, 29th May 1912.)

On 27th December 1911 John Russell, wholesale and retail furnisher and general ironmonger, 28 Quarry Street, Hamilton, brought an action of damages for slander against Stubbs, Limited, incorporated under the Companies Acts, and having their principal office at 42 Gresham Street, London. E.C., and carrying on business at 116 St Vincent Street, Glasgow.

April 3, 1913.

Russell v.
Stubbs,
Limited.

Ld. Chancellor
(Haldane).
Lord Kinnear.
Lord Shaw of
Dunfermline.

The pursuer averred, *inter alia* :—(Cond. 2) “The defenders are the proprietors and publishers of the gazette known as *Stubbs' Weekly Gazette*. The defenders carry on for profit a business which they describe in their advertisements and prospectuses as a means of enabling traders to avoid making bad debts, and they act as an agency for the recovery of overdue accounts, bills, and rents, &c. The said *Stubbs' Weekly Gazette* has a wide circulation, which is not confined to the trading community, throughout Scotland, and also in England and Ireland. It has a special portion devoted to the publication of the names and addresses of traders and others by and against whom decrees in absence have been taken. This is popularly known as and called the ‘Black List,’ and the name of any trader appearing in that list is looked upon with grave suspicion as to solvency by all persons reading the said *Gazette* or knowing of its contents. Its object is to give information to tradesmen and the mercantile community generally as to bankrupts, insolvents, and defaulters in payment of their just debts and obligations.” (Cond. 3) “The pursuer, as a part of his business, is a dealer in explosives, and a large part of such business consists in supplying colliery companies and dealers with explosive material and colliery furnishings. One of the companies from whom the pursuer obtained the goods he required was the British Electric Detonator Company, Limited, 43 Castle Street, Liverpool. Questions arose between the pursuer and this company as to the amount of the pursuer's indebtedness, the pursuer maintaining that he had a counter claim which fell to be set off against this company's claim. Ultimately, the British Electric Detonator Company raised an action against the pursuer in the Sheriff Small-Debt Court at Hamilton for payment of the sum of £9, 19s. 6d. On 12th October 1911 the dispute between the pursuer and said company was adjusted, and on said date said sum of £9, 19s. 6d. was paid by the pursuer, and the action was settled. The case was called in ordinary course in the Sheriff Small-Debt Court at Hamilton on 20th October 1911, when, the matter in dispute having been settled as stated, neither party appeared, and the action was dismissed.” (Cond. 4) “Notwithstanding that the said action had been dismissed as aforesaid the defenders wrongfully, falsely, and calumniously published in the issue of said *Stubbs' Weekly Gazette*, of date 26th October 1911, under the heading, ‘Extracts from the Court Books of Decrees in Absence in the Small-Debt Courts’ the following statement :—

Court.	Date.	Pursuers.	Defenders.	Amount in Decree.
Hamilton.	Oct. 20th.	British Electric Detonator Co., Ltd., Liverpool.	John Russell, 28 Quarry St. Hamilton.	£9, 19s. 6d.

April 3, 1913. This entry is not a correct record from the Court books, nor of what took place in Court, and is of and concerning the pursuer, and is false and calumnious. It falsely represented that a decree in absence had been granted against the pursuer for £9, 19s. 6d., that the pursuer was unable to pay his debts and was in insolvent circumstances and in pecuniary embarrassment, and was evading payment of a just debt, and it was so understood by the public, and in particular by the pursuer's customers and creditors. . . ."

Russell v.
Stubbs,
Limited.

The defenders averred, *inter alia*, in answer:—(Ans. 4) "The issue of *Stubbs' Weekly Gazette*, of date 26th October 1911, and the entry therein regarding pursuer are referred to for their terms. Explained that said notice is in a column of the defenders' *Gazette* to which the following heading is prefixed: 'Extracts from the Court Books of Decrees in Absence in the Small-Debt Courts. *Note*.—The following extracts from the Court books have been received since our last issue, made up to the several dates given in the second column. It is probable that some of the decrees have been sisted, settled, or paid; and in no case does publication of the decree imply inability to pay on the part of anyone named, or anything more than the fact that the entry published appeared in the Court books. . . . We are willing at all times to insert any authentic information or explanation relative to decrees, or to correct any inaccuracy of record or otherwise.' Explained further that said entry is in accordance with the original entry made in the Court book, but it is explained that the entry in the Court book was altered after the entry had been copied by the defenders, and it is admitted that it is not in accordance with the amended entry in said Court book. The original entry had in the column under 'Interlocutors or Decrees' the letter 'D,' which represents 'Decree.' This entry was afterwards amended, and the word 'Dismissed' was substituted for the letter 'D.' *Quoad ultra* denied. Explained that during the period from February until October 1911 the pursuer has persistently refused or delayed to make payment of the just and lawful debts of his trade creditors, who have repeatedly requested payment from the pursuer of the amounts due, and in consequence of pursuer's failure or refusal to make payment have been compelled to raise actions against him in the Courts. In particular, during said period the following creditors of the pursuer were unable to obtain payment from him of the sums due at their due date, notwithstanding repeated remonstrances, and only obtained payment after actions had been raised in the Sheriff Courts of Lanarkshire, and in some cases after decrees had been pronounced, viz.:—" [Here followed a list].

The pursuer proposed an issue—Whether on or about 26th October 1911 the defenders wrongfully published in the *Gazette* under the heading quoted in condescendence 4 a statement in the form of the entry quoted in the same condescendence, and whether the statement was of and concerning the pursuer and falsely and calumniously represented that he was unable to pay his debts? No reference was made in the issue to the *Note* quoted in answer 4.

The defenders proposed a counter issue—Whether the pursuer, during the period from February until October 1911, repeatedly refused or delayed to make payment of his just and lawful debts to his trade creditors?

On 28th February 1912 the Lord Ordinary (Hunter) pronounced an interlocutor approving of the issue and disallowing the counter-issue.

The defenders reclaimed, and on 29th May 1912 their Lordships of April 8, 1913. the Second Division pronounced an interlocutor * refusing the reclaiming note, adhering to the interlocutor reclaimed against, and granting leave to the defenders to appeal to the House of Lords.

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The defenders appealed to the House of Lords and the case was heard on 10th February 1913.

Argued for the appellants ;—The issue ought to have been disallowed because the entry in the *Gazette* could not bear the innuendo the pursuer sought to put upon it, the test being whether the innuendo represented a reasonable or natural or necessary inference from the words used. It did not. It was not enough to say that some persons might understand the words in a defamatory sense, because, where a statement was capable of bearing a number of good interpretations, it was unreasonable to select the only bad one as having been the one necessarily meant.¹ It was out of the question to say that a statement that a small-debt decree in absence had gone out against a tradesman meant, or would necessarily suggest to anyone the meaning, that the tradesman was insolvent, there being many other reasons which might account for the occurrence. The entry referred to one particular debt only, and was not a representation as to the pursuer's general financial position. Accordingly, even if there had been no note prefixed to the list, the pursuer would have failed. The note, however, in express terms disclaimed the interpretation which the pursuer sought to put upon the entry.² *Hunter & Company v. Stubbs, Limited*,³ was distinguishable from the present case because, firstly, no objection had apparently been taken by the defenders to the issue, and, secondly, because the Court was not concerned with the law as to the adjustment of issues, but was considering whether a new trial should be allowed after the issue had been tried. *Crabbe & Robertson v. Stubbs, Limited*,⁴ assuming it to have been rightly decided, was also distinguishable because the explanatory statement made by the defenders in that case as to the meaning of the list was far less explicit than the one here. It had to be kept in mind that the question here was not the general question whether it was slanderous to say of a tradesman that a small-debt decree in absence had gone out against him, but the particular question whether the precise statement published by the defenders could, upon any reasonable interpretation of it, mean that the pursuer was unable to pay his debts.

Argued for the respondent ;—The entry was capable of bearing the innuendo suggested, and the issue had been rightly allowed. *Crabbe & Robertson v. Stubbs, Limited*,⁴ was indistinguishable from the present case and should be followed. Although *Hunter & Company v. Stubbs, Limited*,³ was not precisely in point, Lord M'Laren, with whom the other Judges concurred, indicated⁵ a clear view that the publication of a person's name in such a list was a representation that he was unable to pay his debts. *Reiss v. Perry*,⁶ where *Searles v. Scarlett*² was discussed, also supported the pursuer's case. In considering whether the statement was capable of bearing the innuendo it was legitimate to

* No opinions were delivered by their Lordships.

¹ *Capital and Counties Bank v. Henty*, (1880) 5 C. P. D. 514, at p. 541, (1882) 7 App. Cas. 741, at p. 788.

² *Searles v. Scarlett*, [1892] 2 Q. B. 56.

³ (1903) 5 F. 920.

⁵ 5 F. 920, at p. 922.

⁴ (1895) 22 R. 860.

⁶ (1895) 11 T. L. R. 373.

April 3, 1913. have regard to the character and purpose of the publication in which the statement appeared. [Lord Shaw of Dunfermline referred to *Sexton v. Ritchie & Company*.¹]

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At delivering judgment on 3rd April 1913,—

LORD ATKINSON.—The Lord Chancellor desires me to state that he has had the advantage of reading the judgments which have been prepared by Lord Kinnear and Lord Shaw, and that he concurs in them.

LORD KINNEAR.—The question in this case is whether the Court below has done right in adjusting an issue for the trial of an action for libel, or whether they ought not to have refused to send the case to a jury and given judgment at once for the defenders. We have not the advantage of having any opinions of the learned Judges before us. But from what was said at the bar it may probably be inferred that they proceeded on the supposed authority of the case of *Crabbe & Robertson v. Stubbs, Limited*.² I am of opinion that that case does not support the judgment. But, however that may be, it is not binding on this House; and before I examine it I think it will be convenient in the first place to consider the present question on its own merits, with reference to rules of law that are otherwise well settled.

The appellants, who are defenders in the action, are the proprietors and publishers of a newspaper called *Stubbs' Weekly Gazette*; and the pursuer avers that they carry on for profit a business which they describe in their advertisements and prospectuses as a means of enabling traders to avoid making bad debts. As Lord President Inglis observes in *Andrews v. Drummond & Graham*,³ with reference to a similar publication, "the object seems quite a legitimate one, and if prosecuted in a legal manner no one could object to it." But the pursuer's complaint is that the defenders have gone beyond what the law allows, to his injury, inasmuch as their *Gazette* contains a list of persons against whom decrees in absence have been obtained; and in the issue of 26th October 1911 his name appeared in the list as a defender against whom a decree in absence for £9, 19s. 6d. had been taken in the Sheriff Small-Debt Court at Hamilton, whereas, in fact, this statement was false, because the claim of debt to which it referred had been settled and the action had been dismissed.

It is admitted that the entry of the pursuer's name in the list was made in error. The validity of the excuse the appellants put forward for their mistake is not relevant to the present question. But I observe in passing that people who follow such a business as was undertaken by the appellants impose upon themselves a duty of care and circumspection, because they have taken the reputation and credit of their neighbours into their own hands, and it will be no answer to any well-grounded complaint of injury through misrepresentation of fact that they have misunderstood the import of entries in the Sheriff Court books, or that the entries themselves were misleading. They undertake to say what passed in Court apparently by a

¹ (1890) 17 R. 680, *aff.* (1891) 18 R. (H. L.) 20.

² 22 R. 860.

³ (1887) 14 R. 568.

study of what is recorded in the Sheriff Court books, and they take the April 3, 1913. risk of their own interpretation of the entries which they may not perfectly understand. But, as I say, that is not material to the present question, which is whether there should be a trial or not. All that it is to the pursuer to say upon this statement in defence at present is that the appellants cannot plead, as they might otherwise have done, that no action will lie for a mere statement made in a newspaper or elsewhere that a decree has passed in a public Court of justice, because that is a public fact which everybody is entitled to state. But no such plea of justification is required if the statement is not in itself libellous, and I am of opinion that taken by itself it bears no defamatory meaning. To apply the approved definition of a libel for which action will lie, it certainly does not hold the pursuer up to hatred, contempt, or ridicule, and just as little does it convey an imputation injurious to him in his trade. An injurious inference might no doubt have been drawn, if inability to pay a just debt were the only reason which could account for a decree in absence being allowed to pass in a Small-Debt Court. But, as the appellants' counsel very forcibly pointed out, such a thing may happen from a variety of causes that are perfectly consistent with solvency and honest intention on the part of the debtor. If this were all, the question would be whether a publication is libellous because one out of various possible inferences from the facts which it states may be injurious while others are harmless. This question was answered in the negative by the decision of this House in *Capital and Counties Bank v. Henty*.¹ But in the present case it does not really arise. It is absolutely excluded by the express language of the very statement of which the pursuer complains.

The alleged ground of action is an entry in what he describes as the defenders' black list. But the entry is a mere statement of names, with a date and a sum of money; and what it is intended to represent is explained in a head-note, which must be read along with it in order to make it convey any intelligible meaning. The head-note begins with a descriptive title of what is to follow, to wit:—"Extracts from the Court Books of Decrees in Absence in the Small-Debt Courts," and to this there is appended a note in the following terms:—"The following extracts from the Court books have been received since our last issue. . . . It is probable that some of the decrees have been sisted, settled, or paid; and in no case does publication of the decree imply inability to pay on the part of anyone named, or anything more than the fact that the entry published appeared in the Court books." This appears to me to be conclusive of the whole question. It is impossible to say that this statement fairly read would convey to any reasonable mind the imputation on persons whose names are found in the list that they are unable to pay their just debts. The pursuer admits that he cannot put the bare entry in the list to a jury without an innuendo; and the only innuendo he proposes is embodied in the issue which has been allowed, and by which it is proposed to ask the jury "whether the said statement" (that of course refers to the statement in the appellants' newspaper which it is proposed to append in a schedule

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¹ 7 App. Cas. 741.

April 3, 1913. to the issue) "falsely and calumniously represented that the pursuer was unable to pay his debts." But that is the very thing that "the said statement" in the plainest and most explicit language declares that it does not represent.

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Lord Kinnear. It is said that, although the language of the statement taken by itself may be harmless, a libellous character may nevertheless be given to it by evidence of extrinsic facts relating to the purpose or circumstances of the publication. I agree, and if there were any relevant averments of such facts, I should think the pursuer should be allowed to prove them. But there is nothing stated on record which can alter the plain meaning of the document. If the purpose ascribed to the defenders were more suggestive than it is of an intention to defame by imputing insolvency, no inference of that kind could stand against the positive and explicit language in which it is repelled by the defenders. The question is, in reality, whether the defenders' statement means what it says, or whether it means the reverse of what it says, and I am of opinion that that is a question which should not be allowed to go to a jury.

The law is perfectly well settled. Before a question of libel or slander is submitted to a jury the Court must be satisfied that the words complained of are capable of the defamatory meaning ascribed to them. That is a matter of law for the Court. If they are so, and also of a harmless meaning, it is a question of fact for a jury which meaning they did convey in the particular case. It is unnecessary to cite authorities, because they are many, but I take the doctrine as laid down by Lord Selborne in *Capital and Counties Bank v. Henty*,¹ where, after stating the general rule to the same effect as I have just stated it, the learned Lord adds:—"If the Judge, taking into account the manner and the occasion of the publication and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury."

In a very recent case, *Smith v. Walker*,² in the Court of Session, the Lord President pointed out that, in applying this doctrine, which his Lordship cited from Lord Selborne as I have just done, to the practice of Scotland, it is necessary to substitute for the words "facts properly in evidence" the words "properly averred on record." This is because in Scottish practice the question of libel or no libel, so far as it is a question for the Court only, is not left to be raised at the trial, but must be decided at the stage at which the interlocutor now under review has been pronounced. The Court cannot allow an issue in any case without deciding that there is a proper case to go to a jury and ascertaining the question of fact which the jury is to decide. In the present case, therefore, it is decided by a final judgment of the Court that the words complained of when taken in connection with the facts alleged on record are capable of the defamatory meaning ascribed to them; and the Judge at the trial would have no power to withdraw the case from the jury on the ground that they will not bear that innuendo. I think it clear, in the first place, that the whole of the statement in the head-note, as I have quoted it, must be read in conjunction with the alleged

¹ 7 App. Cas. 741, at p. 744.

² 1912 S. C. 224.

excerpt from the Sheriff Court books, and, secondly, that when it is so April 3, 1913.
read it is impossible that any reasonable man should collect from it the
libellous imputation alleged.

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Taking this view of the law, I do not think that the Court need have
been embarrassed by the case of *Crabbe & Robertson v. Stubbs, Limited*.¹ Lord Kinnear.
It so far resembles the present that in an action against the present appel-
lants it was held that a statement in their paper that a decree in absence
had passed against a certain person when read along with the context, and
in the circumstances there alleged, might support an issue in the same
terms as that before us. But the facts alleged as to the avowed purpose of
the publication were more suggestive of an intention to impute insolvency
than anything stated in the present record; and, what is much more im-
portant, the perfectly explicit statement which I have quoted, and which
seems to me to be the vital point in the appellants' case, was not to be
found in the paper complained of in the case of *Crabbe & Robertson*.¹

There was a statement as to the possible imputation of insolvency, but the
Court did not read it as a clear disavowal of such imputation as regards all
the persons whose names were found on the list, but only as an indication
that some of them might have paid their debts or taken proceedings for
avoiding the decree. It was therefore thought that the record presented a
relevant case to go to a jury. I am bound to say that I think the case was
a very narrow one, although I still remain of opinion that it was rightly
decided. But the only general doctrine for which it can be cited as an
authority is that which I have already had occasion to state, and which I
take to be beyond dispute, that the purpose and circumstances of a publica-
tion may impart to language a meaning which it would not otherwise bear.
Whether that doctrine was rightly applied or not in the particular case is a
matter of no importance, because a decision as to the libellous or innocent
character of particular words in particular circumstances cannot govern
the construction of different words, however minute the difference may be.

The other case cited, *Hunter & Company v. Stubbs, Limited*,² is in a dif-
ferent position. The publication complained of seems to have been in terms
which I cannot distinguish from those in the publication now complained
of; and it follows from what I have said that, in my opinion, the issue
ought not to have been granted in that case. But the only question
reported arose after trial, when it was too late to question the issue; and it
does not appear from the report on what ground it was allowed, or whether
the point was contested. I cannot therefore regard the case as an authority
upon this question one way or the other. It was certainly not binding upon
the Court below, and of course it is not binding upon this House.

I have only to add that, if the innuendo proposed cannot be allowed, I
think it impossible that your Lordships should send the case back to the
Court below, as was suggested, in order that some permissible innuendo
may be discovered. This would, in my opinion, be inconsistent with all
sound practice and with legal principle.

I cannot say that I see any other libellous suggestion in the publication
complained of if the pursuer's innuendo fails; and there are no extrinsic

¹ 22 R. 860.

² 5 F. 920.

April 8, 1913. facts averred which would support any other. But I do not propose to put my judgment upon that ground. I make the observation in passing, but the true ground of judgment is to my mind that the pursuer must allege his own ground of action and must state on record all material facts which he is prepared to establish in support of it. If it cannot be sustained as he states it, it is not for the Court to discover some other ground which he has not found out for himself, or to require him to prove some injury which he has not averred.

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On the whole matter I am of opinion that the interlocutors under review ought to be reversed.

LORD SHAW OF DUNFERMLINE.—The appellants are the proprietors and publishers of *Stubbs' Weekly Gazette*. This is a newspaper which they issue for profit, and which it is admitted has a large circulation among traders. It is considered to be of interest and advantage to these traders to find in this paper what upon application they could have ascertained for themselves as registered public facts, namely, the decrees in absence pronounced in the Small-Debt Courts of Scotland. No question is raised as to the right of the appellants to publish this record.

Upon the other hand, it is also, as it must be, conceded that while this is the appellants' right, it is also their duty to make their publication of these decrees accurate in fact. If for any reason they fail in this duty, and if thereby a trader against whom no decree in absence has in fact passed is erroneously entered in that list, the appellants must stand responsible for any injurious consequences which the erroneous entry has produced or would be reasonably likely to produce, taking into account its terms and the circumstances upon the one hand of the trader and upon the other of the publication. I did not gather that the appellants disputed this proposition. It has been the basis of many decisions both in Scotland and in England, and I do not desire in the judgment which follows to throw doubt upon it. It lies, however, with the pursuer to make a relevant averment of such injurious consequences, and the burden rests upon him of establishing them as the effects of the erroneous publication.

The rights and obligations of parties being thus granted, it must also, I think, be admitted that an erroneous statement that a decree had been passed for a small debt in Scotland would not necessarily import harm to anybody. In order to enable it to be treated as a harmful publication, an innuendo must be placed upon the erroneous entry showing that the character or business of the trader has been injuriously affected because the readers or the public were led to conclude as against him something much more serious.

For such a decree might pass for a large variety of reasons, none of which would injuriously affect the reputation or trade of the debtor. One quite natural interpretation of the entry would be that the alleged debtor had forgotten to pay the small sum sued for. Another reason might be that he was—having certain opinions as to the injustice of the claim or the full amount of it—determined not to pay except under force of law: A third reason for such a decree might be that he was absent and knew nothing about the summons: A fourth that he was a person given to refusing or

delaying to pay his debts in ordinary and proper course. This last might April 3, 1913, possibly affect the reputation and credit of the alleged debtor. And I am not prepared to say that there may not be circumstances in which injury, more particularly to a trader in humble and struggling circumstances, would be produced if the erroneous entry had been taken up in the last-mentioned sense. Such a person might never have been in a Court, might always have met his obligations with regularity, might be in a critical stage in the development of his business, and, as at present advised, I should not say that it was a strained construction to put upon the entry that it was reasonably likely to imply that he was given to or had begun the practice of refusing or delaying to make payment of his debts and that the public or those dealing with him had understood it in that sense.

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The position taken up by the respondent, the pursuer in the action, however, is that he has put forward in issue the erroneous entry with a much more sweeping and serious innuendo. That innuendo is that the entry "falsely and calumniously represented that the pursuer was unable to pay his debts." He has, in short, taken upon himself the burden of saying that the entry of a decree in absence having passed against him for £9 odd was equivalent to or implied an imputation of his insolvency.

After much consideration, I am of opinion that this innuendo imports into the erroneous entry more than it can reasonably bear. For I think the test in these cases is this:—Is the meaning sought to be attributed to the language alleged to be libellous one which is a reasonable, natural, or necessary interpretation of its terms? It is productive, in my humble judgment, of much error and mischief to make the test simply whether some people would put such and such a meaning upon the words, however strained or unlikely that construction may be. The interpretation to be put on language varies infinitely. It varies with the knowledge, the mental equipment, even the prejudices, of the reader or hearer; it varies—and very often greatly varies—with his temperament or his disposition, in which the elements, on the one hand, of generosity or justice, or, on the other, of mistrust, jealousy, or suspicion, may play their part. To permit, in the latter case, a strained and sinister interpretation, which is thus essentially unjust, to form a ground for reparation, would be, in truth, to grant reparation for a wrong which had never been committed.

There are circumstances, to which I am about to allude, which bring very vividly before the mind the mischief to which I have referred. But before I mention them I desire to add that it appears to me that the statements which I have made are amply supported by authority. The general rule, indeed, occurs by way of statement in a single sentence of Brett, L.J., in *Henty's* case¹: "It seems to me," said that very learned Judge, "unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document." In the same case in the House of Lords,² Lord Selborne enunciated the familiar proposition that the words must be "taken in their natural sense." I refer to *Henty*^{1 & 2} on account of its high authority. It was twice argued in this House and was the subject of careful and elaborate judgments. On

¹ 5 C. P. D. 514, at p. 541.

² 7 App. Cas. 741, at p. 746.

April 3, 1913. this question of the meaning attributable to words no dissent in the judgments of the majority is expressed from the general proposition just quoted from Brett, L.J. Indeed I am not sure that in particular the judgment of Lord Blackburn¹ does not go further, for he states the principle on which

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the Court is to proceed in this language, "viz., that unless the plaintiff has so far satisfied the onus which lies on him to show it to be a libel that the Court can, with sufficient certainty, say that the writing has a libellous tendency, they should not so say"; and in another passage he refers to this onus which is upon plaintiff thus, "that the Court can (to adopt Lord Tenterden's language) with reasonable certainty say that the tendency of the letter was to convey the libellous imputation." Lord Watson² used language of a less pronounced but still broad and emphatic character when he said, "If I were satisfied that an inference injurious to the credit of the bank would naturally and necessarily suggest itself to the mind of any person of average intelligence on reading the circular"; and Lord Bramwell³ puts the hypothesis, "If a libellous inference may be drawn from them as a necessary or natural consequence, they are libellous." Out of this variety of expressions I have ventured to gather up what I think to be the result, namely, that the innuendo must represent what is a reasonable, natural, or necessary inference from the words used, regard being had to the occasion and the circumstances of their publication.

By the laws both of England and of Scotland the duty of saying whether this inference may be made lies with the Court. The difference of procedure between the two countries is this, that in England the whole inquiry may be taken and the jury may have passed its verdict, before this essential and truly preliminary question is determined. If the verdict be for the defendant, then of course that is an end of the matter; but if the verdict be for the plaintiff, it is open—after, it may be, a very lengthy procedure—to the defendant to maintain that the inference made by the jury in favour of the plaintiff was one which the language employed will not bear. If the Court affirms that proposition, then judgment is entered for the defendant.

In Scotland the inquiry as to the reasonable, natural, or necessary interpretation of the libellous words is not entered upon at so late a stage. It is for the pursuer of an action to state definitely the meaning which he alleges that the article or words complained of bear, and to put that meaning in issue; and thereafter the Court determines whether there is any issuable matter and approves or disapproves, or it may vary or adjust, the issues proposed for the trial. But the principles upon which the Court proceeds in Scotland at the early stage are identical with those which the Courts in England proceed upon at the later stage in reference to the point now under discussion.

What happened in the present case was this: The pursuer stated the entry, and alleged that it was false that there had been such a decree in absence. This was admitted. He then proposed the issue whether the statement was of and concerning him, and "falsely and calumniously represented that the pursuer was unable to pay his debts." The defenders in their

¹ 7 App. Cas., at pp. 782, 785.

² 7 App. Cas., at p. 788.

³ 7 App. Cas., at p. 790.

record founded upon the following heading which was, in the issue of their April 3, 1918. paper complained of, prefixed to the list of decrees in absence which they gave. That was in these terms:—"Note.—The following extracts from the Court books have been received since our last issue, made up to the several dates given in the second column. It is probable that some of the decrees have been aisted, settled, or paid, and in no case does publication of the decree imply inability to pay on the part of anyone named, or anything more than the fact that the entry published appeared in the Court books." For some reason which has not appeared, the pursuer was allowed to present his issue with a schedule confined to the erroneous entry, but without any mention of this note. Such a proceeding cannot be defended. It was corrected by the Inner House in the case of *Crabbe & Robertson v. Stubbs, Limited*.¹ It appears to me quite clear that the omission of this note from the schedule must have been inadvertent.

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The defenders admit the error, explain how they had been led into it, and quote the apology made to the pursuer in their next week's issue. But they then proceed to give a list of eleven cases, extending over six months prior to the alleged slander, in which the pursuer had figured in the Court lists, and with regard to which they say that the pursuer's creditors "were unable to obtain payment from him of the sums due at their due date, notwithstanding repeated remonstrances, and only obtained payment after actions had been raised in the Sheriff Courts of Lanarkshire, and in some cases after decrees had been pronounced." They also accordingly proposed a counter issue "whether the pursuer, during the period from February until October 1911, repeatedly refused or delayed to make payment of his just and lawful debts to his trade creditors."

The importance of the shape of the pursuer's issue, and in particular of its innuendo, thus becomes apparent. For while the pursuer's issue with its sweeping innuendo has been allowed, the counter issue of the defenders—that the pursuer repeatedly refused or delayed to make payment of his debts—has been disallowed by both Houses of the Court of Session. This has been done presumably upon the familiar ground that the counter issue does not meet the entire breadth of the innuendo which the pursuer had put in his issue, namely, that he was unable to pay his debts. In short, the defenders were disabled from tendering proof that the pursuer for eight months before the entry founded on repeatedly refused or delayed to make payment of his just debts because he might have done all that, although he was not insolvent, and the pursuer had so framed his issue as to make the erroneous entry of one decree in absence impute insolvency in general terms. It is plain to my mind that this was paving the way for a complete miscarriage of justice.

But that miscarriage arose, or would have arisen, simply because, in my humble judgment, the Courts below had permitted the imputation of insolvency to be put forward as a reasonable, natural, or necessary inference from a statement that a decree in absence had been taken for a sum of between £9 and £10. I do not refer to the note, which specifically stated that nothing was meant to be inferred except that a decree had been taken.

April 3, 1913. It may be true that in a weekly gazette of this character a note so inserted might not obliterate the evil effect of the erroneous entry; but it does not appear to me to be justifiable to infer an imputation of insolvency from a single decree in absence for a small amount. Had the far less strained interpretation been put upon the words that the entry meant that this trader was a person who was refusing or delaying to pay his just debts, this would have enabled the whole facts under both the issue and the counter issue to go before the jury, because it was exactly that not unreasonable interpretation which the defenders were willing to meet, and if they had established their averments and their counter issue, they would, of course, have been entitled to a verdict.

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It would be productive of wrong if the over-straining of an innuendo were in such a manner and by a finesse of procedure to be permitted to block out the real substance of a case; a verdict for the pursuer in such a situation would be obtained because the jury had been left compulsorily in the dark. I am aware of the answer made, that the debtor's had record could be looked at for the purpose of mitigating damages, and that the jury might grope towards the real truth on the whole case by the light thus let in upon one point as through a chink in the shutter. This again is a finesse of procedure; its use beyond the one point is illegitimate as all parties know. In the case in hand any exclusion of the whole light on the whole case would, in my opinion, be productive of possible mischance and contrary to law.

These considerations illustrate the necessity of confining innuendoes upon, and inferences from, words which in themselves are not libellous within an area which admits of their being made without strain and as an expression of the reasonable, natural, or necessary meaning of the words employed. The present case shows that, if that rule were to be departed from, it would enable pursuers, first, to strain by inference the meaning of words, and then, secondly, to prevent a complete answer to an issue being made by a defender, who might be thoroughly furnished in his defence against the inference which was the reasonable and natural one.

I am aware that in the case of *Hunter & Company v. Stubbs, Limited*,¹ and also in that of *Crabbe & Robertson v. Stubbs, Limited*,² to which I have referred, the form of issue now to be declared by this House improper was allowed. In *Hunter's* case,¹ however, the defender had agreed to the issue and the question was not raised at the proper stage. *Crabbe & Robertson's* case² has been dealt with fully by my noble and learned friend Lord Kinnear, and I agree with his Lordship's observations thereon and with the course which he suggests should be pursued.

INTERLOCUTOR appealed from reversed. The respondent to pay the costs in the Courts below and of the appeal to this House.

HAMLINS, GRAMMER, & HAMLINS—ERSKINE DODS & RHIND, S.S.C.—M'KENNA & Co.
—GEORGE F. WELSH, Solicitor.

WILLIAM BLACKIE HANLEY, (Pursuer) Appellant.—*Constable, K.C.*— No. 6.
Ingram—J. R. Marshall.

THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDINBURGH, (Defenders) Respondents.—*D.-F. Dickson—W. J. Robertson.* April 4, 1913.
 Hanley v. Magistrates of Edinburgh.

Burgh—Drainage—Road—Flooding of land in burgh—Responsibility of drainage and road authority—Reparation—Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. cap. cxxxii.), sec. 179—Edinburgh Corporation Act, 1900 (63 and 64 Vict. cap. cxxxiii.), sec. 28.

The Edinburgh Municipal and Police Act, 1879, enacts, sec. 179, "The magistrates . . . shall from time to time cause to be made and maintained . . . within the burgh such sewers and drains as shall be necessary for the effectual draining of . . . the burgh. . . ."

The Edinburgh Corporation Act, 1900, which incorporated the estate of Craigentenny in the burgh, by sec. 28 provided with regard to a burn, which flowed through the estate and carried off a portion of the drainage and sewage of Edinburgh, that (except upon an order of the Sheriff) it should not be lawful for the Corporation to diminish the supply of sewage water flowing through the burn and used for irrigation, or to deepen, or otherwise interfere with, the burn so far as passing through the estate.

On two occasions in 1909, after heavy rainfalls, a market garden on the estate of Craigentenny bounded by the burn was flooded owing to a culvert which carried the burn under a road being of insufficient capacity to admit free passage of the water, which in consequence overflowed on to the road, whence it found its way into the garden.

In an action of damages at the instance of the tenant of the market garden against the Corporation, *held* (rev. judgment of Second Division) that sec. 28 of the Act of 1900 did not affect the obligation of the defenders at common law, and under sec. 179 of the Act of 1879 to make and keep the drainage system of the burgh effective, and that accordingly they were liable in damages.

Observed that the liability of the authorities did not arise only if and when flooding had been periodical or frequent, but that they were responsible for every failure in effective drainage.

(In the Court of Session, July 12, 1912—1912 S. C. 1199.)

Ld. Chancellor (Haldane).

The pursuer appealed to the House of Lords.

The view of the facts taken by their Lordships, which differed from the view of the Judges of the Second Division and agreed substantially with that of the Lord Ordinary (Ormidale), is set forth in the opinion of Lord Shaw of Dunfermline. Briefly stated it was that owing to the insufficiency of the culvert the burn overflowed its banks on the upstream side of the culvert, flowed on to the road and thence, through the gate, into the pursuer's garden.

Lord Kinnear.
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The case was heard on 13th, 17th, 18th, and 20th February 1913.

At delivering judgment on 4th April 1913,—

LORD CHANCELLOR.—In this case I have had the advantage of perusing and considering the judgment about to be proposed by my noble and learned friend Lord Shaw. As I concur with the conclusions which he has there very fully set forth, I do not propose to address your Lordships separately.

LORD KINNENAR.—I also have had the advantage of reading the judgment of my noble and learned friend, and I concur in it.

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LORD SHAW OF DUNFERMLINE.—The appellant, who is the pursuer of this case, sues as tenant of a market garden on the estate of Craigentinny within the bounds of the city of Edinburgh for damage done by the flooding of his market garden and premises on two occasions, namely, the 25th July and the 13th October, both in the year 1909.

The Restalrig Road runs from that village southward, and by way of a bridge across the Craigentinny Burn. The appellant's garden is upon the east of that road ; upon the west of it is the stretch of ground known as the Lochend Meadows, which have for many years been artificially irrigated. The road crosses by a bridge the Craigentinny Burn, which flows upon the south side of the meadows, then through a culvert under the road and part of the adjacent land, and thence along the south side of the garden in an easterly direction towards the sea.

On the dates mentioned the pursuer's ground was, to the extent of about 9 acres, flooded by water from the burn, and it is not disputed that considerable damage was thereby caused. The Lord Ordinary has assessed this damage at £150 sterling, and the respondents do not dispute this estimate. The natural water of the Craigentinny Burn is mixed with the sewage of the city of Edinburgh, which is emptied into it at a point considerably above the pursuer's garden ; and the burn, thus containing the city sewage, flows in an open channel for a space of about 250 yards before reaching the culvert under the Restalrig Road. The city, while not challenging the fact that damage was done by the overflow of this sewage burn, disputes its liability in law for the injury so caused.

The case of the pursuer is extremely simple. He maintains that on the dates mentioned the burn, being in spate, rose until the culvert as constructed could not carry its waters away. These accordingly gathered until they flooded the Lochend Meadows to a considerable height. The waters, thus dammed back, burst over the road, flowed from the level of the bridge down the slope of the road until they reached the pursuer's garden gate, which is the point of the lowest road level, and rushed in considerable volume through that gate and on to his land. The accumulation thus formed was added to by this circumstance, that owing to the damming back of the water the drains in the road itself, both between the village and the culvert, and also to the south thereof, were filled up ; and they regurgitated, emptying considerable volumes on to the gathering water in the road, and adding to the destructive flood.

On the other hand, the case of the respondents is that the volume of water thus stated to have swept through the garden gate on to the appellant's ground is exaggerated, and that the real cause of any flooding which resulted in substantial damage was not on account of the damming back of the water and the regurgitation just described, but arose by reason of the banks of the burn on the south of the pursuer's garden being insufficient to contain the flow of the stream, and that with that circumstance they have nothing to do.

This defence upon the facts is altogether different and is separate from the defence which the respondents found upon their statutory position, duties, and responsibilities. That defence in law will be dealt with presently.

Upon the allegations of parties with reference to the flooding, the learned April 4, 1913. Lord Ordinary, who heard the witnesses, and has manifestly considered the evidence with minute care, has little hesitation in holding the pursuer's case to be made out. It might be sufficient to say that in these circumstances it is the habit of this House to accept a verdict so pronounced unless there be some manifest or controlling reason in the nature of the case, or in the views of the Judges on appeal, to displace the verdict. But this case was argued with such anxiety, and the issues in it are evidently of such importance both to the local authority and to the general body of riparian occupiers and owners, that it may be expedient to examine the evidence independently, not without brevity but in some detail.

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I understand all your Lordships to be of opinion, as I am, that the allegations as to flooding of the meadows occasionally happening many years ago have no real bearing upon the present case. The accommodation of the culvert to receive the swollen waters of the burn may have been different in those times; but in no view can a prescriptive right of the character adumbrated be maintained.

An event, however, occurred towards the end of the year 1906 which appears to me to be of considerable importance. The Edinburgh and District Water Trust made an application to the respondents, who are also the road authority, for leave to carry a water-pipe, not over the culvert, but across and through the culvert, enclosing the upper portion or arch thereof and reducing, so to speak, the frontage of the culvert to the advancing water by about 6 superficial feet in a sectional area which in all is rather over 36 feet. I shall consider afterwards what is denominated the scientific evidence with regard to this subject; but there can be no doubt that this alteration was assented to; and the permission for carrying the water-pipe in the manner described was granted by letter of the 5th December 1906, "provided the work is carried out at the sight and to the satisfaction of the Burgh Engineer."

The sectional area of the culvert being thus reduced, it is certainly to be observed that, whether causally connected therewith or not, the reduction was succeeded in fact by flooding of the watercourse.—[His Lordship reviewed the evidence which proved that there had been flooding on several occasions.]

Upon the fact whether the pursuer's garden was injured by water accumulated on the road and flowing through his gate, I cannot myself see any ground for doubt.—[His Lordship reviewed the evidence which established this point.]

The case for the defenders on this matter of fact is not so much a denial of the flood, and even of the flood in some volume through the pursuer's gate, as an assertion that the flood was mainly caused by water which overflowed the banks below the culvert. If this be true, it might not absolve the defenders, if the facts otherwise showed that the obstruction by the culvert caused a damming of the water and an artificial increment of the force and volume of the flow below that point. But I cannot view the evidence as to the overflow over the banks of the stream with any satisfaction.—[His Lordship reviewed the evidence on this matter.]

I do not pursue the analysis of the evidence further. A review of it as

April 4, 1913. **Hanley v. Magistrates of Edinburgh.** Lord Shaw of Dunfermline. a whole convinces me that three things are established: First, that upon the occasions in question the water of the sewage burn was dammed back by reason of the insufficiency of the culvert, and reached at least to the top of the arch thereof. Secondly, that a considerable volume of water flowed through the pursuer's garden gate at a depth at that point of about one foot. Thirdly, that any overflow from the burn below the culvert was of the most trifling character. The Lord Ordinary is of this opinion on all these three points, and I hold each of them to be well and satisfactorily proved. They furnish the data, in fact, upon which the case must be decided.

It is necessary, however, to consider whether there is any substantial ground for rejecting these facts because of skilled evidence given that they were "scientifically impossible."—[His Lordship examined the skilled evidence.] I need not give further instances of such things which occur in the course of the defenders' skilled evidence. I would say of it in short what unhappily has to be said of similar evidence very often, that it is not scientific evidence. It is not evidence; it is hearsay, and hearsay of error. It is not scientific; it is simply the arithmetical development of mistake. In the present case it affords no answer to the case in fact, which the pursuer has proved.

There remains the defence which is put forward in law. It being established that the town sewage has thus been emptied upon the pursuer's lands by reason of the insufficiency of the culvert, which, instead of accommodating it, dammed it back, there would seem to me to be little doubt that the pursuer is entitled to recover damages in respect of the loss caused by this nuisance, and that at common law. Suppose there had been no statutory provisions upon the subject, it could hardly be doubted that the construction of such an obstacle, necessarily followed by the creation of such a nuisance, were things for which the person injured thereby had a good right of action. There is nothing peculiar by the law of Scotland in the situation of a corporation in this regard. They have no title at common law to divert the course of a sewage drain so as to make it overflow the property of any citizen. The common law remedies remain both for the purposes of interdict and reparation unless they be excluded or impaired by statute.

The case upon its facts is fairly analogous to that of *Hawthorn Corporation v. Kannuluik*,¹ in which, as in the present case, there had been more than once an overflow of sewage into the plaintiff's lands. "As for negligence," said Lord Macnaghten, "it is difficult to imagine a more conspicuous example of negligence than is shown by repeatedly pouring offensive stuff into a receptacle or channel proved over and over again to be insufficient to hold it and pass it on. The municipal authorities might just as well pour this stuff directly on the plaintiff's land. The damage to the plaintiff cannot be denied. It is nothing to the purpose, even if it be true, to say that the property in the plaintiff's hands, and in the hands of his predecessors in title, was often flooded before the municipal authorities turned the watercourse into a public drain. Nor is it enough to prove that

¹ [1906] A. C. 105, at p. 108.

the work done in 1889 was sufficient at the time. It is insufficient now. April 4, 1918. It has been insufficient for some time past. The mischief grows as building increases, as new roads are made, new channels formed, and more and more of the surface becomes impervious to rainfall.”

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There being thus no defence at common law, the question that remains is whether the statutes founded upon by the respondents have relieved them of their common law obligations. It would have been somewhat surprising if they had, although Parliament might possibly, for some supereminent reason of necessity, have thus interfered with the protection of the subject. But a perusal of the statutes removes all real difficulty and establishes that such a defence is not well founded. By the Edinburgh Municipal and Police Act, 1879, it is provided by section 179 as follows:—“The magistrates and council shall from time to time cause to be made and maintained, under streets or courts, or elsewhere within the burgh, such sewers and drains as shall be necessary for the effectual draining of any portion of the burgh, and shall also cause to be made and maintained all such reservoirs, sluices, engines, and other works as shall be necessary for cleansing such sewers and drains, and, if needful, they may carry such sewers and drains through and across any enclosed or other lands, and through any underground cellars and vaults, making full compensation for any damage done, which compensation shall be ascertained in the same manner as compensation for land to be taken under the provisions of the Lands Clauses Acts, and the magistrates and council shall have right of access for maintenance of all such sewers and drains.”

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The effect of this section appears to be to impose an imperative obligation upon the respondents to make and maintain all such sewers and drains as shall be necessary for effectually draining any portion of the burgh. It is not a case of giving the city an option. Parliament has imposed this obligation, and in order to secure that it shall be fulfilled without impediment it gives a statutory power to carry, if needful, sewers and drains through any enclosed or other lands on making compensation. In short, the word of Parliament is a word of command, and the command is to make the drainage effective, with a power compulsorily to achieve that object. So far from there being any disability upon the respondents from avoiding nuisances, they have the obligation, by statute clearly imposed, to respect the common law rights of the citizens, and, turning—as they substantially do—a natural stream into a drain, to see to it that the drainage be effective and the polluting matter carried past to the sea.

Upon this latter point I cannot, with much respect to the learned Judges of the Second Division, draw any distinction between the obligations resting upon the Corporation with regard to the size of the culvert under the road, of which they have charge as road authority, and the continuation of the culvert eastward under what presumably is private property. What the statute has ordered is that the drainage shall be made effective, and the amplest power to make it effective by traversing private lands has been given. And it would seem to me an extraordinary result that the Corporation should be held as obliged, in the discharge of this duty, to make a fully accommodating culvert under its road, and yet to discard its obligation to continue that full accommodation of the culvert so as to allow the uninter-

April 4, 1913. rupted effluent of the drainage. This construction would render nugatory the very thing which Parliament has provided shall be made effective, and Hanley v. Magistrates of Edinburgh. would impliedly give a statutory warrant to block up the drainage and sluice it on to the riparian owner's lands instead of conveying it to the sea. I do Lord Shaw of Dunfermline. not think that such an abrogation of common law rights or of statutory duties can be contemplated as sanctioned by law.

I now come to that part of the case which the learned Dean of Faculty towards the close of the debate admitted to be the real strength of the city's defence. I refer to the provisions of the Edinburgh Corporation Act, 1900, and in particular to section 28 of that statute. I am of opinion that that section was not intended by Parliament, and does not import by its terms, a licence, either express or implied, to the Corporation to flood the pursuer's lands. By its terms the section is for the protection of the proprietors of the estate of Craigentenny and their successors. It provides that the Corporation shall not interfere with the right of those proprietors to use the estate for irrigation purposes as has hitherto been done, nor injuriously affect or interfere with that irrigation, nor "diminish or intercept, or otherwise injuriously affect the supply of sewage or sewage water used for such irrigation," nor "deepen, divert, cover over, or otherwise interfere with" the sewage burn. The whole of these stipulations are subject to the important proviso that if in the public interest the Corporation deems it necessary to injuriously affect or interfere with the irrigation or the sewage burn, it shall be at liberty to do so upon giving to the proprietors twelve months' notice and obtaining an order from the Sheriff and giving compensation in respect of land acquired for or affected by the necessary works. It is unnecessary to refer to the further proviso that nothing in the section shall affect the provisions of the Public Health Act, 1897, for the Corporation, thus charged with its duties under the Municipal Act of 1897, would be protected and its powers preserved under the proviso for necessary works here made.

But in the second place I am humbly of opinion that no part of this section, which was a section for the protection of the proprietors of Craigentenny, imports any repeal of the right at common law that those lands should be protected against the inundation nuisances which have occurred, nor imports, either by implication or by its terms, any repeal of the imperative obligations resting upon the Corporation under the Municipal Act of 1879 to make the sewers of the burgh such as shall effectually drain every portion of it. It would no doubt be possible to figure a case in which a protection clause was so framed as to work out to the injury of the person assumed to be protected by Parliament, but nothing of the sort is in this case to be inferred. I do not doubt that all the protection afforded the Craigentenny irrigation works can be continued alongside of the proper and effectual draining of the burgh, and I should myself have had little doubt that Parliament would not, except by extreme inadvertence, have permitted the protection of one riparian owner's rights to operate as a title to stoppage of the general and effective drainage of the city of Edinburgh—a stoppage which might involve serious consequences in the production of disease or in patrimonial loss.

I am, therefore, of opinion that the statute founded upon is no defence in law against responsibility for what has occurred. Even if the obligation for

effective drainage were not compulsory, as I have ventured to opine, but April 4, 1913. were permissive in the full sense of the proviso of section 28, there is abundance of authority to support the view which I have ventured to ex-
 presa. This will be found gathered together in the judgment of Lord Watson in the *Canadian Pacific Railway v. Parke*.¹ I may refer especially to the opinion of Lord Chancellor Selborne in the *Managers of the Metropolitan Asylum District v. Hill*.² In the same case, on page 208, Lord Blackburn said, "It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears."

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There are only two further points which I think it important to mention, in view of certain expressions of opinion in the Courts below.

In the first place, I am at a loss to understand any hostile criticism whatsoever upon the pleadings of the pursuer in this case. That criticism, especially in the judgment of Lord Guthrie, is directed to this, that the pursuer, grounding his case upon the action or inaction of the Corporation, has not by particular specification set forth what were the *opera manufacta* which the Corporation failed to undertake and which, if undertaken, would have avoided the injury which has been caused. The pursuer's case is very simple. He says, "You, the Corporation, are bound effectively to drain the city; you have not done so. You have permitted such a volume of spate water and sewage to accumulate because you have not accommodated its egress by a culvert of sufficient dimensions." Another way of putting it is,—either the volume was too great for the culvert or the culvert was too small for the volume. It is of no use distinguishing between the capacities of the Corporation as drainage authority and road authority, for they were both; and they should have managed both their powers as drainage authority and road authority in such a way as to produce accommodation for the sewage burn, which, in point of fact, was stopped up and so prevented from being effective. I am of opinion that the pursuer required to show nothing more than that in order to make a relevant case, and I wish to add that I would not view with equanimity any obstruction placed by the law on such simplicity of pleading. Nor would I consider it to be promotive of the rights of citizens if, in order to secure reparation for a wrong thus committed, they were forced to inquire into and enumerate the engineering and other works which the Corporation would have required to undertake. A person suffering wrong has nothing to do with that. It is for the Corporation, charged with its common law and statutory duties, to see that they are fulfilled and to take its own advice upon such a subject.

In the second place, I must venture respectfully to dissent from the view expressed in Lord Salvesen's judgment to the effect that responsibility would arise for the injury, disease, or loss caused by flooding and nuisance if, but only if, such flooding and nuisance had been periodical or frequent. The learned Judge puts the condition thus³: "If it is found that injury is being periodically done to his property." I agree with Lord Salvesen in his

¹[1899] A. C. 535.

²(1881) 6 App. Cas. 193, at p. 199.

³1912 S. C., at p. 1215.

April 4, 1913. declaration that "each ratepayer in the town is entitled to have his property efficiently drained; and it can never be the right of the town authorities to sacrifice the interest of the owners of houses situated on a lower level for the benefit of the upper districts." But his Lordship proceeds to make a serious limitation upon this wholesome doctrine, for he adds: "If, therefore, the owner of a house abutting on a street or road within the city boundaries finds himself frequently flooded with sewage because of the drains constructed by the Local Authority becoming gorged in times of heavy rainfall, I cannot doubt that, apart from *damnum fatale*, he would have a claim against such authority for failing to discharge one of their primary functions." I am of opinion that the citizens of Edinburgh are not subject to the serious peril which is thus suggested as defensible in law. If citizens must wait time after time, and suffer the incidence of flooding, with its dangers and possible loss, until the inundations can be characterised as periodical or frequent, I think the security aimed at, both by the common law of the land and by the statutes affecting the city of Edinburgh, would be largely and improperly impaired. The responsibility of the authorities is for each and every failure of their duty in effectual drainage. Unless this be secured a dangerous latitude would be allowed in effective local administration, and I do not think that such a latitude is permissible by law.

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For these reasons I am of opinion that the judgment of the Lord Ordinary should be reverted to by this House, and that the judgment of the Second Division should be reversed with costs.

ORDERED that the interlocutor appealed from be reversed, and that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellant his costs here and in the Courts below.

MORICE STRODE & SON—D. TUDHOPE, Solicitor—BEVEHIDGE, GREIG, & Co.—
SIR THOMAS HUNTER, W.S.

No. 7. GEORGE HERBERT AND OTHERS (Trustees of the deceased George Herbert), Respondents.—*Clyde, K.C.—Ryde, K.C.—Hon. W. Watson.*
May 2, 1913. THE COMMISSIONERS OF INLAND REVENUE, Appellants.—*Att.-Gen. Sir Rufus Isaacs—Sol.-Gen. Sir John Simon—Sol.-Gen. Anderson—J. A. T. Robertson—W. Finlay.*
Herbert's
Trustees v.
Inland
Revenue.
Revenue—Duties on land values—Valuation—"Assessable site value"—Minus value—Finance (1909-10) Act, 1910 (10 Edw. VII. cap. 8), sec. 25 (4).

Held (rev. judgment of the Judges of the Court of Session named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts) that under section 25 (4) of the Finance (1909-10) Act, 1910, the "assessable site value" of land can be a minus quantity.

Ld. Chancellor (In the Court of Session, 18th April 1912—1912 S. C. 948.)
(Haldane). The Commissioners of Inland Revenue, the respondents in the
Ld. Atkinson. Court of Session, appealed to the House of Lords. The appeal was
Lord Shaw of against an interlocutor of 18th April, which dealt with the merits,
Dunfermline. and also against a subsequent interlocutor which found the appellants
Lord Moulton. liable in expenses.

The case was heard on 3rd, 4th, and 7th April 1913.

At delivering judgment on 2nd May 1913,—

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LORD CHANCELLOR.—The question which comes before the House for determination in this appeal is one of an entirely novel character. It is whether, in making the valuation of the site value of land required to be made by the provisions of the Finance Act of 1910, for the purposes of the new land taxes which the Act imposes, the original assessable site value which has to be ascertained may be shown as a minus quantity. The argument for the Crown, which was the appellant, is in substance that while it is admitted that the site value which is the subject of these taxes must always be a real element in the actual value of the land, the statutory calculations in which that real element appears may, with a view to the measurement of its subsequent increase, have to express it, in an appropriate valuation account, under the guise of a minus figure, just as might be the case in measuring with a Centigrade thermometer the rise from a temperature below the freezing point. It is therefore said that while this mode of measurement appears artificial, and may present the original site value under the form of a negative quantity, it is not really different from the procedure of a surveyor who measures the difference between quantities below and above a datum line arbitrarily selected for convenience in reckoning, and that it is a way occasioning no injustice of ascertaining a factor required for the measurement of the actual and positive value which is to be the subject of taxation.

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By the respondents, on the other hand, it is contended that, reading the statute as a whole, it appears that what is called in it original assessable site value must always, if it exists at all, be shown as an actual and positive amount. And it was pointed out that in one case, at all events, the statute in terms directs a reduction to be made of 10 per cent of the site value, a reduction which would be nugatory and impossible if that value could be shown as a minus amount.

In order to make clear the meaning of the question thus raised I turn to the scheme of levying duties on land values enacted by the Finance Act of 1910. Part I. of the Act, which contains this scheme, consists of forty-two sections. Of these sections, the first twenty-four relate to the levy of duties and the remainder to the machinery of valuation for the purpose of these duties and to other matters of a miscellaneous character. Part I. commences by enacting a charge of duty on what it calls the increment value of land, defined by section 2 to be the amount (if any) by which the site value of the land, on the occasion on which increment duty is to be collected, exceeds the original site value. The value to be taxed must have accrued since 30th April 1909.

The next duty imposed by Part I. is reversion duty, which is to be paid by the landlord on the value of the benefit accruing to him by the determination of a long lease. This value is to be the amount by which the total value, after deduction of so much as is attributable to works executed or expenditure made by him during the lease, exceeds the total value at the date of the lease.

The third duty imposed is undeveloped land duty at the rate of one half-penny per annum for every twenty shillings of the capital amount of the

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site value of undeveloped land of certain kinds, with a special provision that the duty is not to be charged where the site value does not exceed £50 per acre.

The fourth of the group of duties imposed under Part I. is the mineral rights duty, but this it is unnecessary to refer to for the purposes of the present case.

I now come to the sections which provide for the valuation required for the measurement of the values so to be taxed.

In approaching the controversy as to the meaning of these sections I think it worth while to recall a principle which must always be borne in mind in construing Acts of Parliament, and particularly legislation of a novel kind. The duty of a Court of law is simply to take the statute it has to construe as it stands, and to construe its words according to their natural significance. While reference may be made to the state of the law, and the material facts and events with which it is apparent that Parliament was dealing, it is not admissible to speculate on the probable opinions and motives of those who framed the legislation, excepting in so far as these appear from the language of the statute. That language must indeed be read as a whole. If the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if they could be taken by themselves. But subject to this the words used must be given their natural meaning, unless to do so would lead to a result which is so absurd that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated.

I will now consider the valuation sections. Section 26 directs a valuation to be made of all land in the United Kingdom as on 30th April 1909. It is to show separately the total value and the site value of the land, and the definition of these terms is to be found in section 25, which is of cardinal importance for the purposes of this appeal. That section defines four separate kinds of value—gross value, full site value, total value, and assessable site value. The object is, by means of valuation based on these definitions and carried out in a fashion which is prescribed, to provide a standard by which assessable site value may be measured. Such a standard is necessary, for in the case of increment duty section 2, to which I have already referred, defines the increment value on which the duty is to be levied as the difference between the site value when the duty is to be collected and the original site value.

These two site values therefore appear as figures one of which is to be subtracted from the other; as terms the importance of which is that they bear a relation to each other which enables such a sum to be done. But on reference to the rest of section 25 it will be seen that while site value is regarded in the statute as signifying a real element in the value of land, it is an element which the statute separates from the rest of that value only notionally, and for the purposes of measurement. The method by which this is done is to begin by defining as gross value the estimated market value of the fee-simple of the land as it would stand if sold free from incumbrances, burdens, charges, or restrictions. The next step is to proceed to define the full site value, and this is declared to be the amount which remains

after deducting from the gross value, estimated as above, the difference between that value and the amount which the fee-simple might be expected to realise if the land were sold divested of all buildings, structures, trees, &c. What is here directed to be deducted is the difference made to the selling price of the land by the presence of the buildings, structures, and trees on it, the result affording a measure of the value of the bare site. The next step is to measure what is called the total value, and this is defined to be the gross value after deducting the amount by which the sale price would be diminished if the land were sold subject to all qualifications of the absolute title, in the nature of fixed charges, public rights, easements, and covenants entered into in the public interest. It will be observed from the definition section that the expression "fixed charges" includes feu-duties and ground rents, but excludes mortgages and similar incumbrances. With the aid of these definitions the Act next proceeds to lay down how assessable site value is to be ascertained.

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It is what remains of the total value after deducting the same amount as is to be deducted for the purpose of arriving at full site value from gross value. In the case of gross value and full site value the land is assumed to be sold with an absolutely clear title. In the case of total value that title is treated as subject to certain specified qualifications, but the land is assumed to be sold with all its buildings, structures, trees, &c., upon it. But before the figure for assessable site value can be reached there are other and additional items which, under the provisions of section 25, subsection 4, may have to be deducted from the total value. These are such parts of the total value as are attributable to works executed, expenditure of a capital nature for improving the land for building or business purposes, the appropriation for the use of the public of other land by the person interested, money spent on redemption of fixed charges, enfranchisement of copyholds, or obtaining release from restrictive agreements and other items mentioned. Moreover from the total value there is also to be deducted the amount which it would be necessary to spend in order to divest the land of the buildings, trees, and other things of which it is to be taken to be divested in order to arrive at the full site value.

It is obvious that the aggregate amount of these deductions may exceed the total value as the Act defines it. The value of the buildings and other structures and of the trees on the land may be great in proportion to the total value, and so may the amount of the expenditure which is directed to be allowed for. The result may easily be that the person making the calculation will have, after ascertaining this aggregate amount, to bring out the balance of assessable site value as a minus quantity. On this the language of section 25 appears to me to be imperative and quite clear and to afford no room for uncertainty.

And when I look back to section 2, which deals with increment value, it seems to me that this conclusion leads to no difficulty. For the increment value directed to be taxed is, as I have already pointed out, simply the difference between present and past site value, and this difference is as real and easily measured when one of the quantities is minus as when both are plus. Julius Caesar was born in 100 B.C and died in 44 B.C. The period of his lifetime is not on that account less real, nor does the circumstance

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that it commenced before the Christian era, in a time the lapse of which is consequently reckoned by minus numbers, make the aggregate of years between then and the present time the less real. The temperatures below the freezing point which is indicated by zero on the Centigrade thermometer are shown as minus figures, but a rise in such temperatures is not the less actual because it is measured negatively.

And so in the case of increment duty, the duty in relation to which the valuation called in question in the controversy before us becomes of practical importance, there is no difficulty. The growth in value which is marked out for taxation is not rendered the less real because of the method prescribed for its measurement. What the Act appears to contemplate is that the actual growth is to be taxed, and it lays down how the amount of this growth is to be expressed. If, as has been argued, it is wrong to enter a minus amount in the balance-sheet which the valuer has to make out, the consequence must be that notwithstanding that there has been an actual increase, measured by the difference between a minus figure and nothing, the starting point of this increase must be struck out, and the original site value entered in all cases as nothing.

Such a result would lead to great injustice. Suppose two houses side by side in a street where the site values were exactly the same originally, and had increased equally, and that in the case of one of them a lump sum price had been paid so that there was a small feu-duty or none at all, while in that of the other the feu-duty was substantial. The assessable site value might appear as a minus quantity in the latter case and as a positive quantity in the other. This would make no difference in the estimation of increment duty as chargeable on a rise in site value which was actually equal in both cases. But if in the latter case the original site value were entered as nothing, the result would be that the increase in the site value of the second house would be made to appear as less than in the case of the first, simply because there was a substantial feu-duty. And yet there was really no difference between the two cases excepting in the mere form in which the price was paid for the site and the building upon it. The seller gets his lump sum price, or an equivalent feu-duty in the second case, secured over both site and building. In either alternative his title is to a fixed sum and to nothing more. The buyer, on the other hand, gets his site and building, and an exclusive title to any rise in the value of either.

It appears to me that the Act of Parliament is definite in its directions, and that its scheme is not ambiguous. It was pointed out by Mr Clyde in the able argument which he addressed to us on its construction that subsection 5 of section 3 does not, if read literally, harmonise with the interpretation I have put on the rest of Part I. For it directs that on the first occasion of the collection of increment value duty the increment value is to be deemed to be reduced by an amount equal to 10 per cent of the original site value, which must therefore have been contemplated by the draftsman as being a positive quantity. That is true if the words are read literally and without reference to the context. But an isolated expression of this kind cannot alter the plain scheme and principle of the whole of the valuation sections. And I think the subsection in question becomes harmonious and intelligible if original site value is read in this particular case as meaning, not the arti-

ficially expressed figure to which the last paragraph of the general definition May 2, 1913. in section 25, subsection 4, refers, but original site value in the sense of what remains after deducting from the amount of the site value at the time of collection the amount which represents the increase since the original valuation of what at that time, however described in the valuer's balance-sheet, must have been contemplated by those who framed the statute as, taken by itself, an actual and therefore positive element in the value of the entire property. A similar observation may be made about section 17, subsection 1, which prescribes that undeveloped land duty is not to be charged in respect of any land where the site value of the land does not exceed £50 per acre. From the nature of the case and the very definition of undeveloped land, questions which may arise in the case of increment duty are excluded, and it was not necessary to provide for them.

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As soon as it is realised that the deductions, which have to be made in order to state the account which the statute prescribes, have to be made equally when ascertaining present site value and when ascertaining original site value for the purposes of increment duty, the obscurity disappears. That these deductions have to be made in both cases is plain from the concluding words of section 2, subsection 2, which gives directions to that effect. Those who framed the Act have adopted a method of working out the account which appears artificial, but which when examined carefully turns out to be necessary if the injustice is to be avoided which a different procedure would bring about in such instances as that of the two adjacent houses to which I have referred. The true view appears to me to be that the intention is to levy the tax only on an actual increase of value, and that it is merely in order to measure this increase that an arithmetical method is used in which minus numbers may appear among other figures.

Having arrived at these conclusions as to the meaning of the valuation provisions of Part I., I now come to their bearing on the appeal before this House.

The appeal is brought against two interlocutors of the Judges of the Court of Session named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts. By the first of these interlocutors the learned Judges overruled the decision of a referee appointed under the Finance Act of 1910, by which decision the referee had entered the original assessable site value of certain property vested in the respondents as trustees of George Herbert, deceased, and being Nos. 57 to 69 Westend Park Street, in the city of Glasgow, as minus £545. The second of the interlocutors under appeal was consequential, and was a decree against the appellants for costs.

The referee decided that the original assessable site value was the minus sum I have mentioned, but he went on to say, in the case which he stated, that, if it should be held by a Court of law that such a minus value was illegal under the Finance Act, 1910, he alternatively determined that the original assessable site value was nothing, and that in the event of his first alternative finding being upheld there were to be no expenses, while if the second alternative was upheld the respondents were entitled to expenses.

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The only controverted question related to the site value, and as to this the referee found as follows :—

Gross (original) value	£4828
Deductions from gross value :—Difference between gross value and value of the fee-simple of the land divested of buildings, trees, &c.	4320
Feu-duty, ground-annual, or tack-duty	1053
Original full site value	508
Original total value	3775

He went on in the case to state that it seemed to him that his duty under the Act was clear. By section 25, subsection 4, the assessable site value meant, he thought, the total value after deducting the same amount as was to be deducted for the purpose of arriving at full site value from gross value. Applying these figures, the result he reached was this :—

Original total value	£3775
Deduct amount to be deducted for the purpose of arriving at full site value from gross value	4320
Original assessable site value	minus 545

The Judges of the Court of Session who heard the case held that, reading the Act as a whole, an assessable value could not be a minus quantity, and on this ground they overruled the decision of the referee and gave judgment to the effect that the value in question must be entered as nothing. They seem to have been impressed with the idea that upon the principle adopted by the referee the owner of the site held it under burdens which prevented him from getting any benefit from it until it had appreciated to a positive quantity, and that until then the appreciation accrued for the benefit of the holder of the feu-duty or other fixed charge. The answer to this is that what will be taxed when increment duty is levied will be not the original site value, but the increase in site value, an increase which must always accrue for the benefit of the fiar, and can never increase the amount of the feu-duty or other fixed charge. The fallacy in the judgments of the learned Judges appears to me to be that they took original site value, which is nothing but a formula for measuring a real element of increase in value, as intended to be by itself a definition of an assessable value. With all deference to the learned Judges, I think they have misconceived the machinery of the statute, and that the referee, whose decision they disturbed, was right in the conclusion he came to.

For these reasons I move that the two interlocutors of the Court of Session be recalled, and that it be declared that the first or principal decision of the referee was right.

LORD ATKINSON.—This is in substance an appeal against an interlocutor dated 18th April 1912, of the Lords of the Court of Session named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts, on a case stated by way of appeal from a referee under section 33 of the Finance (1909-10) Act, 1910. It appears from the case that the referee had fixed the original assessable site value, as he styles it, of the proprietary estate and interest of the testamentary trustees of one George Herbert,

deceased, in premises described as 57 to 69 Westend Park Street, Glasgow, May 2, 1913. at a minus quantity or sum, namely, minus £545, or in the alternative, if it should be held by a competent Court of law that the original assessable site value cannot under the Act be legally fixed at a minus sum, he fixed it at nil. By the interlocutor appealed from, it is, as I understand it, decided that it is illegal to fix this original assessable site value at a minus sum, and that the alternative decision to fix it at cypher would under the circumstances of the case have been right. The referee has set out in detail in figures the values in money necessary to be ascertained, and the deductions and calculations necessary to be made under the statute to arrive at the original site value of the land. These values are, or must for the purposes of this appeal be taken to be, accurate, and the deductions and calculations must be taken to have been properly made, so that the sole question for discussion is this: Is it lawful under the provisions of this Finance Act to fix the original assessable site value of land to which Part I. of the Act applies at a minus sum?

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Part I. comprises forty-two sections. Of these sections 1 to 12 inclusive deal with increment value duty; sections 13 to 15, both inclusive, with reversion duty; sections 16 to 19, both inclusive, with undeveloped land duty; and sections 20 to 24, both inclusive, with mineral rights duty. By sections 25 to 34, both inclusive, machinery is set up for the purpose of ascertaining and determining the amounts of these several descriptions of duties. Section 41 is a definition clause, and section 42 contains provisions adapting the statute to Scotland.

The definitions are matters of importance. In the former of these two sections the word "land" is defined negatively, *i.e.*, as not including any incorporeal hereditament issuing or granted out of the land. In section 42 it is defined, as to Scotland, as not including amongst other things "any servitude, superiority, casualty, feu-duty, or ground-annual, or any incorporeal heritable right." The expression "rent-charge" is defined in that section as including "feu-duty and ground-annual." The expression "interest" in relation to land is defined as not including, amongst other things, any *teninds*, servitudes, or superiorities. The expression "owner" is defined as the *fiar* of the land except where the land is let on lease for a term of which more than fifty years are unexpired, when the lessee is to be deemed the owner. It also includes an institute or heir of entail in possession. The expression "freeholder" is defined to include "*fiar*," "liferenter of land settled within the meaning of the Finance Act of 1894," and "institute or heir of entail in possession." The expression "fixed charge" is in section 41 defined to mean, among other things, a rent-charge, and as a rent-charge includes a feu-duty, the latter is, therefore, a fixed charge. It is a fixed charge upon the land and everything upon it, invariable in amount, though, of course, if capitalised, as it must be under section 32, its capital value may vary according as it is well or ill secured, but the superior to whom the feu-duty is payable is not an owner of land within the meaning of the Act. He has not by virtue of his superiority even an "interest" in the land within the meaning of the Act. He pays no taxes on any increment in value such as this case has in contemplation, and has no concern with the calculations by which the amount of that increment is determined.

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Now the general policy of Part I. of the statute (certainly as to all the subjects of property other than minerals), so far as revealed by its provisions, is in its main outline apparently this, to levy a heavy tax on the kind of increment in the value of land used, or suitable to be used, as a site or sites for buildings, which is not attributable to the expenditure of capital by or on behalf of the owner for the purpose of improving the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture. The increment in value arising from an increased demand for building land due to an increase in the wealth or numbers of the surrounding or adjacent population, to its progress in trade or manufacture, or to works carried out at the expense of the municipality within the limits of which the lands are situate, and such like things, the unearned increment as it is popularly called, it is alone designed to tax. Purely agricultural land and some other classes of land are expressly exempted from liability. Special provisions are introduced dealing with undeveloped land duty and reversion duty, and certain conditions and qualifications are prescribed as to the application of this principle in particular instances, but the above are, I think, the chief features of the policy. With the merits or demerits of this policy this House in its judicial capacity is, of course, in no way concerned. Its task is to ascertain from the provisions of the statute itself what the policy is, and, when ascertained, to apply that policy so far as those provisions will permit.

It was easy to select the *punctum temporis* from which the increment in value to be taxed should be taken to have commenced to accrue. This is done by section 26. It is 30th April 1909. The difficulty was to fix the particular value which was to be taken to have increased, and by the comparison of which with some other value the amount of the increment could be measured. Whether these two values be fictitious, or actual, positive, and real, is wholly immaterial, provided only that a comparison between them can be made, and that that comparison, if made, will furnish a true measure of the amount of the increment.

By two of the machinery sections, namely, sections 26 and 27, the Commissioners named in the Act are required, as soon as may be after its passing, to cause a valuation to be made of all the land in the United Kingdom, showing its estimated total value and site value respectively as on 30th April 1909.

They are also required to serve upon the owner of every piece of land with which they deal a copy of their valuation of that land. It is called a provisional valuation because the owner may object to it; machinery is set up for determining the validity of his objection, and, if need be, amending the valuation according to the result. If no objection be made, or if made be overruled, or if allowed and the valuation be amended accordingly, the values mentioned in this valuation as it was originally framed or as amended, as the case may be, are to be the original total value and the original site value of the land for the purpose of the Act.

Some rather fanciful estimates have to be made and elaborate calculations resorted to in order to fix, in conformity with the policy and provisions of the Act, this original site value, this datum line, as it were, from which the increment in value is to be measured.

Section 1 is the taxing section. It imposes a duty on the increment May 2, 1913.
 value of land at the rate of 20 per cent, and treats that value as accruing after 30th April 1909. It also specifies the occasions upon which the duty is to be collected. Section 2 shows what is the nature of the increment to be taxed, indicates how it is to be measured, its amount ascertained, and the occasions on which the duty is to be collected. By subsection 1 of this latter section it is provided that the increment value on any one of these occasions shall be deemed to be the amount, if any, by which the site value on that occasion exceeds the original site value. As far as this function of the site value is concerned it does not matter, it would appear to me, in the slightest whether the fixed starting point is indicated by a plus sum or symbol or by a minus sum or symbol, because the difference between minus £500 and minus £100 is £400, just as truly as the difference between plus £100 and plus £500 is £400. For instance, if the original site value be taken as minus £500, that is, £500 less than nothing, and the site value at the time when the duty falls to be deducted be taken at minus £100, that is, £100 less than nothing, there would still be as truly an increment of £400 in the value of the land as if the original site value had been fixed at plus £100 and the site value at the time the duty fell to be collected had been found to be plus £500. The increment in both cases would be precisely the same, and should be taxed in the one case as in the other.

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Again, if the decision appealed from were right, and if, although the methods for ascertaining the original site value prescribed by the statute should bring out a minus sum, £500, its value should be fixed at cypher, the result would be that though the value of the property as building ground increased by £1000, the site value at the date of collection of the duty would only appear as plus £500. The true increment would not be taken as its undoubted amount, £1000, but only at half that amount, £500, since it would only exceed cypher by that sum. Subsection 1 of section 2 prescribes the mode and method by which the site value is to be ascertained upon the occasion when the duty falls to be collected. The words occurring at the end of subhead (d) of that subsection take one forward to the 25th section, as they provide that from the values mentioned in sub-heads (a), (b), (c), and (d) deductions are to be made like those to be made under the general provisions of the Act as to valuation for the purpose of arriving at the site value of land from the total value. These general provisions are contained in this 25th section. They must necessarily be applied by the Commissioners for the first time when these officials proceed under sections 26 and 27 to fix the original site value, and they must be again applied when the occasional site value has to be ascertained, namely, when the duty falls to be collected. The deductions thus authorised, indeed made imperative, are so many and so considerable that they must often produce, as they have produced in this case, a minus result; but as they are to be made at both ends of the scale, as it were, the upper and the lower, in ascertaining the two site values, the original and the occasional, the comparison between the amounts of the two values, even if over-reduced, will still furnish a true test and measure of the actual increment.

Now section 25 provides in effect (1) that the gross value of land means its market value if sold as it stands free from incumbrances; (2) that the

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full site value is what remains after the difference between this market price and the sum which the land would fetch in open market if sold divested of all buildings and other structures upon it, timber, fruit trees, &c., has been deducted from the gross value.

Then total value (subsection 3) means this gross value after certain deductions have been made from it. These deductions are of a peculiar nature. In the present case the only one of the things enumerated in subsection 3 which affects the land with which the case is conversant is the fixed charge, the feu-duty. The capitalised value of this duty has been found to be £1053.

The gross value of the premises has been estimated to be £4828, the deduction from which of this sum of £1053 leaves the sum of £3775 as the total value. Further deductions have, however, to be made under subsection 4 from this total value to obtain what is unhappily styled "the assessable site value of the land." That is a most misleading expression. It suggests the idea that site value itself is assessed with a duty, is taxed. Site value is neither assessed nor taxed. That is plain from section 1. What is taxed is the increment in the site value, starting from the original site value, and in my view it is clear that the "assessable site value" mentioned in section 25 is and must be the same thing as "the original site value" mentioned in section 2, subsection 1.

In the present case the only additional deduction to be made from the total value is that mentioned in subhead (a) of this subsection 4. It is formidable in amount. On referring to subsection 2 of this section it will be found to be the difference between the gross value and the market value of the fee of the land if sold, divested of all buildings, timber, &c. That has in this case been fixed at £4320, which, if deducted from the total value of £3775, leaves, of course, a minus balance of £545. This looks, no doubt, an absurd result, but if it be applied to an imaginary case, such as the figures in this case will enable one to deal with, as part of the machinery for measuring the amount of the increment to be taxed, it will, I think, be found to work out satisfactorily. Suppose, for instance, the owners in the present case had spent £1000 on improving the buildings on their land, and by reason of that expenditure, and that alone, had raised the market value of the premises, if sold free from incumbrances, by £1000, and had, in fact, sold the premises so improved for £5828, on the transfer of the property an occasion would arise for the collection of the increment value duty. The site value of the land should then be taken to be the purchase money, less the deductions authorised by section 25 (subsections 3 and 4 (a)). But these deductions would not then be confined to the capitalised value of the feu-duty, and the sum of £4320. If these alone were deducted it would show an increment in site value of £455, whereas, *ex hypothesi*, there has been no such increase. Another deduction would have to be made, that mentioned in subsection 4 (b) of section 25, namely, that part of the total value proved to be attributable to the expenditure by the owners of £1000 in rebuilding. This would presumably be £1000. When this sum is also deducted from the total value, it leaves the site value determined for the occasion at minus £545, the same as the original site value. This is quite as it should be, since, *ex hypothesi*, there is no increase in the site value.

The figures do not enable one to take a case where the gross value of the May 2, 1913. land as it stands is increased from causes other than capital expenditure, since the market value of the denuded land under such circumstances has not been found.

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Gross value, total value, full site value, are, no doubt, all real things, actual positive values. It does not necessarily follow, I think, that occasional site value must always be a real thing, an actual positive value. Circumstances might conceivably occur in the locality between the time the original site value was fixed and the time when the occasional value had to be fixed which would cause a great diminution in the value of the land, both in the state in which it stood and as a building site. The occasional site value would then be less than the original site value, and in such a case the former would properly and necessarily be indicated by a minus sum or quantity if the original site value was itself indicated by 0.

Ld. Atkinson.

With all respect to the learned Lords who have pronounced the interlocutors appealed from, it would appear to me that they have not steadily kept in view what is the true function of this original site value when ascertained, the particular purpose which it serves in Part I. of this statute. The main, if not the only, purpose which it serves is, as I have said, merely to fix the datum line from which the taxable increment in the value of the particular piece of land shall be measured on the occasion when the duty on that increment falls to be collected.

The fact that it is indicated by a minus sum or quantity cannot, I think, be held to prevent its serving this purpose, any more than it could be held that the increasing temperature of mercury from the freezing point upwards could not be measured by a Fahrenheit thermometer because the freezing point of mercury is, in that instrument, fixed at nine degrees below zero.

In my opinion the comparison between the original site value and the occasional site value where both are fixed in conformity with the statute will furnish, in this and every other case, a true measure of the amount of the increment value which is to be taxed, and I cannot find anything whatever in the statute to justify the fixing of the original site value at any figure different from that arrived at by following the methods expressly prescribed in the statute.

Mr Clyde in his most able and ingenious argument on behalf of the respondents relied much on the provision of section 3, subsection 5, to show that the original site value could not be a minus sum or quantity, inasmuch as that subsection directs that on the first occasion on which the so-called occasional site value is to be fixed 10 per cent of the original site value is to be deducted, and 10 per cent of a minus quantity could not be deducted, or if deducted, would result in an increase of the occasional site value. Well, though this last result would not follow from a deduction of 10 per cent of nothing if the original value was fixed at nil as it has been by the interlocutors appealed from, still the provisions of the subsection, I think, do indicate that the framers of the statute did not contemplate that the original site value should ever be reduced to a 0 or to a minus quantity; or it may be that the words "original site value" have been used in some sense different from that which they bear in section 2, subsection 1; or lastly, I suppose, that they have crept into the subsection by mistake. He suggested, as I

May 2, 1913. understood, that the words "full site value" should be substituted for "original site value."

Herbert's Trustees v. Inland Revenue. Speaking for myself, I may say that I do not, as at present advised, see my way to a satisfactory solution of the difficulty he has raised.

Ld. Atkinson. The House is not required, however, to construe section 3, subsection 5, on the present occasion. It is therefore unnecessary on this appeal to express any decided opinion as to its meaning. Upon the only question we have to decide, namely, whether it is legal to fix the original site value at a minus sum or quantity, I have formed a very definite opinion in the affirmative. I think it is lawful so to do, and if the provisions of the Act are to be carried out it is necessary to do so. And I am further of opinion, for the reasons already given, that this will in no way prevent the site value serving efficiently and justly the purpose it was designed by the Act to serve. I therefore think the decision appealed from was wrong and should be reversed, that the original site value should be fixed at minus £545, and this appeal be allowed.

LORD SHAW OF DUNFERMLINE.—This appeal to your Lordships' House is regarded as of importance, not only because it is said to affect a principle upon which the entries with regard to land values are to be made by the officers charged with that duty under the Finance Act, 1910, but also on account of the large number of values throughout the kingdom which the principle affects.

Importance in various passages of the judgments of the Court below is rightly attached to the objects of the statute. One of the chief of these is that to be achieved under section 26. By that section—(1) it is provided that "the Commissioners shall, as soon as may be after the passing of this Act, cause a valuation to be made of all land in the United Kingdom, showing separately the total value and the site value respectively of the land." I exclude the reference to agricultural land, with which this case is not concerned; but the section goes on to provide that each piece of land under separate occupation shall be separately valued. And the estimate of value is to be made as on 30th April 1909.

To all intents and purposes this is a statutory requirement for the formation of a Domesday Book, and the object cannot be accomplished unless all land in the United Kingdom is included in that book. The two items which must appear with regard to every piece of land under separate occupation are the total value and the site value thereof respectively.

With regard to each and all of these terms the statute explains, and, in my opinion, clearly and sufficiently explains, their meaning. I think it right to say so, and, looking to the complexity of the subject, and having in mind the pressing conditions under which modern legislation is accomplished, to say so emphatically. Its drafting in subsequent cases will, no doubt, have to be as minutely analysed as it has been in the present; but upon the only point which your Lordships have to determine I do not myself see how language could have made it clearer.

That point is, What is site value? Mr Binnie, a skilled valuer, having reached his results by conforming simply to the provisions of the Act, is able to make his calculations with brevity and entire clearness; and he

makes these two remarks. He says, "My duty under the Act is clear and unambiguous," and in a later portion of the stated case he says, "I do not see how, having regard to the directions in section 25, it is possible to arrive at any other conclusion." I think that Mr Binnie—addressing himself, as he manifestly did, to no other task than that of conforming to what the statute has laid down—was justified in both of these observations. The statute in no way confused him; his figures and calculation appear on half a sheet of paper. I think this result arose because the terms of the statute as well as of his duty were so plain.

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Having in view accordingly this main object of the statute, namely, the formation of a Domesday Book, or a valuation of all land in the United Kingdom, showing separately the total value and site value of each separately occupied portion of it, I ask myself what, according to the Act, is the meaning of these terms? In the first place as to the meaning given to "land." Land has been already defined by the Interpretation Act of 1889,¹ and by section 42 of this Finance Act it is further declared that land does not include superiority, casualty, feu-duty, or ground-annual; nor does "interest" in relation to land include superiorities.

There was a considerable discussion and exposition at your Lordships' bar of the system of landed rights in Scotland. With regard to these I will only observe that the policy of this statute, as well as its provisions, appears to me to be fairly clear. It is no doubt true that the right of a superior—the *dominium directum*—is in law an estate in land under the feudal system just as much as under that system is the right of the vassal, whose estate in land is denominated the *dominium utile*. But the situation of parties must also be viewed from the standpoint of business, of possession, and of finance. One would not unnaturally expect that this last, and not the other, is the standpoint of the Act.

The subject being so viewed (and casualties and occasional payments being for the sake of simplicity discarded), the superior is the recipient from the vassal of a feu-duty. The vassal is the person holding the land by a permanent and substantially indefeasible tenure; and howsoever property may improve in value, the increment in that value is secured by the vassal alone. The rights of the superior are financially nothing more nor less than the right to draw a fixed sum secured upon the land from the vassal. Within the range of finance and actual management that is how the matter stands. In the region of feudal conveyancing it is true that the right of the superior, being a right in the land itself, can in certain circumstances be amplified or made effective, so far as practical result goes, by the remedy called an irritancy *ob non solutum canonem*, that is to say, the entire subject can be made to revert to the superior if the vassal is two years in arrear with his feu-duty.

I have purposely made these observations in the most general form because I desire to state broadly that I do not think a Finance Act in the United Kingdom ought to be—unless that be logically compelled—diverted from its plain financial object and meaning by considerations which do not touch general finance but affect merely the feudal conveyancing of land in

¹ 52 and 53 Vict. cap. 63.

May 2, 1913. Scotland. As I have already mentioned, so far as finance is concerned, the true owner who will get the benefit of any rise in the value and who is in that sense the beneficial owner interested in the taxation upon land value, and also in the increment thereof, is the vassal, the owner of the *dominium utile*. And so far as the superior is concerned, he is placed by the statute exactly as what in the region of finance he is, namely, a person having a right to a fixed payment subject to no increment by change in economic or market conditions. Accordingly he and the bondholder or mortgagee are *quoad* finance upon the same footing. The superior drawing his feu-duty is treated like a mortgagee drawing his interest. He takes a fixed sum per annum. No doubt in one case, as in the other, were that fixed sum not paid certain drastic remedies and consequences might follow; and no doubt in the one case, as in the other, if the gross value of the subject goes up the feu-duty or the loan becomes better secured; but so far as the land is concerned the beneficial owner is the vassal, and the land dealt with by the Act is the vassal's land.

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This, which would seem the natural and reasonable view to take of a financial statute, is entirely confirmed by its various terms. Under what clause, for instance, does feu-duty come? By section 25, subsection 3, there is a reference to fixed charges. What are these? By section 41 the expression "fixed charge" means "any rent charge." That term is also defined by the statute. In the application of the Act to Scotland by section 42 "the expression 'rent charge' includes feu-duty." Feu-duty accordingly is treated like any other fixed charge. In particular, because all feu-duty is drawn by a superior, and because a superior has an estate in the land itself under the feudal system—all this is wiped away in a financial statute. The vassal is the owner, and one of the fixed charges he pays is his feu-duty.

It is only in view of a protracted argument in your Lordships' house that I have ventured to state these things which are rescued from confusion and made so plain by the text of the statute itself. Having thus ascertained what the term "land" is, and disentangled it for the purposes of the Act from the superior's rights, the next thing, under section 26, is that all land must appear in the valuation. Therefore all land under contract of feu must there appear, and the land which there appears is the vassal's right, and the vassal's alone, the superior's right having fallen into the category of what financially it truly is, a fixed charge upon the vassal's land.

The second term applicable to the making of the Domesday Book, under section 26, is that, while all land is to appear, the valuation is to show separately the total value and the site value. What, then, is total value? That is made clear by section 25, subsection 3:—"The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges." By subsection 1 the gross value is explained to mean the open market value of the whole subject with all the buildings, &c., upon it, and free from incumbrances. So that to get the total value you have simply to deduct from the gross or market value the amount of the fixed charges. So far as total value is concerned, that is a very simple calculation. If the gross market value was £5000, and the fixed charges (in this case the feu-duty when capitalised) were £1500, the balance would be "the total value,"

namely, £3500. This separate entry in the Domesday Book is the result May 2, 1913. of a simple calculation.

The next statutory entry in the valuation is the site value. How is that to be arrived at? In section 25, subsection 4, it is said site value (I dismiss the reference to the parenthesis, which does not apply to the present occasion) "shall be deemed to be a reference to the assessable site value," and in the same subsection "the assessable site value of land means the total value, after deducting (a) the same amount as is to be deducted for the purpose of arriving at full site value from gross value." Various other deductions are to be made from total value, but they do not occur in the present case and need not be referred to. Now, gross value was the unincumbered market value of the whole subject, including the buildings, &c. The full site value of land means (section 25, subsection 2) the market value of the whole subject if divested of the buildings, &c. It may be called divested site value. In the case given, if the gross value were £5000 and the buildings were worth £4000, the full site or divested site value would be £1000.

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I revert accordingly to, What is the assessable site value? It is to be the total value after deducting the buildings, &c. Now the total value was £3500. Accordingly, the assessable site value means that £3500, after deducting the buildings, and these were £4000. The result is demonstrably certain that there is produced a minus value of £500. As Mr Binnie says, if you proceed by the directions of section 25, it is not "possible to arrive at any other conclusion."

But I desire to state that, if the data prescribed by the statute for the calculation be employed, this minus value which is thus reached is exactly what would be reached, not in hundreds, but in thousands and tens of thousands of cases in Scotland. The system of feuing land is much prized, providing as it does perpetuity and security of tenure, and giving the beneficial increment to the vassal who erects the buildings or makes the improvements. But in the feu-charter it is, by the commonest words of style, a matter of express prescription that the vassal must make the superior also secure in the feu-duty by erecting and maintaining upon the lands buildings of sufficient value to afford a cover for that security. Land may be worth, in its agricultural condition, from £1 to £3 per acre, but, on account of its local situation and advantages, it may be feued for building purposes at from £10 to £30 or from £100 to £300 per acre. The buildings in such cases are often tenements erected upon the old Scotch system—with regard to which there is a convenient and familiar code of law; they are of several storeys in height; and they are owned, it may be, each storey, or even part of each storey, by a separate proprietor. Upon an acre of ground there thus grows up a group of proprietors, among whom the feu-duty is split up under arrangements which need not be here entered upon. Where buildings of the kind described have been erected, their value is large. But, upon the other hand, the heavy feu-duties, when capitalised and loaded upon the market value of the whole subject, very greatly reduce that, and so the "total value" (arrived at after this deduction) becomes relatively small in the very cases in which the value of the buildings becomes relatively high. In such cases the buildings and improvements far exceed in value the market value of a subject so heavily burdened with feu-duty. The case dealt with by Mr

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Binnie shows figures which must be much within the mark in common experience; but, to use the round numbers I previously employed, the gross value of the whole subject burdened with the feu-duty is the total value under the statute, and is the figure of £3500. The buildings and improvements are £4000, and the minus figure is demonstrably £500.

I repeat these things because of this—that, unless this figure be so arrived at and the statute with regard to these calculations be loyally and strictly followed, one of the main objects of the statute under section 26 will be largely defeated. As I have mentioned, in thousands of cases of urban land in Scotland, the value of the buildings by themselves exceeds the value of the subject if loaded with a large feu-duty, and it would be to sterilise the action of the officials under the statute in making a valuation of all land if these instances had to be excluded. The land of Scotland would not be wholly valued, and numberless separate occupancies would disappear. It appears to me not difficult to affirm that such a result could never have been intended by the Legislature.

With much respect to the learned Judges of the Court below, I attach no importance whatsoever to the plan of setting down those instances in all cases with a value of nil. “Nil” is not in accordance with the arithmetical deductions which are expressly prescribed by the statute. It is a defiance of the statute. It is arrived at only after the mind has conceived the notion that there must be a positive value to start with and that the Legislature must have intended that. Once that notion is arrived at, of course, where no positive value, but only a minus value, appears, the statute cannot work unless the device is adopted of putting the figure 0. But this figure 0 is a figure of despair, indicating that no positive value can be found. It might have to be set down if the statute anywhere prescribed, with regard to the valuation as a whole, or in its details, that the value should be positive. But, after anxious consideration, I do not find that the statute does anything of the sort.

It would, indeed, be rather extraordinary if it did, because it would be making unworkable the very figures and calculations which it expressly prescribes; and, secondly, it would be a writing out of the valuation for all purposes of true and effective comparison of values at one date with values at another the practical datum or standard line—the foundation from which all subsequent variations in the value of the property could be measured.

This last consideration is important, for another main object of the statute is the imposition of an increment value duty; and a construction which would upset or remove the very foundation upon which increment could be truly reckoned does not accord with reason. And, moreover, such a construction might, in those numberless cases to which I have referred, postpone the ascertainment of any increment whatsoever until decades or centuries had passed, and such an enormous rise had taken place in value as to make that value, even though loaded with a heavy feu-duty, exceed that of the buildings and improvements upon the land. Not until that time would what is called “positive value” be reached, and not until that time could any figure actually representing the truth appear upon the valuation or become the measure for future increment.

The statute does not look at the matter in that light, for not only has it

prescribed that the valuation shall be of all the land in Scotland, but it has stated that this valuation shall be as at 30th April 1909. May 2, 1913.

I incline, with reference to the view which has been presented, and which is alluded to in the judgments of the Valuation Court, that the operation of deduction of the two specified figures may result in a minus value mathematically, but that such a result is repugnant to reality—I incline to say that, in my humble opinion, the repugnancy is in the other direction. I will venture to give the illustration which I presented to the bar at the discussion. Assume that in ten years' time the gross market value has increased by £1000, the buildings and feu-duty remaining as before. The buildings are still £4000. The total value has come up to the figure of £4500. And so with regard to the assessable site value, the undoubted increase of £1000—an increase which in the circumstances is unquestionably due to the appreciation of the land—is plainly accounted for by the former minus value of £500 being now transmuted into a plus value of the same figure. To say that you would be entitled, notwithstanding the undoubted increment of £1000, to reduce that increment to £500, is simply to defend what was truly a fiction, of entering the original assessable value at nil instead of what it truly was, namely, minus £500. So far from mathematics having led the calculator away from actuality, it has entirely squared with the truth and history of the increment.

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One element derived from the statute was introduced to show that the calculations made according to the rule set up in section 25 were impossible. The reference was to section 3, subsection 5, which provides that, "for the purpose of the collection of duty on the increment value of any land under this section, the increment value shall be deemed to be reduced on the first occasion for the collection of increment value duty by an amount equal to ten per cent of the original site value of the land." The argument was that with a minus value assessable site value could never thus be credited with its 10 per cent of allowance. The argument is illegitimate, because by section 25 that very subsection (namely, subsection 5 of section 3), which is for the purpose of the collection of duty on the increment value, is excluded from the definition of site value. By section 25, subsection 4, it is provided that "any reference in this Act to site value (other than the reference to the site value of land on an occasion when increment duty is to be collected) shall be deemed to be a reference to the assessable site value of the land." The parenthetical reference is precisely to the occasion on which increment duty is to be collected, and that is the occasion set forth in section 3, subsection 5, which is specifically "for the purpose of the collection of duty." It is accordingly, I think, pretty clear that it is not legitimate to treat the reference to the allowance of 10 per cent deduction under section 3, subsection 5, as a reference to assessable site value at all. It is a reference to a site value different from the assessable site value and called for the purposes of that subsection the original site value.

The argument was developed, however, by this: that it was stated that an actual duty was to be imposed by the statute on undeveloped land. This is true, and the duty is laid down by section 16, but section 17 clears all difficulty as to positive and negative values, or plus and minus quantities, out of the way, because by its first subsection it prescribes, "Undeveloped

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land duty shall not be charged in respect of any land where the site value of the land does not exceed £50 per acre." That is to say, that when land duty is imposed as such, it is upon a site value which is positive, namely, upon land worth £50 per acre and over; but when the statute is treating the problem and fact of increment, it is in the position of laying down, to begin with, the mode of settling a datum line from which in future years and on future occasions the increment shall be reckoned. There is no necessity whatsoever to make that datum line positive, any more than there would be for declaring—to use the illustration familiar in the discussion—that the actual fact of a rise of temperature should be differently dealt with or declared not to have occurred because the points of rise were both below zero on a Fahrenheit thermometer. The illustrations might be multiplied. The datum line for a railway system, for harbour works, for a mine, may differ (in the last-mentioned case the datum may be taken from the pithead or from the bottom of the mine), and may differ greatly, but the rise upwards is quite real and quite calculable in any of the cases mentioned, and any exclusion because of the location of the datum line and certain contours being below it would not be natural, but highly artificial. Or, in the region of history: Some Roman historians date events *ab urbe condita*, others *ab anno Domini*. But although the latter were to be set up as the correct datum, it would be strange to deny the flight of time from the founding of Rome till the year of our Lord.

For these reasons I do not entertain doubt that Mr Binnie's valuation and its entry of a minus value of £545 were properly arrived at and were correct. I do not find the statute anywhere to prescribe, with regard to the making of this valuation, that the datum from which increment is reckoned is to be positive. If it were—the materials for the calculation being what they are—the result would be to render void to all intents and purposes large portions of the Domesday Book, or rather to describe the entries as nil, which is not a statement but a misstatement of the truth. The Act of Parliament, if accepted according to the rules which it itself sets down, may, so far as we have seen, and so far as applicable to the question argued before this House, be very easily worked, its rules being so clear, and the completeness of the valuation be unchecked.

I humbly agree to the course proposed.

LORD MOULTON.—The only point raised in this case relates to the proper mode of performing the duty imposed upon the Commissioners under the Finance (1909-10) Act, 1910, by section 26 of the Act, namely, the compilation of "the valuation to be made of all land in the United Kingdom showing separately the total value and the site value respectively of the land." It is clear from the provisions of the Act that by "site value" as here used "assessable site value" is to be understood. The point in issue is as to what is the site value, *i.e.*, the assessable site value, of the land to which the case relates. There is no controversy as to the facts. The value of the land and buildings, the value of the bare site, and the amount of the charges thereon are all agreed. The sole issue is as to what is the "site value" of the land to be deduced from those facts.

Neither "total value" nor "site value" is a term of art. They are appellations coined for the purpose of the Act, and they bear the meanings which are

statutorily given to them by section 25 of the Act and no other. It follows, May 2, 1913. therefore, that although the dispute between the parties is in form a dispute as to the duties of the Commissioners under section 26, it depends entirely upon the interpretation to be given to the definitions to be found in section 25, and our decision must therefore turn on our interpretation of that section.

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Section 25 is the first of a fasciculus of clauses headed "Valuation for purposes of duties on land values." It substantially consists of four definitions, namely, definitions of (1) gross value of land, (2) full site value of land, (3) total value of land, and (4) assessable site value of land.

There is no difficulty in apprehending the meaning of "gross value of land" as there defined. It is described as meaning—

"The amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances and from any burden, charge, or restriction (other than rates or taxes), might be expected to realise."

It corresponds, therefore, to the full value of the land unincumbered. It is needless to say that the buildings on the land and all that goes with the land are here included in the term "land."

The "full site value of land" is equally easy to comprehend. It is the full market value of the cleared site. But the language of the statute, though leading to this result, does so in a very peculiar way. It defines the full site value of land as the amount which remains after deducting from the gross value of land the difference, if any, between that value and what I may shortly term the value of the unincumbered cleared site. The result of such a deduction is to give the value of the unincumbered cleared site. I do not think that it is obvious for what reason the draftsman chose to express the definition in so peculiar a fashion. It may be that he wished to familiarise the mind with a figure representing the difference between the gross value of the land and the full site value, i.e., a figure representing the amount which that which has been put upon the land, such as buildings, &c., has added to the full site value.

The "total value of land" also offers no difficulties. It is the value of the land subject to the actual fixed charges upon it and to public rights of way, easements, &c. It may broadly be defined as the full value of the incumbered land, and represents most closely the then value of the actual property which the owner of the land possesses in it. Here again the draftsman has adopted a circuitous mode of effecting his purpose. He defines the "total value of land" as the gross value after deducting the amount by which the gross value would be diminished if the land was sold subject to its charges, easements, &c. This, of course, leads mathematically to the same result as if it were defined as the full market value of the land taken as subject to the charges, easements, &c.

It is with regard to the "assessable site value of land," the fourth and last of the terms defined in the section, that the present difficulty arises. It is defined as meaning the total value of the land after making certain deductions which are set out in the section. For present purposes it will suffice to consider the first and principal deduction alone. This deduction is to be—

"The same amount as is to be deducted for the purpose of arriving at full site value from gross value."

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The "total value of land" is the "gross value" after deducting the capital value of the actual charges upon it, and of the restrictions and easements, &c., which affect it. This may be shortly expressed by saying that it is the "gross value" less the burden of the incumbrances. The amount that "is to be deducted for the purpose of arriving at full site value from gross value" is of course the gross value less the full site value. Deducting the latter of these quantities from the former (an operation which by the definition gives us the "assessable site value") we arrive by a mathematical necessity at the same result as if we deducted the burden of the incumbrances from the full site value. It follows, therefore, that the "assessable site value of the land" is obtained by deducting the burden of the incumbrances from the value of the site. It is obvious to anyone acquainted with the customs which prevail in different parts of the country, as to creating burdens on land on which buildings already exist or are about to be erected, that it will often happen that the burden of the incumbrances will exceed the value of the site. Nothing is more common than to create charges upon land upon which there are buildings of a permanent character, or upon which the erection of such buildings is secured by covenant. In such cases the charges so created may well be greater than the site value of the land, and the result of the deduction prescribed in the section will be to obtain a minus quantity. This is so in the present case, and the Commissioners in making out the valuation have felt themselves bound to register as the assessable site value of the land in question the minus value thus arrived at. The respondents contend that it is impossible to conceive of a value that is less than nothing, and that, therefore, the Commissioners ought to have inserted "nil" as the assessable site value of the land in question.

So far as *a priori* considerations are concerned I cannot follow the contentions of the respondents on this point. The "assessable site value" is something which is defined by the section and does not pretend to correspond to anything known outside the statute. In order to see whether there is any absurdity in this being a negative quantity it is justifiable, and even necessary, to look to the way in which the "assessable site value" so arrived at is to be used for the purpose of assessment of taxes. When this is done it will be found that the principal assessment based upon it is that of the increment value duty, and that the amount of this duty does not depend upon the actual amount of the assessable site value, but upon its variations. For such a purpose there is no incongruity in the assessable site value being a negative quantity, because a negative quantity is capable of positive variations just as much as is a positive quantity. The thermometer may rise a certain number of degrees in the Arctic regions, though the temperature from which it starts is a minus one. A change from 60 degrees below zero to 20 degrees below zero is a positive rise of 40 degrees. Therefore the purpose for which the assessable site value is to be used, and for which it is necessary that a record of that value should be preserved, does not in any way indicate that it should be a positive rather than a negative quantity.

But when we look more closely into this purpose it will be seen that it is most essential that the actual result of the deduction should be recorded, whether that be positive or negative. For it is evident that the meaning and aim of the "increment value duty" is to tax any increase in the value

of the site which is not due to expenditure of money on the land itself, but May 2, 1913. to surrounding circumstances, such as, for example, the development of neighbouring lands for town purposes. This will be deducible from the assessable site value provided that the actual result of the deduction directed by the statute be recorded, but it will not be deducible therefrom if negative values are not to be recorded. Take, for instance, the figures of the present case. The total value of the land is £3775. The difference between the gross value of the land and the full site value of the land is £4320. This latter figure must be deducted from the former in order to obtain the assessable site value of the land, and the result is minus £545. Now assume that from extraneous causes the full site value is increased by an amount, say £500, the burdens, &c., remaining the same. The assessable site value will then be minus £45, and the increment value duty will be proportionate to this rise in the assessable site value, i.e., to £500. But if the contention of the respondents be correct, the assessable site value in both cases would be nil. There would therefore be no change in the assessable site value of the land, and no increment duty would be chargeable, although there has been a rise of £500 in the value of the site.

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The absurd inequalities which such an interpretation of the section would introduce is best shown by the illustration which was given by one of your Lordships in the course of the argument. Suppose that there are two precisely similar houses on adjoining plots of equal value in all respects—say two adjoining houses in a row of uniform houses—and suppose that the full site value in each case is £500. The owner of the one creates a charge upon it of the capital value of £1000. The owner of the other leaves it uncharged. Suppose that the development of the neighbourhood increases the site value in each case by a sum of £300. Each of the owners has had his wealth increased thereby to the same amount, i.e., £300. Yet according to the contention of the respondents the one would have to pay a proportion of this increment to the State and the other would pay nothing.

I am of opinion, therefore, that both the language of section 25 of the Act and the purpose of the valuation as shown by section 2 of the Act require that the true result of the deduction should be inserted in the valuation, whether that result be a plus or a minus quantity.

Against this conclusion two arguments have been put forward by counsel for the respondents based upon other parts of the Act. In the first place, it is pointed out that assessable site value is used for the calculation of undeveloped land duty as well as increment value duty, and that in the case of undeveloped land duty the duty depends on the actual assessable site value and not on its variations. This would no doubt be an argument of weight were it not that there is a special provision in section 17 that undeveloped land duty shall not be charged in respect of any land where the site value of the land does not exceed £50 per acre. Its incidence, therefore, is confined to cases in which the assessable site value is not only a positive quantity, but is actually greater than £50 per acre. No difficulty, therefore, arises in this case, nor does it throw any light upon the matter in issue.

The second argument appears at first sight to be a more formidable one. In subsection 5 of section 3 it is provided that for the purposes of the col-

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lection of duty on the increment value of any land the increment value shall be deemed to be reduced on the first occasion for the collection of increment value duty by an amount equal to 10 per cent of the original site value of the land, and on any subsequent occasion by an amount equal to 10 per cent of the site value on the last preceding occasion for the collection of increment value duty. Now it is pointed out that the Act provides that any reference in it to "site value" is to be deemed to be a reference to "assessable site value," and it is urged therefore that this provision is irreconcilable with the idea that "assessable site value" can be a negative quantity, because to reduce a sum by 10 per cent of a negative quantity would be to increase and not to diminish it.

The true answer to this argument is, in my opinion, to be found in the very provision as to the meaning of a reference to "site value" in the Act which is relied on for the purposes of this argument. It is contained in section 25, subsection 4, and reads as follows :—

"Any reference in this Act to site value (other than the reference to the site value of land on an occasion on which increment duty is to be collected) shall be deemed to be a reference to the assessable site value of the land as ascertained in accordance with this section."

In my opinion the words in brackets refer to section 3, subsection 5, and were inserted with the special object of obviating the difficulty which it is suggested is caused by its language. It follows from those words that in section 3, subsection 5, the phrase "site value" must not be understood as meaning "assessable site value," but as meaning actual or, as it is called in the Act, "full site value." This is always a positive quantity, and the difficulty therefore vanishes.

I am of opinion, therefore, that the Commissioners were right in inserting a minus quantity in the valuation as the assessable site value of the land, and that this appeal should therefore be allowed.

Counsel for the respondents asked that in the particular circumstances of this case, which was a test case raising an entirely novel point, costs should not be given against the respondents.

Counsel for the appellants stated that he left the matter in their Lordships' hands.

LORD CHANCELLOR.—Under the very peculiar circumstances of this case their Lordships propose to make no order as to costs—that is to say, the parties will bear their costs here and in the Court of Session and before the referee. That is only done because the question is an entirely novel one, and because in order to give it the fullest consideration the hearing has been somewhat extended.

INTERLOCUTORS appealed from reversed, and decision of the referee in its first alternative restored. No costs in this House or in the Court below or before the referee.

CAMERON, KEMM, & Co.—CONNELL & CAMPBELL, S.S.C.—HUGH BERTRAM COX, Solicitor of Inland Revenue for England—SIR PHILIP J. HAMILTON GRIERSON, Solicitor of Inland Revenue for Scotland.

MARY ANN LEAROYD OR DICK, (Pursuer) Appellant.—*Constable, K.C.* No. 8.
—*MacRobert—Macgregor.*

JOHN MOTHERWELL ALSTON, (Defender) Respondent.—
Macmillan, K.C.—D. P. Fleming.

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Dick v.
Alston.

Agent and Client—Law-agent transacting with client—Transactions between law-agent and wife of client.

A law-agent acted for a client (who was a partner in a commercial firm) and also, as an individual, made advances to his client's firm. He was, besides, the agent for a branch bank where the firm's bank account was kept, and in that capacity made advances to the firm on overdraft. He also acted from time to time as law-agent for his client's wife with regard to certain investments and other matters. The client's wife, having become entitled to a legacy of £12,000, assisted her husband's business (1) by making direct advances to the firm, (2) by becoming surety for overdrafts from the bank, and (3) by transferring to the law-agent securities for advances made by him to the firm. During these transactions the wife had no separate legal advice.

The husband's firm having become insolvent, and the wife having thereby lost the whole of her fortune, she brought an action against the law-agent for recovery of damages for loss sustained by her through his alleged negligence and breach of duty as her law-agent, and for repayment of gain alleged to have been improperly made by him out of his transactions with her.

Circumstances in which the House of Lords (affirming judgment of First Division) assailed the defender, having regard in particular to the fact that he had not advised in favour of the transactions and that the pursuer had really acted on her own responsibility.

Bank of Montreal v. Stuart, [1911] A. C. 120, distinguished.

(Is the Court of Session, 18th June 1911—1911 S. C. 1248.)

The pursuer appealed to the House of Lords.

The case was heard on 16th, 17th, and 18th June 1913.

At the conclusion of the appellant's argument,—

Ld. Chancellor
(Haldane).
Lord Shaw of
Dunfermline.
Lord de
Villiers.
Lord Moulton.

LORD CHANCELLOR.—This case has been argued with great thoroughness by the learned counsel who led for the appellant, and he has said everything that could be said on behalf of his client; but we do not think it necessary to call upon counsel for the respondent.

The appeal arises in proceedings which were brought by the appellant as pursuer against a Mr Alston, and the nature of the action was shortly this: Mrs Dick, the appellant, claimed against Mr Alston, the defender, that Mr Alston, acting as her law-agent, had improperly advised her with regard to certain transactions whereby she had suffered damage by his breach of duty; and that, further, or alternatively, he, while occupying the position of law-agent, had made a profit which he was not entitled to retain.

Before adverting to the history of the case I wish to speak of the principles which govern these matters, and which have to be applied to transactions of this kind, for I should be sorry if anything that fell from me, or from any of your Lordships, should seem to throw the least doubt upon principles which are well settled. To begin with, a claim which may be made by a client against her solicitor in a case of this kind may fall under three heads. It may be a claim for negligence—that is to say, for damage arising from a breach of duty to give proper advice or to exercise proper

June 18, 1913. **skill.** If, in such a case, the solicitor has acted at the same time for two clients, the law readily presumes, if those clients had inconsistent interests, that he has been swayed in his advice unduly, and has not given to the client who is charging him with negligence assistance up to the standard which the client is entitled to have. I say the law presumes that readily, and it presumes it certainly not less readily when the solicitor is also acting in his own interest at the same time. Generally speaking, the proper course for the solicitor is to recommend, and, if necessary, to insist, that a separate law adviser should be called in. But while that is the broad principle, it is a principle which only applies when you have got the facts to which it is naturally applicable. It assumes that the solicitor is acting as the legal adviser of his client, and that the client is entitled to look to him as so acting. It is not a technical principle to be applied rigidly without any regard to the circumstances; it is a principle to be applied whenever the circumstances really admit its application.

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Then I come to the second of the alternative heads under which a claim of this kind may be made, the head, namely, of a benefit taken by the solicitor from the client, which the law does not allow him to retain unless he shows that the client had shaken herself free from the relationship before conferring it upon him, either by obtaining independent advice or otherwise. That is a principle which the law applies with the greatest strictness. A solicitor is not allowed to take a gift from his client arising out of a transaction upon which he has been her confidential adviser unless under the conditions which I have just stated. The case of *Rhodes v. Bate*,¹ which was cited in the argument for the appellant, is an illustration of that class of case. *Rhodes v. Bate*¹ was in no sense an action of negligence. As I pointed out, an action of negligence would not have lain in the Court of Chancery at that time. *Rhodes v. Bate*¹ was simply a case in which the defendant was charged by the bill on the footing that a benefit had been obtained by him while in a confidential relationship, and for that benefit he was made to account, upon principles about which there can be, I think, no dispute.

Then the third head is well illustrated by the other case which was much relied upon in the argument, the case of the *Bank of Montreal v. Stuart*.² If a solicitor, acting as such, negotiates with his client, and the negotiation results in a bargain for himself, then the client may have a very easy task if he seeks to set aside the transaction, because the burden lies upon the solicitor to justify what he has done. But there again not only must the relationship extend to the transaction, but more than that, the condition of obtaining redress under that third head of rescission or reduction is the possibility of making *restitutio in integrum*. In the present case no question arises under that head; there is no question of reduction, because, for obvious reasons, the pursuer was not in a position to make *restitutio in integrum*. We have therefore to consider this case as falling under one or other of the first two heads, namely, that of negligence or that of benefit unduly taken.

Now I pass to the circumstances of the case. Mr and Mrs Dick were

¹ (1865) L. R., 1 Ch. 252.

² [1911] A. C. 120.

married in 1885, and after they had been married some twelve years Mrs June 18, 1913.
 Dick succeeded to a fortune of from £10,000 to £12,000. Mr Dick was ^{Dick v.}
 an ironmaster in Coatbridge, where he and his father, and, I think, after-Alston.
 wards another brother, but I am not sure, had a business, which was not
 large as those businesses go, but was a small business. It was, however, ^{Lord}
 one which seemed to have been doing fairly well. In 1897 there was talk
 of his father retiring from the firm, and Mr Dick was very anxious to get
 the concern into his own hands, possibly with his brother, but at any rate
 to be the leading partner in the firm, and it occurred to him and Mrs Dick
 that her money might well be used for the purpose of putting fresh capital
 into the business and so giving her husband the preponderating interest. ^{Chancellor.}

Now I am satisfied that that was the root and origin of the transactions to which I am going to refer. There is a pregnant sentence in the judgment of the Lord President to the effect that the loss which has been occasioned in this case has not arisen from any bad bargain advised by the defender, but from the circumstance that the money was lost in the business of the appellant's husband. Right through this case Mrs Dick and her husband appear to have been acting with a common purpose firmly held by both of them. The case made in the condescendence and the case raised at the trial before the Lord Ordinary was to the effect that Mr Alston had given advice about, and induced, these very transactions in their earliest stages, but that case went to pieces on cross-examination when Mrs Dick was in the box. The result was that her testimony was rejected and that of Mr Alston accepted by the Lord Ordinary, who tried the case, and in the result we stand with the facts clearly proved. Mr Alston throughout figured in the case as a legal adviser, no doubt, who was called in to carry through conveyancing transactions and to give advice on such technical questions as arose, and to prepare deeds and instructions, but he was not the moving spirit or the adviser of Mrs Dick in the real transactions which are impeached in these proceedings.

Now what was the position of Mr Alston? Mr Alston was not only a law-agent, he was the agent of the Commercial Bank at Coatbridge, the bank with which Mr and Mrs Dick banked, and with which the firm banked. Everybody who is at all familiar with the customs which obtain in Scottish country towns knows that it is quite a common thing for a bank to have an agent who is also a local solicitor, and the customers of the bank very often transact legal business with the agent, and the agent's clients very often come and bank with the bank. Sometimes the writing chambers, as they are generally called, and the bank, are in one building, at any rate the offices are in close proximity, so that it is difficult at times to say whether you are dealing with the bank-agent or whether you are dealing with the lawyer. In this case at the beginning Mrs Dick's transactions with Mr Alston seem to have been with him as a bank-agent rather than as a solicitor, because she came to him at the suggestion of her husband to see what she had best do with this money to which she had succeeded, and Mr Alston advised her to realise it, and a number of deposit-receipts are given for it, and £10,500 is banked with the Commercial Bank at Coatbridge for which he was the agent, and with which she opened an account at his suggestion, in order that it might be seen how the money should be invested.

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The money having got in that way into the bank the next step is to see what was done with it. What was done with it is perfectly plain. There was a series of advances made to the business, to the firm of John Dick & Company, there was a series of promissory-notes which were given to her by the firm, with the result that at a certain stage by 1898 Mrs Dick had advanced as much as £5500 out of her fortune. One large sum was advanced at once in November 1897, soon after she succeeded to her property, and other sums were advanced in amounts varying from £500 and upwards, bringing the whole up to the sum of £5500, which I have mentioned. Then there were other sums of money that were invested in various securities; there was an investment in the stock of the Coatbridge Corporation; another in preference shares in Stewart & Lloyds; and there was a loan to a Mr Ross, a pawnbroker, as to which I will make no further reference than to say that nobody says that any loss occurred in connection with that investment as an investment, and in the case of one of the investments at least, that of Mr Ross, Mr Alston had nothing to do with suggesting the security.

Now, what is the next step? These advances to the firm having been made by Mrs Dick of her own motion, the only inducing agent being her own husband, there are then a series of transactions with reference to the firm which are really the transactions impeached in this case. The sequence of events may be divided into seven chapters, which I need do little more than mention, because I do not propose to go into the facts in detail. The first chapter in the story begins in 1897, when the position was that the firm owed Mr Alston £3250, and Mrs Dick came forward and paid off £3000, taking as her security a transfer of the security which Mr Alston had in the form of a bond and disposition over the works. There is no dispute that that was a good security at that time.

The next transaction was in April 1900. That is a transaction which has been much impeached. Mr Alston had been paid off the £3000, but there was still due to him, as I mentioned, another £250, and it was that balance which became the subject of part of the transaction in 1900. In 1900 the Coatbridge stock was dealt with in this way. The firm came to Mr Alston and said,—“We shall be glad if you will lend us £750,” and he said,—“I will do so on getting security, but the security will have to include the £250 which I have already advanced, and for which I have parted with the security which I once had.” Mr Alston may very well have thought that the further borrowing meant that his £250 was not in such a safe position as it had previously been; anyhow, the result was that Mr Alston bargained for this, and nothing less, that he should have security for the £750, plus the £250 which was already owing to him.

Now Mr Alston was not the inducing person bringing it into the mind of Mrs Dick to enter into these transactions; all he did was that he insisted to the firm on getting this security, and as security he, through the appellant and her husband, got possession of Mrs Dick's Coatbridge stock of the value of £1000. The transaction not only assumed that form but that was its substance. The £250 could, in my opinion, have been recovered only on the footing of rescission, and as there is no question of making restitution in this case, rescission is impossible, and it cannot be treated, as

it was sought to be treated in the dissenting judgment of Lord Johnston, June 18, 1918. as a mere benefit accruing to Mr Alston while in the position of law-agent, ^{Dick v. Alston.} because it was part of a comprehensive contract which related, not only to the £250, but to the £750, and was not an unfair one. It must be remembered, too, that Mr Alston stood in the relation to the appellant and her husband of a banker, quite as much as of a solicitor. Then the next transaction I come to is one that begins in December 1900. At that time security was required for the bank overdraft and insisted upon by Mr Alston in the name of the bank, and further securities of Mrs Dick, her Stewart & Lloyds shares and her promissory-note from Mr Ross, appear from the evidence to have been given as the security. ^{Lord Chancellor.}

I think that is a transaction with regard to which it is very difficult to take exception now because no loss of any sort or kind has accrued in respect of it. The overdraft for which the security was given has long since been paid off and the securities dealt with in another fashion. I take it that it has been relied upon mainly as showing the footing upon which the parties dealt. It is sufficient for me to make this observation upon it: that as regards this money it stands upon the same footing as the other transactions, and I do not find that the transaction was in any way induced by Mr Alston; and the real gravamen of the complaint in regard to it is not anything done by Mr Alston as law-agent, but that the transaction was entered into at all. But this was due to Mr Dick himself and his wife, and not to this lady's legal adviser.

Then I come to June 1902. At that time there was an overdraft of £2315, and money was required further to meet a loss. The firm was not in difficulties but it required this money, and what happened was that on the 16th June 1902 a conveyance of the works, which your Lordships will remember had been acquired by Mrs Dick as security, was made to Mr Alston, the agent of the bank, as security for the overdraft, and two back-letters were given, the latter of which made it clear that the security covered not only these advances but any further advances of the bank. I think it is quite plain that the character of that transaction was quite understood by Mrs Dick. She knew what she was doing. It is said that it was the duty of Mr Alston to have advised her against it. It is quite true in this case that Mr Alston did in certain particulars act as the legal adviser of Mrs Dick, but there are other transactions in which, as I said, he did not act as her legal adviser at all, and these are the most important transactions in this case. It is true that in drawing deeds and so on he was the solicitor employed, and what is said is that because he was the person who drew the deeds, therefore he ought to have advised her not to go into this transaction at all.

Now that is perfectly sound as a general principle, and the only question is whether it is displaced by the circumstances. In my opinion Mr Alston has discharged the burden of proof of showing that Mrs Dick was well aware of what she was doing and judged for herself. It must be remembered that she was interested in the firm almost to the same extent as her husband. She had got a great deal of money in it, and her prospects in life depended upon his hopes of success being realised, and I am satisfied after considering the evidence that Mrs Dick fully understood what she

June 18, 1918. was about in these matters. That being so, I think the law-agent was justified in taking the view that he was asked, not for his opinion of the transaction, but simply what was the proper form in which to carry it out ; and of this, as of other things, which he and his firm did for Mrs Dick, I would observe that no criticism can be made upon what they did as conveyancers. In all the cases the transactions were carried out so far as I can see in a form which was appropriate to the circumstances ; the only point is one of substance—whether there should have been any transaction at all. That Mr Alston seems to have considered to have been outside his province altogether, and I think he was right in that conclusion for he made his view clear.

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Then in 1903 the Dick business was converted into a joint stock company, and as the result Mrs Dick was induced, not by Mr Alston, who seems to have had nothing whatever to do with that matter, but by her husband with whom she was co-operating, to accept shares for his debt. That may or may not have been a wise proceeding looking at the circumstances. It may have been the only way of carrying through the business. Certainly at this stage I can conceive nothing more likely to have been distasteful to the parties concerned than calling in an outside solicitor who could have had no option but to tell Mrs Dick, You had better on general grounds get back all the money you can and leave your husband's affairs to go to ruin. Mrs Dick might well have replied : I prefer to take my chances with it, and I am hopeful and sanguine that this business will turn out a success and that I shall be better off thereby. I think that was her mind, and that it is almost certain that if such advice had been given it would have been rejected. Anyhow Mr Alston does not seem to have been concerned in this matter. There even is evidence that he did try to dissuade Mrs Dick from entering into the transaction. Then finally there was a further loan of £1500 which was made on the security of Mrs Dick's property in 1905. It is sufficient to say about that that Mr Alston appears to have had nothing substantial to do with inducing it, and to have advised against it.

Under these circumstances the question is what are the legal rights of the parties. As I have intimated to your Lordships, I desire to say emphatically that the rules which have been laid down for regulating the relations of people in these relations are sound rules, and that nothing that I desire to decide in this case in the slightest degree derogates from them, but they are rules which you must apply having regard to the circumstances, and when the circumstances are such as to show that the burden of proof has been discharged by the person charged with breach of duty, by showing that the client was not really acting on advice given by him, but was transacting with him as a banker and was acting practically independently of him, that she knew her own mind and was doing what she considered to be best for herself and did not consult him as solicitor, then I think it would be pedantry to say that because there is an abstract rule the case must fall within it. It is not that there is an exception to the rule, but that the circumstances do not admit of the application of this rule.

I have come to the conclusion with the Lord President that that is the true view of this case. It is a totally different one from that of the *Bank*

of *Montreal v. Stuart*,¹ where Mr Bruce, the solicitor, took an active part June 18, 1913. in negotiating on behalf of the lady, and, apparently without instructions from her, for the surrender of her securities. Mr Bruce not only was acting on behalf of the bank but had an interest of his own, and he and the lady's husband took part in the transactions which led to the lady conveying away her property, the lady being an invalid with no power of forming a judgment of her own. In this case Mrs Dick appears to have taken an active part in the business transactions of her husband's firm, and she appears to have been a capable person exercising her own judgment, and consultation with Mr Alston was consultation with him as a banker mainly, and only to a very limited and technical extent consultation as solicitor. He acted, as far as I can see, honourably and straightforwardly, and did his duty under difficult circumstances.

I have therefore come to the conclusion that the judgments of the majority of the First Division were right, and that they took the proper course in arriving at the same conclusion as had the Lord Ordinary, and I move your Lordships that the appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE.—In regard to the principles of the case I acquiesce in what has just been laid down from the woolsack. I took part in the decision in the case of the *Bank of Montreal*,¹ and I have read with interest and satisfaction as well as with assent the review of that case and the analysis of its principles by Lord Mackenzie in the Court below.

It is a trite observation that it is often extremely difficult to extract abstract principles from cases widely divergent in fact. As to the case of the *Bank of Montreal*,¹ so clear and vivid is the distinction between that case and the present that I think it necessary to cite only one passage from the judgment of Lord Macnaghten in regard to the conduct of the solicitor that was therein challenged. His Lordship said,² "Without communicating with Mrs Stuart Mr Bruce (whose actings were challenged) of his own motion extended the guarantee to past advances from the Chatham branch." Then follows this sentence: "More than that, he took upon himself to act on behalf of Mrs Stuart in procuring the transfer of shares to her by way of consideration for undertaking a risk which neither he nor any of his solvent associates were willing to accept." And in another passage²: "Mr Stuart had no money to risk. The game Mr Stuart was playing was desperate. It was the throw of a gambler with money not his own. No man in his senses with any regard to the interest of Mrs Stuart or the interest of Mr Stuart could have advised Mrs Stuart to act as her husband told her to do."

It is only necessary to refer to that passage to show how vitally different from those of the present were the circumstances in which the judgment of the Privy Council was delivered in that case.

That brings me to remark upon the state of matters involved in the performance by one man, as your Lordship has observed, of a variety of functions. It is not infrequent in Scotland to have a threefold function performed, as here. There is a gentleman who, being a solicitor, is the legal adviser of the husband; that being so, then, in the second place, I hope nothing pro-

¹ [1911] A. C. 120.

² At p. 138.

June 18, 1913. nounced in this case will mitigate the view of Lord Davey that that gentleman is naturally regarded as being also the legal adviser of the wife. *Prima facie* that must be so. But in the third place it not infrequently happens in Scotland that the same gentleman is also in the position of a personal creditor of one or both of the spouses, either as representing himself or as representing a bank of which he is agent, and either or both of them are the customers. I do not hesitate to affirm that if that position obtains, if the transaction is on its merits an improvident one or such as would not have been entered into with independent advice, and if matters are still entire, such a transaction cannot stand. An action of rescission or, as in Scotland it would be known, reduction, would succeed.

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But in the present case matters are not entire, and the general situation otherwise is this. In the first place, between September 1897 and December 1898 Mrs Dick, the wife of a gentleman engaged in business in the west of Scotland, lent to him, upon promissory notes and for the purposes of that business, sums amounting to £5500. It is an admission at the bar throughout the case that the defender, Mr Alston, was not concerned in any way whatever with that investment.

Next, there are three transactions which are challenged, one of May 1900, the second of December 1900, and the third of June 1902. Now the case that was made in the Court below was that these transactions were entered into by reason of advice tendered by Mr Alston to the pursuer and by reason of that advice being bad. That case has completely failed. It produced a judgment of the Lord Ordinary which conclusively settled that it was without foundation, and it is now admitted at your Lordships' bar, as it was in the Inner House, that that case cannot be supported.

But although there might be other reasons for reducing or granting damages in respect of the three transactions to which I have last referred, I call attention to the fact that in February 1903 (and this is one of the objects of my addressing your Lordships' House) there occurred a transaction the strength of which has not even now, in my humble judgment, been sufficiently adverted to. This lady in that month took shares in the limited company into which her husband's business had then been formed. She could not have done so except upon the footing of allotments of shares in that concern having been made to her in respect of money or money's worth. By that transaction her debts were converted into shares and she thus was debarred entirely in my view from challenging those debts as having been debts in respect of which she had actions against other people, for she took the former debts as if they were converted into cash and as if with that cash she had become a shareholder of the concern. Accordingly, in my view, this transaction in February 1903 wipes out of view as a ground of any relevant action in law the antecedent transactions of 1900 and 1902.

I had at one period of the discussion some difficulty on this subject, but I have come clearly to be of opinion that Mr Alston, the defender, in no way advised this lady with regard to the merits of taking these shares. On the contrary, I hold it to be proved that all the advice coming from Mr Alston and his son to this lady was in an opposite direction; it was in the direction of warning her off an enterprise of this kind which had great financial peril attached to it. But my greatest doubt in the case, if I ever

had great doubt, was with reference to a transaction of February 1905. June 18, 1913. Now in regard to that the position of Mrs Dick by this time was that she ^{Dick v. Alston.} was not lending money to her husband, that she was not conferring any benefit on her husband except indirectly, but that she was lending money ^{Lord Shaw of Dunfermline.} to and conferring benefit upon a limited concern in whose prospects she was deeply interested and in which she was herself a large shareholder. Under those circumstances she consulted Mr Alston. It is said that on the principle of the case of the *Bank of Montreal*¹ Mr Alston should have advised her to take independent advice. I am not concerned to dispute that proposition, but in the present case I hold that the respondent did so. He—the matter not being a legal one, not being a question, for instance, as to the validity or correctness of deeds to be granted, but being merely one with regard to expediency and finance—referred this lady deliberately to the auditor of the concern. She and the auditor met and discussed the situation, and it is clear from a perusal of the auditor's evidence that this lady was rightly advised of the perils of the position, but that she was as determined as before to risk her fortune still further in the limited company. That may have arisen partly from natural affection, partly from a sanguine disposition, and partly from a desire to speculate to this extent that she might save what she had already invested. But whatever it did arise from, it arose from nothing in respect of which the defender advised her, or is responsible for advising her. It arose from her own view, under the influence possibly of her husband and with the guidance of the auditor of the company—a view taken with regard to the future of that concern in which she herself had staked a considerable fortune.

That is an end of the case. I do not hold that any of the principles of the previous decisions cover the present situation. In a question of this kind on which I observe that the learned Judge, Lord Johnston, who dissented, agrees that there is nothing morally reprehensible to be suggested against the defender, I should myself be very slow to differ from concurring judgments of the Court below.

LORD DE VILLIERS.—I entirely concur with the observations which fell from the noble and learned Lord on the woolsack, and I have nothing to add to them.

LORD MOULTON.—I concur.

ORDERED that the interlocutors appealed from be affirmed, and that the appeal be dismissed, with costs.

G. T. STRICKLAND—HUME M'GREGOR & Co., S.S.O.—JOHN KENNEDY, W.S.—
LAING & MOTHERWELL, W.S.

¹ [1911] A. C. 120.

No. 9.

MRS ELIZABETH POTTS OR YOUNG, (Pursuer) Appellant.—

J. R. Christie—J. B. Young—J. B. Melville.

July 1, 1913.

THE NIDDRIE AND BENHAR COAL COMPANY, LIMITED, (Defenders)

Respondents.—*Munro, K.C.—H. W. Beveridge.*Young v.
Niddrie and
Benhar Coal
Co., Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58) sec. 13—"Dependants"—Persons not in receipt of support but with legal right and prospect of enforcing—Children deserted by their father and maintained chiefly by their brothers—Competence of appeal on question of dependency.

A person may be dependent upon a workman at the time of his death within the meaning of the Workmen's Compensation Act, and so entitled to compensation, although he was in fact receiving no support from the workman, provided that he had a legal right to support, and that there was also a reasonable prospect of his being able to enforce, and of his enforcing, the right at some future period.

A workman deserted his wife and his four children in March 1907. Up to 1909, besides a few shillings given directly to the children, occasional small payments, amounting in all to £2, were made to the wife by her husband for the children's support. In September 1909 she obtained a decree against him for aliment of the two younger children who were in pupillarity, and recovered 17s. from his employers by arrestment used on the decree. The workman then disappeared, and was not traced until his death by accident in the course of his employment in April 1911. From the date of his desertion his wife and family were supported partly from small sums earned by the wife but mainly from the earnings of the two elder sons. After the workman's death the wages then due to him were paid to his wife.

Held (rev. judgment of the Second Division) that there was evidence to justify the finding of an arbitrator that the two children who were in pupillarity were wholly dependent on their father's earnings at the time of his death, and accordingly were entitled to compensation under the Workmen's Compensation Act.

New Monckton Collieries, Limited, v. Keeling, [1911] A. C. 648, distinguished.

Observed that the question of dependency is one of fact upon which the decision of the arbitrator is final, unless there is no evidence to support it, or unless he has misdirected himself upon a question of law.

Ld. Chancellor (In the Court of Session, 6th March 1912—1912 S. C. 644.)

(Haldane).
Lord Shaw of
Dunfermline.
Lord de
Villiers.
Lord Moulton.

The pursuer appealed to the House of Lords.

The case was heard on 17th June 1913.

Argued for the appellant;—The question of dependency was a question of fact. Upon that question of fact the arbitrator had decided that the two pupil children were wholly dependent upon their father; and there being evidence to support that decision, and the arbitrator having arrived at his decision under no erroneous view of the law, the Court of Session were not entitled to interfere with it on appeal. In deciding this question of fact the legal obligation of the father to support his children was one of the most important elements which had to be taken into account, and the Lord Justice-Clerk was wrong in thinking that there could be no dependency unless the dependant was actually receiving support at the period of death. The necessary elements were a legal right to receive support and a reasonable prospect of the right being enforced in the future. Here there was always a reasonable prospect of the obligation being enforced, because the mother had obtained a decree against the father which she

could execute as soon as she found him. With regard to the contributions of the elder brothers, they were made *ex gratia*, in the expectation that they would ultimately be recovered from the father, the brothers being under no obligation to maintain the younger children. The appellant relied on the statement of the law given by Fletcher Moulton, L.J., in *Lee v. Owner of Ship "Bessie."*¹ *New Monkton Collieries, Limited, v. Keeling*² was distinguishable, because in that case there was no evidence to support the finding of the arbitrator, the facts there showing clearly that the wife had to all intents abandoned her rights long before the workman's death.

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Argued for the respondents;—To make a person a dependant within the meaning of the Act he must be (1) a member of the workman's family, (2) dependent on the earnings of the workman, (3) so dependent at the time of the workman's death. While the last condition must not be construed too literally, it was essential that the person should have suffered some actual loss at the date of the workman's death, i.e., either the cessation of support which was actually being given, or the loss of the reasonably certain prospect of support in the near future. The loss of a theoretical right or problematical prospect was not enough. In the present case there was nothing more than that: the decree held by the wife was merely the judicial expression of the father's liability, and no reliance was apparently placed on it by her or by the children. Had the mother been questioned, she would certainly have replied that she was living on her sons and, had they been accidentally killed, she would have had a good claim against their employers under the Workmen's Compensation Act. The case was governed by *New Monkton Collieries, Limited, v. Keeling*,³ in which Lord Atkinson said that it was by the discharge of the obligation to maintain, not by its mere existence in law, that a husband maintained his wife. If compensation were awarded in the present case it would be an entirely new departure.

At delivering judgment on 1st July 1913,—

LORD CHANCELLOR.—In the judgment which I am about to read Lord de Villiers, who is unable to be present, asks me to express his concurrence.

In substance the facts as found by the Sheriff-substitute are that the two pupil children have been since 1907, when their father left the home, maintained by the mother out of the earnings of the two elder children, together with some small sums which the father gave to the younger children when he met them on the road. The mother's own earnings were so small that they were insufficient for her own maintenance. The contributions from the earnings of the two elder children were not gifts made *ex pietate*, but were sums advanced to meet the necessities of the situation, which they or their mother might have recovered from the father. In 1909 the father

¹ [1912] 1 K. B. 83, at p. 87. The following cases were also referred to:—*Hodgson v. West Stanley Colliery*, [1910] A. C. 229; *Briggs v. Mitchell*, 1911 S. C. 705; *Sneddon v. Addie & Sons' Collieries, Limited*, (1904) 6 F. 992; *William Baird & Co., Limited, v. Bristtan*, (1906) 8 F. 438; *Turners, Limited, v. Whitefield*, (1904) 6 F. 822; *Lindsay v. Stewart McGlashen & Son, Limited*, 1908 S. C. 762; *Dobbie v. Egypt and Levant Steamship Co., Limited*, 1913 S. C. 364.

² [1911] A. C. 648.

³ [1911] A. C. 648, at p. 650.

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had failed to pay the aliment he had promised, and the mother raised an action in the Sheriff Court and obtained a decree against him for £15, 12s. per annum for each of the two pupil children. The decree was enforced in September 1909, by arrestment of a small sum due to the father from his then employers. After that he disappeared in order to avoid further diligence, and notwithstanding that the mother and her two elder sons made inquiries as to his whereabouts, they did not find out his address until they received the intimation of the accident which caused his death on 22nd April 1911. He had evaded them for a year and seven months, and meantime they had maintained the pupil children in the fashion I have indicated.

Under these circumstances, were the two younger children wholly dependent on the father's earnings within the meaning of the Workmen's Compensation Act, 1906? Acting on the view that they were in reality wholly so dependent, the Sheriff-substitute assessed the compensation payable by the employers on account of the accident which caused the father's death at £216, 9s.

The First Schedule to the Act prescribes that the compensation shall, when death results from the injury, and the workman leaves any dependants wholly dependent on his earnings, be a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury or the sum of £150, whichever of these sums is the larger, but not exceeding in any case £300. The arbitrator has not, therefore, to calculate the amount of actual loss, but simply to ascertain whether there were left persons wholly dependent, and then to make the calculation which the statute directs. The only question is, therefore, whether the two younger children were wholly dependent. It is only if this question is answered in the negative that any question as to partial dependence can arise.

I am of opinion that the Sheriff-substitute could properly hold that these children were wholly dependent. They had the right to look to their father for maintenance, and it is plain that those in whose care they were did so look, and endeavoured as best they could to make the right effective. The children had no other means of support which could render their position one of partial dependence. It was only by assistance from their brothers, assistance which might have ceased at any moment, that they were saved from actual want. The father was under an obligation to maintain them which had already been enforced, and which might have been enforced again at any moment had he lived. Under these circumstances I think that the younger children could be held to be wholly dependent within the meaning of the Act of Parliament. The case is quite different from that of *New Monkton Collieries, Limited, v. Keeling*,¹ recently decided by this House. There there had been what was tantamount to an abandonment of the wife's right. She had left her husband more than twenty years before his death, and had virtually given up looking to him for support for herself and her children. Here the wife had kept her right alive, and was apparently only waiting for the opportunity to enforce it. The obligation of the father remained in existence. It was a valuable asset, and she and the children had nothing else that was reliable to look to.

¹ [1911] A. C. 648.

The Lord Justice-Clerk says in his judgment that the true question is not, July 1, 1913. Had the applicant a legal right to maintenance by the deceased? but, Was the applicant actually receiving support from one who was under an obligation to give support, and who was also the servant of the master whom it is proposed to make liable in compensation?

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I cannot agree with this view of the true question. I agree that a mere legal right may not, in certain circumstances, be sufficient. It was held insufficient in the case before this House which I have quoted. The long period of desertion by the wife had so qualified it that, as Lord Atkinson pointed out, there was no evidence on which the arbitrator could properly find the fact of dependency.

Lord
Chancellor.

Here I think there was evidence on which he could find that fact, and if this be so the finding of fact is conclusive. The true question in the present case is, in my opinion, whether there was, as one of the facts to be taken into account, an effective and valuable legal right. If there was such a right, and there was no legal difficulty in the way of enforcing it, then the mere fact that a want of opportunity to resort to it, which might have proved only temporary, had reduced the mother and children for the time to living on charity cannot affect the conclusion that by the father's death they lost something on which they could depend.

I wish to add that I have, since the argument, examined the reported authorities. There has been a good deal of divergence in judicial opinion as to what dependency means. There has been a disposition to draw highly refined distinctions, and the decisions arrived at and the reasons for them have not been always consistent. I think that this tendency and its consequences will be lessened if it is borne firmly in mind that the question is always primarily one of fact, on which the conclusion of the arbitrator ought only to be set aside if it is apparent that there was no evidence to support it, or if error in law appears on the face of it. I am of opinion that this is what the Act of Parliament has laid down as the principle to be followed, and that the intention therefore was to confine the power of review by the Courts within the narrow limits I have indicated.

On the facts as found here I think that it was properly found that there was dependency within the meaning in which the word is used in the Workmen's Compensation Act, and I therefore move that the judgment appealed from be reversed, and that the award of the Sheriff-substitute be restored.

LORD SHAW OF DUNFERMLINE.—The appellant is the widow of a miner named Robert Young, who met his death by accident sustained in a Midlothian coalpit in April 1911. She sues for her two children, who are respectively eleven and eight years of age. The whole question in the case has reference to the Sheriff's third finding, to the effect "that the said two pupil children were wholly dependent on the earnings of the said Robert Young at the date of his death."

I apologise for repeating—one gets tired of repeating—that the matter of dependency—whether it exists, whether it is partial, and whether it is total—all these things are matters of fact, and that findings on them are findings in fact. It is accordingly impossible to disturb this verdict except

July 1, 1918. upon one of two grounds, either that the learned Sheriff misdirected himself in some point of law, or that there was no evidence upon which his findings could legally rest. I am of opinion that neither ground of attack on the finding is good.

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The circumstances of the family were these: In March of 1907 Young deserted his wife and children, of whom there were four. The two elder children contributed to the family fund, the mother had occasional employment in charing and the like, and now and again the father gave his younger children two or three shillings when he met them on the road. After about two years Young went to Castlecary, and a decree was obtained against him for payment of £15, 12s. per annum for each of the two younger children. In September an arrestment was made of his wages, attaching 17s. He left the district to avoid further diligence, and in April 1911, being at the point of death, he sent for his eldest son. A balance of wages, amounting to £2, 18s., was due to him at his death, and the appellant received that sum.

Upon these facts the Sheriff made his finding. As he explains in the stated case, so far as the contributions by the two elder children were concerned, they were under no obligation to maintain the younger children, and were not doing so *ex pietate*, and the sum contributed by them would have been recoverable from their father under the decree. No doubt this is elliptically put, but it is substantially true.

The learned Judges of the Second Division have negatived the Sheriff's finding, and have found on the contrary that the pupil children were neither wholly nor partially dependent upon their father at the date of his death. Their Lordships appear to have been largely led to this conclusion by a construction of the case of *Keeling*.¹ That case, so far as the facts were concerned, was so widely different from the present as this, that for over twenty years the wife knew nothing of her husband, earned independently her own living, lived a completely separate life, and, as their Lordships in this House all thought, her independence either of her husband or anybody else was completely established in fact. And with regard to the law in *Keeling's case*,¹ it settled, and settled conclusively, that the mere fact of relationship will not raise such a presumption as by itself to establish dependency. But it certainly did not settle, nor purport to settle, that relationship (or legal liability arising in consequence of that relationship) was to be excluded from the view of the arbitrator as an element of fact in the case.

Lord Moulton, if I may say so, apprehended with complete correctness the true meaning of *Keeling's case*.¹ when he said, in *Lee v. Owner of Ship "Bessie,"*² "In my opinion the effect of this decision is that legal obligations to support must not be taken at their theoretic value, but at their practical value. For instance, the mere fact that a husband is bound to support his wife does not establish that she is totally or at all dependent upon him within the meaning of the Act if the circumstances are such that there is no reasonable probability that her rights would have been practically and effectually asserted. But if on the evidence there is any fair probability that the legal rights would at any future time have been actually and

¹ [1911] A. C. 648.

² [1912] 1 K. B. 83, at p. 88.

effectually asserted by the wife, then there is evidence of dependency, and July 1, 1913. the compensation must be regulated by an estimate of her practical loss subject to the provisions of the Act."

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I feel loth to add anything to these words of Lord Moulton. But, out of respect to the Court below, I may point out that the opinions in *Keeling's case*¹ placed in a very high position of authority the judgment of Lord Moncreiff in the case of *Sneddon*²; and it may be well to quote the passage which I had fully in view when delivering judgment. Lord Moncreiff said: "There may be cases in which a husband's legal obligation to support his wife may be held to be sopited or suspended. But when that legal obligation, not discharged by his wife, concurs with total destitution on the part of the wife and inability to support herself, the bare fact that at the date of his death the husband was not implementing his obligation is not sufficient to prevent us from holding that the wife was wholly dependent on him. Neither, in my opinion, is the question affected by the fact that during the husband's absence and neglect the wife was kept from starvation by the casual charity of strangers, or even of relatives who might have been bound to support her if her husband had not been alive." If that be the law, as I think it is, it does not appear to me possible to affirm that the learned Sheriff-substitute has in any respect in this case misdirected himself.

With regard to the facts of a case of desertion, or refusal or omission to support dependants, these facts may be within a wide range. On the one hand, there may be a temporary absence of a husband or a father, with the expectancy of immediate aid on the part of those left behind. That is the one extreme. On the other hand, there may be a long absence entirely acquiesced in, and those left behind may live a separate and completely independent life, having no reliance whatsoever either upon support actually obtained or possible through the agency of the law. Between those two extremes there are many gradations, leaving room for the arbitrator to pronounce upon dependency—whether it is total or partial, or whether it exists. In the present case there was a resort to the law and a legal affirmation, through the decree, of dependency. Furthermore, there was evidence of a determination to vindicate the children's right to support. It was, as it were, proved that the wife was determined with regard to her children to show her and their dependence upon him. There were circumstances of occasional support prior to the decree, and by reason of it. I cannot, all this being so, see my way to reverse the Sheriff's finding pronounced in circumstances within the range of the extremes I have mentioned, and essentially upon a fact which a Court of law is not permitted to disturb.

I therefore concur in thinking that the appeal should be sustained.

Lord Moulton.—I concur. In my opinion the point of law to be decided in this case is complementary to that which was the subject of the decision in this House in the case of *New Monkton Collieries, Limited, v. Keeling*.¹

¹ [1911] A. C. 648.

² 6 F. 992, at p. 996.

July 1, 1913. In the latter case the Court of Appeal had decided that within the meaning of the Workmen's Compensation Act, 1906, a wife is presumed in law to be dependent on the earnings of a husband because he is under a legal obligation to maintain her, and that therefore she is entitled as a dependant to compensation on the death of her husband by accident, even though he was not in fact supporting her at the time, and there was no reasonable probability that he would ever do so either voluntarily or under compulsion. That decision was reversed by this House, and it was established that the sums to be awarded under the Workmen's Compensation Act, 1906, are intended to be compensation for the pecuniary loss sustained by reason of the destruction of the deceased workman's power of earning. To put it in other words, this House decided that to establish a claim on the ground of dependency in the case of the death of a workman by accident it is necessary to show an actual *damnum* to the dependant flowing from the death, and that the termination of a mere legal liability of no present or prospective value is insufficient to constitute or establish the existence of such a *damnum*.

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In *Keeling's* case¹ it was the widow of the deceased workman who put forward the claim for compensation as a dependant. In the present case the claim is on behalf of two infant children, aged eleven and eight years respectively. This difference is, in my opinion, immaterial, as the facts of the present case show that the deceased workman was under a legal liability to contribute to the support of the claimants, and where this is the case the law, as laid down in *Keeling's* case,¹ applies, and the question before the arbitrator is whether the right so possessed is of any actual or practical value. It follows, therefore, that if the claim of these infants upon their father to contribute to their support was not merely a theoretical claim, but one which might reasonably be expected to become effective to a greater or less extent, all the requisites of a valid claim under the statute are present.

This question is purely a question of fact, and the tribunal which in this case finally decides all questions of fact is the Sheriff Court. An appeal from it can only be upon questions of law. But it has long been unchallenged law that the question whether there is no evidence in favour of a finding of fact is itself a question of law, although if there be any such evidence the finding cannot be attacked on the ground that, in the opinion of the tribunal of appeal, the original tribunal should have come to a different conclusion on such evidence. In the present case the Sheriff-substitute has found in favour of the claimants, and has assessed the compensation at £216, 9s. It is common ground that the question of *quantum* was entirely within the competence of the Sheriff-substitute, whose jurisdiction in this respect was limited only by the provisions of the statute as to the maximum sum to be awarded. In his assessment of the compensation to be paid in this case he has not exceeded this maximum, which, as pointed out in the decision of this House in *Hodgson v. West Stanley Colliery*² applies both to the case of total and to that of partial dependency. It follows, therefore, that unless this House is prepared to decide, as a matter

¹ [1911] A. C. 648.

² [1910] A. C. 229.

of law, that in the circumstances of the present case the claim of these July 1, 1913.
 infant children on their father for support possessed no actual or practical
 value, the decision of the Sheriff-substitute in their favour must stand.

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What, then, are the relevant circumstances in the present case? They
 are set out very clearly and tersely in the special case. The deceased
 workman deserted his wife in March 1907, and went to reside elsewhere in
 the neighbourhood. During the next two years small sums were given by
 him to the children and their mother which *pro tanto* were contributions
 to their aliment. He then obtained employment as a miner at Castlecary,
 and as he was contributing nothing for the children, the mother in June
 1909 consulted a solicitor in Falkirk, and through him made a demand on
 the workman for aliment of the two younger children. He promised to pay
 aliment but did not keep his promise. The mother then brought an action
 against him, and thereby obtained a decree entitling her to the custody of the
 infant children and granting decerniture against her husband for payment of
 the sum of £15, 12s. per annum for each of the children, with legal interest
 until payment. The date of the decree was 6th September 1909, the first
 instalment being made payable on that date. The mother lost no time in
 enforcing the decree, and on 23rd September 1909 arrested 17s. in the
 hands of her husband's employers. To avoid further enforcement of the
 decree, the workman left his employment, and undoubtedly tried to conceal
 his whereabouts from his family, and succeeded in so doing until he met
 with the accident which led to his death, on 22nd April 1911. After the
 occurrence of the accident he himself sent for his eldest son, but died
 before his son could reach him.

Lord Moulton.

It will be seen, therefore, that, so far from the claim of the infants on
 their father for support having been allowed to remain in the position of a
 purely theoretical right, every step necessary to make it effective had been
 taken by the mother, and she had placed herself legally in a position where
 she possessed a summary remedy against the husband for the recovery of
 definite and substantial amounts in respect of each of the children. More-
 over, she did not content herself with so doing, but, as the special case
 finds, she and her two sons, with the assistance of others, made all reason-
 able inquiries to ascertain the whereabouts of her husband for the purpose
 of enforcing the decree during the period of his final desertion of her. It is
 true that those inquiries had not yet been successful when the accident
 occurred from which he died. But it appears to me impossible for this House
 to decide that as a matter of law it was not open to the Sheriff-substitute as
 judge of fact to attribute a substantial value to the probability that sooner
 or later the decree against the husband would be made productive. In other
 words, I think it is impossible for this House to say that there was no evi-
 dence that the father's legal obligation to support the children was, under
 the circumstances of the case, of some practical value to them.

It is not uninteresting in this connection to contrast the facts in the pre-
 sent case with those before this House in *Keeling's* case.¹ There the wife
 had left her husband twenty-two years before his death, taking her children
 with her, and for the last twenty years had never communicated with him

¹ [1911] A. C. 648.

July 1, 1918. directly or indirectly, never made any claim upon him, and never received anything from him. She reared her children until they were married and placed out in life entirely on the earnings of her own labour. It is no wonder, therefore, that this House decided that (to use the words of Lord Atkinson) it was "impossible to come to the conclusion that there was any reasonable probability that she would ever enforce her right against her husband, or look to the result for her subsistence to any extent."

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For these reasons I am of opinion that this appeal should be allowed, and that the original award of the Sheriff-substitute as arbitrator should be restored.

INTERLOCUTOR of the Second Division reversed, together with the administrative interlocutor of the Sheriff-substitute following thereon, and the award of the arbitrator thereby recalled restored.

JOHN CUTHBERT—R. & R. DENHOLM & KERR, W.S.—BEVERIDGE, GREIG, & COMPANY
—W. & J. BURNES, W.S.

No. 10. WILLIAM HENDERSON MAIR, (Pursuer) Appellant.—*Buckmaster, K.C.*
—*Sandeman, K.C.*—*J. A. Christie.*

July 18, 1918.

THE RIO GRANDE RUBBER ESTATES, LIMITED, (Defenders)

Respondents.—*Macmillan, K.C.*—*Gentles.*

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Company—Agreement to take shares—Rectification of register—Removal of shareholder's name on ground that shares had been taken through misrepresentation in prospectus—Quotation in prospectus of report by one of the directors—Responsibility of company for truth of statements in report—Fraud and misrepresentation—Contract.

A company, formed for the purpose of acquiring a rubber estate in the Philippines, issued a prospectus in which was quoted a report on the natural advantages of the estate by one of the directors, who was stated to be acquainted with the locality. The prospectus also bore that no portion of the price of the estate would be paid until the directors had received an independent report confirming the statements of the director.

A shareholder, who had received the prospectus and had applied for and been allotted shares, brought an action against the company for removal of his name from the register of shareholders and for repayment of the price of the shares, on the ground that he had been induced to apply for them by the statements in the report quoted in the prospectus, which statements he averred were false and fraudulent. The defenders maintained that the action was irrelevant, the directors having in the prospectus not only not vouched for, but expressly refrained from committing themselves to, the truth of the statements made in the report.

Held (rev. judgment of the First Division) that the pursuer had stated a relevant case, in respect that, the prospectus having been put forward by the Company as an inducement to take shares, the Company could not take benefit from the false and fraudulent statements of their agent which it contained.

Opinion (per Lord Shaw) that the pursuer would be entitled to succeed if the statements were merely false without being fraudulent.

(In the Court of Session, 21st November 1912—*Infra* (Court of July 18, 1913. Session Cases), p. 183.)

The pursuer appealed to the House of Lords.

The case was heard on 20th June 1913.¹

At delivering judgment on 18th July 1913,—

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LORD CHANCELLOR.—If the question in this appeal were one simply of procedure I should hesitate much before coming to a conclusion different from that of the eminent Judges in the Court of Session. But the point which has been decided is a point of substance, and the interlocutor against which the appeal is brought purports to rest on principles which obtain equally in the jurisprudence of Scotland and of England.

Ld. Chancellor
(Haldane).
Lord Shaw of
Dunfermline.
Lord Moulton.

The appellant raised an action for reduction of a contract to take shares in the respondent Company, and for repayment of the price and deletion of his name from the register of shareholders. In his condescendence he averred that he had applied for his shares in reliance on the statements contained in a prospectus sent to him by the Company, statements which were substantially to the following effect:—

That the company was formed to acquire a concession from the Government of the Philippine Islands of the exclusive right to the rubber in a certain territory; that Mr. C. A. Littler, who was one of the directors, was acquainted with this locality from long residence in the Philippines; that in a report addressed to the directors and made shortly before incorporation, and set out in the prospectus, he had said that the area was a great centre for the collection of wild rubber until five years previously, when the Government had cancelled the licences owing to damage done to rubber trees and vines; and further, that since then the area had been reserved with a view to the formation of a responsible organisation which would undertake a scheme of collection and re-planting; that, even with the crude methods of extraction which then prevailed, as much as 40,000 lbs. of rubber per month had been obtained, and that the rubber trees and vines were now ripe for tapping on a large scale; that under an organised system of collection it should be easy to maintain an average annual output of 120,000 lbs., which should give a net profit of not less than £12,000 a year, and that later on £64,000 a year might be obtained; that in his (Mr Littler's) experience the estates were unique in that, in addition to the enormous possibilities of such a large territory, if systematically developed, they contained wild rubber trees and vines in such quantities that immediate profits were assured, and that under efficient management they could not fail to yield large profits to the shareholders.

The pursuer in his condescendence charged that these statements were both false and fraudulent, and in particular that there was no wild rubber or any rubber in the territory, unless in quantities so insignificant that it would not pay to collect it.

It should be mentioned that the prospectus stated that no portion of the

¹ The following cases, which were not cited in the argument in the Court of Session, were referred to in the House of Lords:—Redgrave v. Hurd, (1881) 20 Ch. D. 1; Weir v. Bell, (1878) 3 Ex. D. 238, at p. 245; Derry v. Peek, (1889) 14 App. Cas. 337.

July 18, 1918. price would be paid until the directors had received an independent report from their manager or other expert acting for them substantially confirming Mr Littler's report.

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The first plea in law of the defenders was that the pursuer's averments were irrelevant to support the conclusions of his summons, and that they were insufficient in specification. The case went to the Procedure Roll, and the Lord Ordinary sustained this plea in law and dismissed the action as irrelevant. The appellant reclaimed to the First Division, but the Court—Lords Dunedin, Kinnear, and Mackenzie—adhered and dismissed the appeal.

The Lord President took the view that there was no statement put forward in the prospectus as a statement of the directors which could be said to be untrue. All that was stated was that Mr Littler had reported that there was a large amount of rubber in the territory. The Lord President pointed out that the prospectus particularly called attention to the fact that the statements were based on the report, and that the directors announced their policy of not paying the price until they had confirmation of its statements. This, he thought, showed that they did not themselves vouch the truth of what Mr Littler had said, and he held that there was no misrepresentation to anyone who read the prospectus fairly and as a whole.

I am unable to agree in the view taken by the Lord President. It appears to me to overlook that the appellant's averment in his condescendence is one not of mere misrepresentation, but of fraudulent misrepresentation. Of this charge the directors, including Mr Littler, may be able wholly to clear themselves on a proof. But for the present purpose we have to assume the averment against them to be true. Taken as true, it means that the company induced the appellant to subscribe on the faith of a report which contained statements known to at least one of the directors, Mr Littler, to be false and fraudulent. Can the Company retain the money which Mr Littler's statements, on the hypothesis that they were false and fraudulent, must be assumed to have induced the appellant to part with?

The report was made for the directors of the Company, and the Company placed it before the possible subscriber. To this extent, at all events, they adopted the statements it contained, but with what I will, for my present purpose, assume to be an important qualification to which I will refer presently. They invited the appellant to subscribe on the prospect these statements held out. They told him that they were made by one who was now a director, and who was acquainted with the locality from long residence in the Philippines, and that from what he reported large profits might be expected to be realised. They said that if anyone subscribed he would, if he subscribed at once, have their assurance that his money would not afterwards be applied in paying the price unless they had first obtained a further and independent and favourable report. They, however, qualified their statements, as I will assume, to an extent to which I will now refer. They quoted Mr Littler's report in the prospectus as one made to them before incorporation, and presumably before he became a director. I will assume that they thus made it clear that the statements of Mr Littler were his statements and not theirs. But none the less they put forward these state-

ments, subject only to the qualification I have mentioned, in order to induce July 18, 1913. the appellant to subscribe. If the statements be falsely and fraudulently made, I do not think that they can keep the money subscribed on the assumption, which the appellant must be taken to have made and which he was entitled to make, that Mr Littler was reporting honestly. They appear to me to have adopted his action in making his report—to the extent, at least, of putting the report forward as one which possible subscribers might treat as a something worthy of consideration, as an opinion tendered to them, with the authority and concurrence of his colleagues, by a director, who might be assumed to be a person whose sincerity at all events was not in doubt.

In *Weir v. Bell*,¹ Bramwell, L.J., lays down as a general principle that “every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract.” This statement by Bramwell, L.J., was cited with approval by Lord Macnaghten in giving the judgment of this House in *Lloyd v. Grace, Smith, & Co.*² It is true that it was made as an explanation of the real foundation of the law on a different point, the principle laid down in *Barwick v. English Joint Stock Bank*,³ in which Willes, J., had decided that a corporation was liable for the fraud of its agent. But I think it embodies a broad proposition which is not now disputable, and which applies at all events in the absence of some much more extended and precise limitation of responsibility than was expressed in the present case. The representation here was a continuing one, and the Company authorised it to be put forward as made by Mr Littler, and if it was false and fraudulent on his part the Company which authorised it to be made can no more retain money subscribed on the faith of it than it could had the whole board of directors been guilty.

I think the Scottish procedure in deciding questions of relevancy a very valuable one. But I doubt whether this procedure can often be easy to apply satisfactorily when the issue is one of fraudulent misrepresentation. I express no opinion on whether the learned Judges of the First Division would have been right had there been no allegation of fraud. I am not, indeed, quite sure that in the case of a contract to take shares induced by a prospectus, a case in which the applicant is entitled to place full reliance on the impression which he can fairly derive from the various statements read together, the directors ought not to be held, on materials such as those before us, to have conveyed a view of the value of Mr Littler's report which, if it turns out to have been untrue in fact, would entitle the appellant to rescission. But it is unnecessary to discuss this hypothesis, for fraud is distinctly charged, and if the appellant can establish fraud he is, in my opinion, for the reasons I have given, entitled to succeed. The directors of the Company, including Mr Littler, may be absolutely innocent of the charge. There is nothing before us to lead us to believe that they are guilty. But the question is at this stage one of relevancy only, and on this question I think the Courts below have come to a wrong conclusion.

¹ 3 Ex. D. 238, at p. 245.

² [1912] A. C. 716, at p. 737.

³ (1867) L. R., 2 Ex. 259.

July 18, 1913. I therefore move that the interlocutors appealed against be reversed, and that the cause be remitted to the Court of Session with a declaration that the appellant is entitled to a proof of his averments. The respondent Company must pay the costs of these proceedings here and in the Courts below.

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LORD SHAW OF DUNFERMLINE.—[Read by Lord Parker of Waddington].—The respondent Company was incorporated on 28th February 1910. On 1st March it issued a prospectus. On 7th March the appellant having applied for 200 shares, these were allotted to him. He was put upon the register, and he made payments of instalments and calls to the amount of £100. He says that he became a shareholder “in reliance on the statements in the said prospectus and report therein incorporated, and in the belief that they were true.” He adds that “he has recently learned that the said statements were false and fraudulent.” In these circumstances he seeks for reduction or rescission of the contract, and he asks back his money.

For the purpose of a discussion on the relevancy of a Scotch case there are two elementary rules of procedure, namely, that (1) the pursuer's averments must be taken *pro veritate*, and (2) they must be sufficiently specific, so as to disclose to the defender, not the minute particulars, but the real substance of the facts making up the case against him. This being done, it is open to the defender, under the short and simple plea of “No relevant case,” to maintain that, even on the assumption that the pursuer had proved in evidence all that he has set forth, yet he would not be entitled in law to succeed. Upon that plea being sustained the action is dismissed.

It is difficult to overestimate the value of this procedure to Scotland. Under it the scandals which sometimes appear elsewhere are avoided—of a trial taking place involving a prolonged, harassing, and most costly inquiry upon an issue which, if it had been stated to begin with in plain words, and there and then adjudicated upon, would have been settled in the same sense for a fraction of the expense and in a fraction of the time. And, in view of what one of your Lordships has observed, I deem it right to add that I think this procedure has a special value in cases where fraud is alleged. For under the second branch of the rule persons charged with fraud know from the beginning the substance of what they have to meet, and they are not exposed to the hardships of a merely fishing or raking inquiry.

It remains, of course, true that the value of the procedure would, on the other hand, be lost if the Court made such a meticulous examination of the averments as to leave or deny the solid ground of a case because of the absence of technical formalities of expression. That does not happen in Scotland, and under the ample facilities for amendment there is less chance of it happening than ever. In the present case nothing of the kind has occurred, and one has only to read the judgment of the learned Lord President to see with what complete breadth and fairness the pursuer's averments have been construed. The case has been decided, not upon any narrow survey of these, but upon quite another ground. That ground is this—that the prospectus itself was neither false nor fraudulent; that although it did embody a report from a Mr Littler, it did not warrant or adopt the accuracy of that

report, but, on the contrary, reserved it for confirmation, after the applicant had joined the Company, but before money had been paid over to the vendors.

To turn to the facts of this case as averred by the pursuer, it was denied at the bar that the case must be taken upon the footing that the pursuer was induced to apply for shares in the Company because of false and fraudulent statements, which at least appeared within and formed part of the contents of the prospectus. By that document it was stated that the Company had been formed for the purpose of acquiring from the vendors a concession from the Government of the Philippine Islands, giving the exclusive right for twenty years to gather rubber, &c., in about 100 square miles of territory in the Rio Grande Valley.

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The prospectus then proceeds to embody a report, which is quoted textually. Two paragraphs from that report are here cited:—

“The area was a great centre for the collection of wild rubber until five years ago, when the Government cancelled all licences, owing to damage done to rubber trees and vines. Since then the area has been reserved with a view to the formation of a responsible organisation, which would undertake a scheme of collecting and re-planting. Even with the crude methods of extraction which then prevailed as much as 40,000 lbs. of rubber per month has paid royalty (only a little over one penny per lb.). In consequence of the Government not having allowed the rubber trees and vines to be tapped, they are now ripe for tapping on a large scale.

“Under an organised system of collection it should be easy to maintain an average annual output of wild rubber for the next seven years of at least 120,000 lbs., which, with rubber at only 4s. per lb., should give a net profit of not less than £12,000 per annum.”

The paragraph need not be further proceeded with. It narrates that these estates are unique in the reporter's experience, and that they contain wild rubber trees and vines in such quantities that immediate profits are assured. The prospectus then proceeds to quote other reports and pamphlets, and in a later passage it says this: “From the above report by Mr Littler, it will be seen that an immediate profit of not less than £12,000 per annum may be expected,” and it further sets out calculations showing the attractiveness of the investment. In a still subsequent passage it is stated: “No portion of the price will be paid until the directors have received an independent report from their manager, or other expert acting for them, substantially confirming the statements in Mr Littler's report, and until the title to the subjects purchased has been delivered.” And towards the conclusion of the prospectus this occurs: “The statements in this prospectus are based mainly on Mr Littler's report, on information furnished by him, and the publications above referred to.”

If the report which is quoted be treated as part of the prospectus itself and as part of the inducement to the investing public to take shares, there can be no doubt that this prospectus was not confined to setting out expectations or beliefs. The report makes broad averments of fact, that until five years ago the area was a great centre for the collection of wild rubber; that it has been reserved with a view to the formation of a responsible organisation; that the trees are now ripe for tapping on a large scale; and that while it was being worked five years ago 40,000 lbs. of rubber per

July 18, 1913. month had paid royalty. The representation of a future yield may be put on one side; but it is manifest from the statements quoted as to Mr Littler's report being the basis of the prospectus that the directors treated it as true, and founded upon its truth as the basis of attractive recommendations to the public.

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The case of the pursuer is that these statements were false and fraudulent. He also says: "In particular, in the said prospectus it is, *inter alia*, stated that up to 1905 40,000 lbs. of wild rubber every month was got from the property which the Company was acquiring, and that from 1910 (the year of the Company's incorporation) onward there would be got from this property 120,000 lbs. of rubber annually. In point of fact, there was no wild rubber, or any rubber, on the said territory, or at all events such an insignificant quantity that it would not pay the cost of collection, and consequently there could be no income from this source from the property."

The learned Lord President puts this averment in a manner which I entirely adopt when he says of the pursuer, "He avers and offers to prove that there is really for commercial purposes no wild rubber at all in the territory, and that, therefore, the idea of getting 120,000 lbs. of rubber and £12,000 a year of profit is entirely chimerical." Put in a word, the pursuer's averments amount to this, that the whole story (and therefore the whole scheme) was a complete hoax.

In these circumstances it is necessary to inquire what was the position of the directors with reference to this report, or rather, to put the more elementary question, who was Mr Littler? It must be remembered that this is an action for rescission. Were it an action for compensation or damages, the liability of promoters, directors, or persons held out as about to become directors, for statements made in the prospectus, would be, no doubt, regulated by the rules set down in section 84 of the Companies Act of 1908, but in an action for rescission in which the Company stands defendant the cardinal rule as to the prospectus is very simple. Each and every director is the agent of the Company to make the representations which the prospectus contains, and to induce applications for shares on the basis of those representations.

The question, therefore, is again repeated (for I have a fear that the significance of the answer thereto has not been sufficiently regarded in the Inner House) who was Mr Littler?

In view of the decision of the Court below—that the pursuer is held to have no relevant case for reduction of this contract or refund of his money because the directors did not personally make the representations, but only quoted these as from a report made to them—it is somewhat startling to remember that Mr Littler was himself a director. He was the associate of the others on the board, and he was a signatory of the prospectus itself. I am of opinion that in these circumstances Mr Littler, in signing this prospectus, acted as the other directors did, namely, as the agent of the Company, and that the Company must answer for the truth of, and absence of fraud in, the representations made by him.

I do not deny that it would be possible for directors to apprise the public frankly in a prospectus that they dissociate themselves from one of their own number, and that with regard to him no warranty was given to the

truth of what he represented or reported. This would make a peculiar document; but it might be done. Yet the doing of such a thing would require to be in the most clear and unambiguous terms, so as to constitute a specific warning to investors against doing that which otherwise anything under the hand of a director as such would warrant them in doing, namely, relying upon its accuracy and complete good faith. When such a prospectus comes, if ever, to be framed, Courts of law will no doubt scrutinize it.

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In the present case there was no such dissociation, either of the Company or of the general body of directors, from the representations made by Mr Littler. On the contrary, the directors expressly based the prospectus upon his report, and they and the Company stood pledged to the position that they held it out to be true. When a board is formed and the public is approached with a prospectus holding out representations and inducements to take shares made by one director, the board stands together in making such representations and, with regard to the actual author of them, his fellow directors and the company back his word. If the case were otherwise, a prospectus might be filled with individual reports from individual directors, all of which would be false, and an action for rescission would fail, because the board as a whole was pledged to none. It would be impossible that financial concerns could be in such circumstances conducted on the principles of fair dealing, and there is no ratio or principle of law which could justify such a course. The representation of one, unless, as I have said, some repudiation of the position be clearly and unambiguously made, is the representation of all. The responsibility attaches to all, and to the company for whom the board and each director acts. According, therefore, to the principle to be applied to this case, this prospectus is the same as if it contained no quotation marks, but reported as facts emanating from the board what emanated from one of the directors individually.

With much respect to the Court below, I see no ground for the view there taken of treating Mr Littler as a person standing apart from his fellow directors or the Company, nor any ground for the Company endeavouring to get rid of those responsibilities which arise in respect of the acts or statements of one of its agents to make representations by the prospectus, and of one of the signatories of that document. I may add that it would be a singular result if a transaction for the taking of shares—a transaction induced by falsehoods or a hoax—could be upheld because the original author of these was not the entire body of directors, but only one of their number.

The representations accordingly being taken to emanate from the Company, and the whole body of directors or signatories of the prospectus, the case becomes a simple one. In the view which I take of it, it is sufficient in such circumstances that the material representations, or any of them, inducing the contract, were untrue, and it is not necessary separately and substantially to establish fraud in such a case. Fraud is averred on the record—and it is difficult to see how, if the averment as to Mr Littler's report be correct, fraud would not have accompanied the falsehood. For his fellow directors in the prospectus set out that he was "acquainted with the locality from long residence in the Philippines." But with regard to the other directors it might be true that they had themselves been deceived.

July 18, 1913. In law this would not matter, even although it applied to the whole body ;
 Mair v. Rio Grande Rubber Estates, Limited. for, to use the language of Turner, L.J., in the *Reese River Silver Mining Company*,¹—" If it can be shown that a material representation which is not true is contained in the prospectus, or in any document forming the foundation of the contract between the company and the shareholder, and the shareholder comes within a reasonable time, and under proper circumstances, to be released from that contract, the Courts are bound to relieve him from it, and to take his name off any list of shareholders or contributories on which it may have been put." In an action, in short, for rescission of a contract to take shares, on the ground of misrepresentation in the prospectus, it is not necessary to prove a knowledge by the directors or signatories of that document of its untruth. This is in entire accord with a whole body of case law on the subject in recent times, and is substantially the language of Lord Lindley in *Karberg's case*.²

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Then, there is this further to be remembered. Fraud is not far away from—nay, indeed, it must be that it accompanies—a case of any defendant holding a plaintiff to a bargain which has been induced by representations which were untrue ; for it is contrary to good faith and it partakes of fraud to hold a person to a contract induced by an untruth for which you yourself stand responsible. It is elementary that a party cannot take advantage of a benefit derived from a contract sprung out of his own fraud, and I think it is equally sound that a party cannot take a benefit from a contract sprung out of a falsehood which he has placed before the other party as an inducing cause. And in applying this rule to a case of the inducing misrepresentation being made by one of a body of directors and used by his associates, the company, as a means of obtaining a contract or raising money, the principle at stake undergoes a legitimate and proper amplification.

But this record on the part of the pursuer alleges that the statements made were not only false but fraudulent. As I have explained, so far as Mr Littler is concerned, if, as the defenders allege, he was acquainted with the district, and if it were proved that the statements were, in fact, false, then they must have been fraudulent as well. And the same quality in him would attach to the representation itself as issuing from or through the board. On this head of fraud it must also be remembered that, so far as the accuracy of a statement by one director is concerned, his fellow directors signing the prospectus with him do, as I have already said, back his word. So also does the Company. But further, by the very fact of their association, these other directors introduce one of their number and each of their number to the investing public as a person of such reputation that his word can be relied upon. So far as they are concerned, they intimate and represent that the word they back is not only accurate but honest. And to such an intimation and representation the Company itself is also bound.

In this view of the case also (although, as I have explained, I am of opinion that this view does not require to be resorted to) the averments are amply relevant to be admitted to probation. For no one can peruse the prospectus as a whole without seeing that the whole body, and the Com-

¹ (1867) L. R., 2 Ch. 604, at p. 609.

² [1892] 3 Ch. 1, at p. 13.

pany, were representing to investors that the good faith as well as the July 18, 1913. accuracy of Mr Littler were worthy of trust.

I accordingly agree that the judgments appealed from should be reversed and that a proof of the pursuer's averments should be allowed.

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LORD MOULTON.—[Read by Lord Parker of Waddington]—I concur. The question in this action appears to me to depend on broad, general principles. The facts of the case, so far as they are relevant, raise the question almost in a typical form. So far as they are necessary for your Lordships' decision they may be stated as follows.

The pursuer applied for shares in the respondent Company on the faith of a prospectus issued by the Company for the purpose of obtaining subscriptions for shares. In that prospectus there is set out a report by Mr C. A. Littler, one of the directors of the Company, relating to the lands proposed to be acquired by the Company for the purpose of production of the rubber. To work a contract for the acquisition of these lands was the main object of the formation of the Company, and it was to carry out this contract that the issue of shares was made. The report is highly laudatory of the estates in question, and amongst other things it states that prior to 1895 as much as 40,000 lbs. of rubber per month had paid royalty from those estates. The pursuer alleges in his condescendence that these statements were false and fraudulent, and that he was induced to apply for shares in the Company because of these false and fraudulent statements, and that he is entitled to rescission of the contract to take shares.

The defenders allege as a plea in law that the pursuer's averments are irrelevant to support the conclusions of the summons, or, as one would have said in old times in England, they demur to the whole declaration, i.e., allege that it discloses no valid cause of action. This question of relevancy has been tried separately, and the Court of first instance and the First Division of the Court of Session have decided this point of law in favour of the defenders, and the matter is now brought on appeal before this House.

The contention on behalf of the defenders which has succeeded in the Courts below is that on the true construction of the prospectus the report of Mr Littler is put forward, not as a statement by the Company, but as a statement to the Company, the accuracy of which is not vouched for by the Company, but is, if I may use the phrase, one of the risks of the adventure in which the members of the public are asked to share. Now, I have no doubt that a prospectus may be couched in such terms that, when fairly construed, the public are warned that the Company does not vouch for the accuracy of the reports quoted or referred to therein, and that this may be so even although the report may be made by a person in the employment of the Company, or even by a director. It is needless to point out, however, that the more intimately the person from whom the report comes is connected with the Company, and in authority therein, the clearer must be the warning to the public that the accuracy of the statements is not vouched by the Company.

But the error into which the learned Judges in the Courts below appear

July 18, 1913. to me to have fallen is due to their having overlooked the fact that the pursuer alleges the statements in question to be fraudulent as well as false. Mair v. Rio Grande Rubber Estates, Limited. It is evident that the report was written by the director in question for the purpose of its being inserted in the prospectus. Even if this were not so, it is clear that it was used for such purpose, with his knowledge, consent, and participation. We have, therefore, an allegation of a fraudulent statement made by a director of the Company, used by the Company for the purpose of obtaining subscriptions, and effective in inducing the pursuer to take the shares. Now, it is elementary law that no person can take advantage of the fraud of his agent. It would, therefore, be contrary to good conscience that this Company should hold the pursuer to a bargain which (for the purposes of this argument) is admitted to have been obtained by the making of a fraudulent statement by a director of the Company, which fraudulent statement was used by the Company to the knowledge of their director for the purpose of bringing about the contract in question.

Lord Moulton.

I am of opinion, therefore, that the averments of the pursuer are relevant to support the conclusions of the summons, and that this appeal should be allowed. It is not necessary, therefore, for me to examine the prospectus in order to decide whether those averments would have been relevant had there been no allegation of fraud, and I abstain from expressing any opinion upon the point.

INTERLOCUTORS appealed from reversed; cause remitted to the Court of Session, with a declaration that the pursuer is entitled to a proof of his averments.

BARLOW, BARLOW, & LYDE—ST CLAIR SWANSON & MANSON, W.S.—NEISE, HOWELL, & HALDANE—J. STEWART MACDONALD.

No. 11.

July 18, 1913.

Tyzack & Branfoot Steamship Co., Limited, v. Sandeman & Sons.

TYZACK & BRANFOOT STEAMSHIP COMPANY, LIMITED, (Pursuers)
Respondents.—*Horne, K.C.*—*Hon. W. Watson.*
FRANK STEWART SANDEMAN & SONS, (Defenders) Appellants.—
D.-F. Dickson—*Sandeman, K.C.*—*A. R. Brown.*

Ship—Affreightment—Bill of Lading—Exemptions—Condition exempting ship from responsibility for marking on goods—Liability for unmarked goods—Apportionment among consignees of unmarked goods not identifiable as part of any particular consignment—Commixtio.

Bales of jute, consigned to various consignees and specifically marked, were shipped under bills of lading bearing that the bales were received "marked and numbered as per margin," that the number of packages signed for was to be binding on the shipowners unless error or fraud were proved, but that "the weight, measure, quality, contents, and value" were unknown, and that the ship was not to be liable for "inaccuracies, obliteration or absence of marks."

On the discharge of the ship 14 bales were missing and 11 bales were found to be, through some unknown cause, without marks, and could not be identified as belonging to any particular consignment. It was not disputed that these 11 bales formed part of the jute shipped at the port of loading; but the consignees—four in number—who did not receive their full consignments refused to accept any of these bales.

In an action for freight brought by the shipowners against one of the four consignees, who had received 6 bales less than his full consignment, the pursuers, while expressing their willingness to account

to the four consignees for the value of the 14 missing bales in proportion to their respective shortages, maintained that the 11 bales ought to be allocated among them in like proportion. The defender counter-claimed for the value of the 6 bales.

Held (rev. judgment of the Second Division) that the terms of the bills of lading did not exonerate the pursuers from their obligation to deliver the identical goods consigned for shipment; and that, as they had failed to show that any of the 11 bales were part of the defender's consignment, the defender was not bound to accept any proportion of these bales, and accordingly that the pursuers were liable to him for the full value of the 6 bales.

Observations (per Lord Moulton) on the rules of law applicable to a case of *commixtio*.

Spence v. Union Marine Insurance Company, (1868) L. R., 3 C. P. 427, distinguished.

Dictum of Lord Russell of Killowen in *Smurthwaite v. Hannay*, [1894] A. C. 494, at p. 505, commented on.

(In the Court of Session, 30th October 1912—*Infra* (Court of Session Cases), p. 19.)

The defenders appealed to the House of Lords.

The facts of the case are summarised in the opening paragraphs of the Lord Chancellor's opinion.

The case was heard on 19th and 23rd June 1913.

Argued for the appellants;—The respondents had contracted to deliver certain marked bales; they had not done so, and were accordingly liable under the bills of lading. It was idle to offer a portion of the eleven bales left in the harbour shed, there being nothing whatever to indicate that they were the appellants' bales, in fact the evidence was quite to the contrary. What the respondents contracted to deliver, and what the appellants were entitled to get, were the appellants' own bales and not bales belonging to someone else. The question was not a question as to the obliteration of marks, but as to the identity of the goods proffered with those shipped. The fallacy which underlay the decision of the Second Division was that they treated the cargo as having been shipped by one shipper. Had that been so the case would have been different, and the clause in the bills of lading relating to obliteration or absence of marks would have been applicable, and the consignee would have been bound to take the goods. In the present case however the clause had no application. In *Jessel v. Bath*,¹ *Cox v. Bruce*,² and *Parsons v. New Zealand Shipping Company*,³ the identity of the goods was either admitted or proved. *Spence v. Union Marine Insurance Company*⁴ had no bearing on the present case, the whole circumstances being entirely different. That was a case of a claim against an insurance company as for a total loss, and the consignee who claimed in the action required, but failed, to establish the total loss. *Smurthwaite v. Hannay*⁵ was a decision upon practice, and the dictum of Lord Russell of Killowen was *obiter* and, if meant to apply to the case of a claim for delivery, erroneous. The principle of *commixtio*⁶ was inapplicable, because it was impossible to say who was originally the owner of any one of the eleven bales.

Argued for the respondents;—If there had been no conditions

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¹ (1867) L. R., 2 Ex. 267.

² [1901] 1 K. B. 548.

³ [1894] A. C. 494, at p. 505.

² (1886) 18 Q. B. D. 147.

⁴ (1868) L. R., 3 C. P. 427.

⁶ Bell's Prin., sec. 1298.

July 18, 1913. attached to the bills of lading the respondents would have been bound to deliver the full number of bales with the proper markings, all as described in the bills of lading. If they failed to do this, then, in order to escape liability, they would have had to prove affirmatively that certain of the bales, when delivered for shipment, had no marks upon them and were different from the bales described in the bills. The exceptions, however, in the bills of lading entirely altered the matter and shifted the onus on to the consignees, who were in the same position as the shipper.¹ Under clause 7 of the bills the respondents were absolved from all responsibility as to markings and were in the same position as though there had been no markings on the bales. All that they undertook to do was to deliver the number of bales shipped, and, it being found as a fact that the eleven bales were in fact shipped, the appellants were bound to take their proportion of them unless they could prove that the lost bales were actually shipped bearing the marks set forth in the bills of lading, and that therefore they could not be among the unmarked eleven. The argument of the appellants would, if adopted by the other consignees, result in this, that the eleven bales would all be without an owner, although they were undoubtedly shipped on behalf of one or other of the consignees, and the respondents would be liable for all the eleven, notwithstanding the clause which exempted them from liability for the results of a confusion of the different parcels of goods. The cases of *Spence v. Union Marine Insurance Company*² and *Smurthwaite v. Hannay*³ were precisely in point.

At delivering judgment on 18th July 1913,—

LORD CHANCELLOR.—In this appeal the House can deal with the questions of law that arise only on the footing that the facts have been conclusively found by the Court below. But I think that the facts have been so fully found that we are in a position to dispose of the case without difficulty.

The substance of what has been so found is shortly as follows:—The appellants, who are spinners and manufacturers in Dundee, were the indorsees of eleven bills of lading, representing eleven separate parcels of jute, amounting to 2476 bales. As regards nine of these parcels delivery was made in full, but in the case of the remaining two there was a shortage in delivery. The parcels as to which there was a shortage consisted of 246 bales which were shipped under a particular bill of lading, and of 254 bales which were shipped under another.

The cargo was put on board the respondents' steamer "Fulwell" at Calcutta in August 1909. Bills of lading for 28,002 bales of jute were given by the master of the vessel, and were indorsed to thirty-seven different consignees.

The "Fulwell" arrived at Dundee, which was the port of destination, in October 1909, and the discharge of the cargo commenced. It was completed before the end of the month, when it was found that on the out-turn of the

¹ *Cox v. Bruce*, 18 Q. B. D. 147; *Jessel v. Bath*, L. R., 2 Ex. 267; *The Ida*, (1875) 32 L. T. 541; *Horsley v. Baxter Brothers & Co.*, (1893) 20 R. 333.

² L. R., 3 C. P. 427.

³ [1894] A. C. 494, Lord Russell of Killowen, at p. 505.

ship there were missing fourteen bales, and that there also remained in the July 18, 1913. harbour shed eleven bales, forming part of the vessel's cargo, which none of the consignees would accept as shipped under their respective bills of lading. Besides the appellants there were three other consignees who would not accept delivery, and these claimed against the respondents for four, eight, and seven bales respectively. The appellants claimed for shortage of six bales, the total shortage claimed for being thus twenty-five bales. All the other consignees, being thirty-three out of the thirty-seven referred to, acknowledged receipt of the full quantities consigned to them.

The two bills of lading, indorsed to the appellants, over which the dispute has arisen, set forth that there had been shipped in good order and condition on board the respondents' steamer a specified number of bales of jute, "being marked and numbered as per margin." In both cases the markings in the margin were in the words "J. P. S. Naraingunge, 1909-10, on and in red R. B." The total number of bales specified in these two bills of lading was 500, but it is admitted that only 494 bales bearing the marks above mentioned were delivered to the appellants. The bills of lading contained two clauses which are material. Clause 4 declared that "the number of packages signed for in this bill of lading to be binding on steamer and owners unless errors or fraud be proved, and any excess of shippers' marks to be delivered." Clause 7 declared, "The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration or absence of marks, numbers, or description of goods shipped," &c.

There having been, as above stated, a shortage in delivery at Dundee to the appellants of six bales, they refused to pay freight except on the footing of claiming to set off against the freight the value of the six bales not delivered to them. The respondents then raised an action in the Sheriff Court at Dundee, claiming £175, 1s. 6d., being the balance of freight due in respect of the appellants' total consignment. The claim for freight was admitted by the appellants, but they counterclaimed for £15, 5s. 4d., being the value of the six bales which had not been delivered. The respondents in their pleadings offered to pay to the appellants and the other consignees, who complained of short delivery, the price of the missing fourteen bales already referred to, "in such proportions as they may be found to be entitled to the same," but they maintained that as the four consignees were, as they alleged, bound to allocate among themselves the eleven bales left in the harbour shed, they could not ascertain what part, if any, of the price of the fourteen bales would fall to the appellants.

The Sheriff-substitute decided that the appellants were entitled to deduct the value of the six bales not delivered from the sum sued for, and assessed their value at £15, 5s. 4d. The respondents appealed to the Court of Session, and the Second Division heard the case. In the course of the argument before that Court the respondents expressed their willingness to give the appellants credit for a proportion of the value of the fourteen bales irrespective of whether they would come to an agreement as to the allocation of the eleven bales remaining in the harbour shed.

The Second Division reversed the decision of the Sheriff-substitute. They held that the appellants were not entitled to any further deduction than the amount which the respondents were willing to concede, which amounted to

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July 18, 1913. £8, 11s., and they gave judgment for the difference. The sum in dispute is therefore only £6, 14s. 4d. The question over which the controversy has taken place is, however, one of general importance.

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It is, in the view which I take of this case, important to define what was the nature of the claim made on each side. The respondents were suing for freight, and they had to show that they had performed their contract. That contract was to carry and deliver or tender at Dundee the bales put on board at Calcutta. Unless they fulfilled this contract they were not entitled to freight on any bales in respect of which they had not fulfilled it.

The appellants, on the other hand, were entitled to have the bales put on board delivered to them as put on board, unless the special stipulations in the bills of lading protected the respondents. As the bales in question had been signed for, and no error or fraud was shown within the meaning of clause 4, to which I have referred before, the respondents could not say that the whole twenty-five bales had not been shipped. Nor does clause 7 help them. For it can apply only if the goods are proved to have been delivered. If a number of packages were shipped, and that number was delivered to a single consignee, the shipowners, who would have satisfied clause 4 by delivering the proper number, might be protected from inaccuracy or obliteration of marks by clause 7. In the case before the House the Court below has found as a fact that there were eleven bales not marked as described in the bills of lading, and that it is impossible to identify these bales as forming part of any parcels marked as set forth in the bills of lading, and that there are marks on the ends of these bales which showed that some of them could not have been marked "on end in red R. B."

Now, fourteen bales have been lost altogether, and there are four consignees to whom the respondents seek to attribute the eleven bales. Why, then, should the appellants be bound to treat their six bales as included in the eleven which have arrived rather than in the fourteen which did not arrive? It appears to me that a fallacy underlies the reasoning of Mr Horne in the able argument he addressed to us on behalf of the respondents. He assumed that the six bales missing could be identified as forming part of the eleven which arrived. But they may have been among the fourteen which did not arrive. Your Lordships will observe that this being an action for freight, the respondents have to prove that they duly tendered the goods shipped at the termination of the voyage. But this is just what they cannot do. It follows, not only that they must fail in their action for freight in respect of the six bales, but that the appellants are entitled to say to them that, having failed to prove their delivery, a counter claim lies for the value of the goods shown to have been shipped but not delivered.

The learned counsel for the respondents relied on the case of *Spence v. Union Marine Insurance Company*,¹ where part of a cargo of cotton arrived at Liverpool but could not be identified, and it was held that the property in the part of the cargo which arrived, but of which the marks had been obliterated, had not ceased to belong to the consignees, and that the various consignees had become tenants in common of the mass of cotton according to their respective interests. But that was a case of a claim against an

¹ L. R., 3 C. P. 427.

insurance company as for a total loss, and the consignee who claimed in the July 18, 1913. action had to establish his total loss. He failed for obvious reasons. It is sufficient to say that such a claim presents no real analogy to that which is before us. In *Smurthwaite v. Hannay*,¹ which was an action for non-delivery like the present, there is a dictum in the judgment of Lord Russell of Killowen which suggests that the doctrine applied in *Spence v. Union Marine Insurance Company*² might be applied in a case resembling the present. But that dictum was unnecessary for the decision of the appeal, which turned on a point of procedure only, and the other noble and learned Lords who were parties to the judgment did not express concurrence in it.

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For the reasons I have given, I am of opinion that the judgment of the Second Division must be reversed, and that the decision of the Sheriff-substitute must be restored, with costs in this House and in the Courts below.

EARL LOREBURN.—The able arguments to which we have listened help to reduce within a narrow compass all the material points in this case. This ship received at Calcutta, and gave bills of lading, of which the appellants are indorsees, for 2476 bales of jute. When she arrived at Dundee she delivered only 2470 bales, and the question is whether or not there is a valid claim by the indorsees for the balance of six bales undelivered.

Now, the answer rests entirely upon the seventh condition or exception in the bills of lading. It is found, as a fact, that a great many other bales of jute were shipped in this vessel. On arrival all was in order except that fourteen bales out of the total shipped, in some unexplained way, were not forthcoming at all, and eleven bales could not be identified as belonging to any consignee, by reason of defective or obliterated marking. Upon this, the shipowners admitted their responsibility to make good the shortage of fourteen bales, but say that they are not liable at all in respect of the eleven bales, because the seventh exception relieves them. Their contention is that all the consignees of any jute in this cargo to whom short delivery was made must be settled with upon the basis that the fourteen lost bales belonged to them in proportion to their shortage, and that the eleven unidentifiable bales also belonged to them in the same proportion.

The seventh exception runs as follows: "The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration or absence of marks, numbers, or description of goods shipped" The owners bind themselves to deliver the goods subject to the exceptions and conditions. In my opinion, each bill of lading evidenced or constituted a separate contract, by which the owners were bound to deliver the selfsame bales that they received, but would be excused from delivery if it was made impossible by obliteration or absence of marks on these particular bales.

Suppose that in this very case all the bales stowed in the ship at Calcutta had been forthcoming at Dundee, but that eleven of them had been found not capable of identification owing to obliteration or absence of marks, so

¹ [1894] A. C. 494, at p. 505.

² L. R., 3 C. P. 427.

July 18, 1913. that no one could say to which bill of lading they belonged, there would have been no difficulty. All the bales incapable of identification in that case clearly belonged to one or more of the disappointed consignees in definite proportion to the shortage of which each complained, but which particular bale belonged to which particular consignee could not be proved. All the disappointed consignees were in that case disappointed because of absence or obliteration of marks on their own bales as well as upon the bales of the others complaining of shortage. And the shipowners could have said, "Our contract to deliver was conditional; the condition which excused us from delivering has arisen. The facts show that every single bale that each one of you shipped is on board, though its identity cannot be made out because of its defect in marking, for which we are not liable."

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But on the facts found in the case now before your Lordships no such protection is available to the shipowners, and for this simple reason. Apart from the eleven unidentifiable bales there were fourteen missing bales. It may be that the six which the appellants complain have not been delivered to them were among these fourteen. So the shipowners cannot prove, at least they have not proved, that the failure to deliver these six was due to any absence or obliteration of marking of such six bales. Clearly the burden of proving that the case comes within the exception lies upon the shipowners who set it up. They have failed in the proof, and stand in the position of men who contracted to deliver merchandise admittedly stowed in their vessel and have been unable to establish an excuse, however probable it may be that such an excuse really exists if the whole truth could be known.

I do not say anything in regard to the argument as to *commixtio*, because it seems to me quite beside the facts of this case. Owners of goods which have become so mixed as to be inseparable have rights among themselves, but those rights cannot override their contractual relations with other persons. I think this appeal should be allowed.

LORD SHAW OF DUNFERMLINE.—[Read by Lord Parker of Waddington].—By the two bills of lading founded on, the respondents stood charged with the receipt at Calcutta of 500 bales of jute, and they became responsible for the delivery of the same number to the defenders at Dundee. They have only, however, delivered 494. Unless excused by the conditions of or exceptions in the contract they are liable in respect of the short delivery of six bales.

The defenders' goods had been shipped along with many other consignments of jute also destined for Dundee. Delivery of the cargo was made on the wharf *en masse*. In the reckoning eleven bales could not be identified, fourteen others had disappeared. Four merchants had short delivery,—one of these, the defenders' firm, to the extent of six bales. These bales have not been identified with any of the eleven whose marks have gone; on the contrary, Lord Salvesen does not doubt that the quality of the jute in the unmarked bales did not correspond with any of the consignments upon which there had been a shortage. The truth accordingly is, (1) that the respondents became charged with delivery of six bales; (2) that they have failed to deliver; (3) that no clause as to obliteration of marks applies

to this case because the obliteration occurs on parcels of another quality of July 18, 1913. goods; and (4) that the failure either to deliver or to identify is thus complete.

On these facts I am of opinion that no case arises for the extrication of the rights of parties by applying any rule of distribution amongst co-owners. For the defenders are not co-owners with others of the remnant of this cargo. Their goods are not in it; and no principle of distribution, confusion, *commixtio*, or right in common, can apply to the case of a merchant whose goods have disappeared, and who is asked to accept in lieu of them, and in satisfaction *pro tanto* of his contract rights, a distributive share in something else no part of which ever belonged to him. I cannot read the opinion of Lord Russell in the case of *Smurthwaite*¹ as justifying any such proceeding. If it did, as was argued, I should respectfully disagree with an opinion to that effect.

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The respondents have unfortunately to face the total disappearance of fourteen bales. The defenders' six may all be among them. Had the ship-owners delivered the cargo in full, and had the qualities not been so disconform to those of the goods shipped, they might well have argued with force that all the shippers of goods (and all of them parties to bills of lading in similar terms) stood together to take the risk of confusion by the loss of identifying marks. But the cardinal fact of delivery fails and, with it swanting, the doctrine of distribution goes.

Having reached this point I need go no further. For the reasoning and the language of Lord Loreburn are such that I could not presume to add to them, and I venture to adopt in its entirety the judgment of the noble and learned Earl.

LORD MOULTON.—[Read by Lord Parker of Waddington].—In this case the pursuers, the present respondents, have brought an action against the appellants to recover freight upon 2476 bales of jute delivered to them at Calcutta, to be conveyed on the steamer "Fulwell" to the port of Dundee under the terms of certain bills of lading, eleven in number. The defenders admit the contracts, but allege that the pursuers have failed to perform two of them, in that of the 500 bales specified in those two bills of lading only 494 bales were delivered to them at the end of the voyage. They claim accordingly that the pursuers have not earned the freight on the six bales short-delivered; and further, that they are entitled to set against the freight of the bales actually carried and delivered to them the value of the bales short-delivered.

The case was originally heard in the Sheriff Court at Dundee. At the hearing the Sheriff-substitute found in favour of the contentions of the defenders, and assessed the value of the bales short-delivered at £15, 5s. 4d., which was the value claimed by the defenders in their pleadings, and on the basis of which they had made a proper tender for the sum due to the pursuers in respect of freight. Upon certain grounds presently to be noticed, the pursuers had in their pleadings expressed a willingness to allow to the defenders a credit of £8, 11s., and no more, against the full freight

¹ [1894] A. C. 494.

July 18, 1913. due. The difference between these two sums, namely, £6, 14s. 4d., was therefore the amount which was really in issue between the parties. The Sheriff-substitute found in favour of the appellants in respect of such sum, but on appeal his decision was reversed by the Second Division of the Court of Session, and it is from their interlocutor that the present appeal is brought.

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Lord Moulton. To appreciate the point in dispute (which is one of considerable commercial importance), it is necessary to state a few facts. The ship "Fulwell" carried on this occasion a general cargo of jute, shipped under a number of separate bills of lading. Of this cargo the defenders shipped eleven parcels, the numbers and marks on which were duly recorded on the margins of the respective bills of lading. The goods shipped under nine of these bills of lading were duly delivered, but of the goods shipped under the remaining two there was a shortage of six bales. It appears from the evidence that three other consignees also complained of short delivery to the extent of four, eight, and seven bales respectively, and the pursuers do not contest the allegation that the number of bales delivered to these consignees fell short of the number specified in the respective bills of lading by these amounts. On the other hand, upon the discharge of the ship eleven bales were found which corresponded to none of the bills of lading. The goods shipped by the defenders under the bills of lading in question purported to be of at least two different qualities, and the eleven bales found on the ship did not correspond in quality with any portion of those goods, and, in short, there is no evidence whatever to show that any of the eleven bales formed part of the parcels shipped by the defenders under the two bills of lading under which there was short delivery.

It will be seen, therefore, that inasmuch as there is no question that the pursuers are bound by the statements as to numbers in the bills of lading signed by the master, they are in the position of having to admit that fourteen bales were lost, and that none of the eleven bales remaining over can be identified by them as forming part of the goods shipped under the two bills of lading which formed the contracts under which they are suing the defenders.

The pursuers are, therefore, in the position of being unable to assert that they have delivered to the defenders the goods which they received on their account for carriage. *Prima facie* this is a condition of their right to demand the payment of freight. It remains, therefore, to consider how they excuse themselves from proving the performance of that condition.

In the first place, they set up that the bill of lading is not an absolute contract to deliver, but a contract subject to conditions, and they contend that those conditions provide them with the requisite excuse. The two conditions to which they refer are numbered 5 and 7 in the bills of lading. No 5 reads thus :

"Weight, measure, quality, contents, and value unknown."

I entirely fail to see what application this has to the circumstances of the present case. It in no wise affects the obligation of the shipowner to deliver the identical goods entrusted to him for transport. Its plain object and effect is to guard him from being supposed to warrant the accuracy of the representations as to weight, measure, quality, contents, and value that may

be found in the description of the goods or their markings as appearing in July 18, 1913. the bill of lading, and to let it be known that these appear in the bill of lading only as representations made to the master on behalf of the shipper, for the accuracy of which he is in no wise responsible. It is in strong contrast with No. 4, which provides that:—

“The number of packages signed for in this bill of lading to be binding on steamer and owners, unless errors or fraud be proved.”

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Condition No. 7 (so far as material) reads as follows:—

“The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration or absence of marks, numbers, or description of goods shipped, leakage, breakage, loss, or damage by dust from coaling on the voyage, sweat, rust, or decay, except through improper stowage.”

Here again there is no qualification of the absolute obligation to deliver the identical goods consigned to the shipowner for transport. It merely provides that if those goods should be injured in certain ways (one of which is the obliteration of marks) or should have been accepted by the ship without being marked in the way described in the bill of lading, the shipowner shall not be liable for their having been so injured or for their not corresponding to the marking described in the bill of lading. Considering that bills of lading pass into other hands, such a provision is an important protection to the shipowner. The presence of a mark indicating that the goods are the manufacture of some firm of high repute, or otherwise take high rank in the market by reason of their origin, may greatly influence their value, and but for the presence of such a provision in the bill of lading a shipowner might be involved in liability if the goods on delivery were found to be without the marking stated to be in the bill of lading. I can see no ground for attributing to condition No. 7 any other or different effect to this, which is the plain meaning of its words. But for the purposes of this case it suffices to point out that it cannot possibly qualify the obligation to deliver the identical goods consigned for shipment, nor can it refer to the absence or obliteration of marks on any goods other than those to which the bill of lading refers.

But although these points were made the subject of argument on behalf of the respondents, they do not represent the contention upon which they principally relied, and which was the ground of the decision in their favour by the Second Division of the Court of Session. Their main defence was an alleged principle of our law to the effect that, in such a case as the present, where there is a residue of unidentified goods and a shortage in delivery, the shipowner can compel the consignees to take the unidentified goods as a *pro tanto* fulfilment of the contract to deliver. To prove the existence of such a principle they cited the decision of the Court of Common Pleas in *Spence v. Union Marine Insurance Company*¹ and certain expressions appearing in the opinion of Lord Russell of Killowen in the case of *Smarthwaite v. Hannay*² in this House. These cases I shall presently examine, but I think it convenient in the first place to submit to an independent examination the doctrines of our law in cases where goods belonging

¹ L. R., 3 C. P. 427.

² [1894] A. C. 494, at p. 505.

July 18, 1913. to different owners have become mixed, so as to be incapable either of being distinguished or separated.

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If we proceed upon the principles of English law, I do not think it a matter of difficulty to define the legal consequences of the goods of "A" becoming indistinguishably and inseparably mixed with the goods of "B."

If the mixing has arisen from the fault of "B," "A" can claim the goods. Lord Moulton. He is guilty of no wrongful act, and therefore the possession by him of his own goods cannot be interfered with, and if by the wrongful act of "B" that possession necessarily implies the possession of the intruding goods of "B," he is entitled to it.¹ But if the mixing has taken place by accident or other cause, for which neither of the owners is responsible, a different state of things arises. Neither owner has done anything to forfeit his right to the possession of his own property, and if neither party is willing to abandon that right the only equitable solution of the difficulty, and the one accepted by the law, is that "A" and "B" become owners in common of the mixed property.

Farther than this I do not think that it is safe to go. That the whole matter is far from being within the domain of settled law is shown by the divergence of opinions as to the relative shares of the participating parties in the case of an accidental *commixtio*. Blackburn, J., in *Buckley v. Gross*² (following Kent's Commentaries), considers that they would be tenants in common in equal shares. In *Spence v. Union Marine Insurance Company*³ they were judged to possess the mixed mass in proportion to the probable amounts of their contributions to it. The fact is that the conclusions of the Courts in such cases, though influenced by certain fundamental principles, have been little more than instances of cutting the Gordian knot—reasonable adjustments of the rights of parties in cases where complete justice was impracticable of attainment. I doubt whether even the fundamental principles enunciated above would be strictly adhered to in extreme cases where they would lead to substantial injustice. For instance, if a small portion of the goods of "B" became mixed with the goods of "A" by a negligent act for which "A" alone was liable, I think it quite possible that the law would prefer to view it as a conversion by "A" of this small amount of "B's" goods rather than do the substantial injustice of treating "B" as the owner of the whole of the mixed mass.

It is from these propositions of law that the pursuers in this case attempt to spell out a right to compel the defenders to accept a proportion of the unidentified bales as a good delivery under the bills of lading. There are, to my mind, two fatal objections to this—the one of fact and the other of law. In the first place, before any such principles can be applied it is necessary that it should be proved or admitted that the goods of the owners in question have in fact contributed to form the mixed mass. If the goods of "A" and "B" have become mixed, and it is possible, but not proved or admitted, that some of "C's" goods are in the mixture, there cannot possibly be a presumption of law that they are or are not to be found there, and accordingly "C" cannot be compelled to take up the position of being a

¹ 2 Kent's Commentaries, 13th ed., 364, 365.

² (1863) 3 B. & S. 566, at p. 575.

³ L. R., 3 C. P. 427.

co-owner with "A" and "B," nor is he entitled to insist on being regarded July 18, 1913.
 as such co-owner if "A" or "B" objects thereto. Whether his goods are
 to be found therein is a question of fact, which must be proved by the
 party asserting it. Now, in the present case there is not the slightest
 proof that any of the goods shipped under the bills of lading issued to the
 defendants are to be found in the unidentifiable bales. Everything, indeed,
 points the other way, because they are of a wholly different quality to any
 of the jute purported to be shipped by the defendants. But it is not neces-
 sary to discuss this question, or to do more than say that it is admitted
 that fourteen bales must be taken to have been lost, and there is no
 evidence, and there can be no presumption of fact, that the six bales
 belonging to the defendants were not among these missing bales. It follows,
 therefore, that, accepting to the full the above doctrines as to the effect of a
 confusion of goods, they afford no ground for requiring the defendants to
 accept the position of co-owners of the unidentifiable bales.

But there is, in my opinion, an objection of law which is equally serious.
 The doctrines to which I have referred deal with property, and not with
 contract. To illustrate my meaning, let me take a case where the circum-
 stances are such as would justify in the strongest manner the application of
 these doctrines in the case of goods shipped under bills of lading. Let me
 assume that "A" and "B" were the owners of two separate parcels of
 cargo which have become inseparably and indistinguishably mixed, without
 loss and without deterioration. It may well be that they could assert the
 position of joint owners in the mixed cargo, and as such take action against any
 person who sought to get possession of it or convert it to his own use. But it
 does not follow that the shipowners would have performed their contract of
 carriage. Their duty is to deliver the goods entrusted to them for carriage, and
 they do not perform that duty if all that the consignee obtains is a right to
 claim as tenant in a common mixture of those goods with the goods of other
 people. No doubt if such a right is of some value, and the consignee avails
 himself of it, the shipowners are entitled to the benefit of what he receives
 in reduction of damages for their breach of contract, just in the same way
 as they would be entitled to credit for whatever value the goods possessed
 if they were delivered mixed up with some extraneous substance which
 lessened their value or compelled the consignee to go to expense in separat-
 ing it out. In the present instance, therefore, the defendants were, under
 the bills of lading, entitled to the delivery of their goods, and even if the
 pursuers could compel them to take up the position of co-owners of the
 mixed mass, it would not be a defence to their claim for breach of contract
 to deliver, nor would it affect the damages recoverable thereunder, except so
 far as they had received or could receive payment representing the value of
 that co-ownership. The pursuers would have no right to claim that the
 right of the shippers to the proceeds of the goods as co-owners was a fulfil-
 ment of their own contract of carriage. They could only claim that any
 payment so received or receivable would be *pro tanto* a reduction of their
 liability in damages by reason of the defendants having received or being in
 a position to receive payment to that extent, so that the damages which
 they would suffer from the breach of contract would be diminished by a
 like amount. In the present case the defendants have received no payment

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July 18, 1913. of this kind, and for all that appears in the case the unidentifiable bales may possess no appreciable value, so that (apart from all other grounds) the pursuers are not on this account in a position to claim any reduction of the damages *prima facie* due from them to the defenders for their breach of contract to deliver.

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The nature and consequences of the contention of the pursuers are well illustrated by considering the manner in which they have arrived at the sum of £8, 11s. for which they express their willingness to credit the defenders. The number of bales short-delivered was twenty-five, of which fourteen are admitted to have been lost. The value of the six bales short-delivered to the defenders is fixed at £15, 5s. 4d., and £8, 11s. is arrived at by taking fourteen twenty-fifths of that sum. The pursuers therefore contend that they have specifically performed their contract with respect to the remaining eleven twenty-fifths of the missing six bales (i.e., two and sixteen twenty-fifth bales) by telling the defenders to take their share of eleven unclaimed bales which are not shown to be identical with or to correspond in any particular with the bales which they undertook to deliver.

I now turn to the decisions which it is contended establish doctrines inconsistent with the above conclusions. The chief, and in fact the only decision to which we are referred, is that of *Spence v. Union Marine Insurance Company*.¹ The facts of that case were as follows: Cotton belonging to different owners was shipped for Liverpool in bales specifically marked. On her voyage the ship was wrecked, all the cotton was more or less damaged, some of it was lost, and some was so damaged that it had to be sold at an intermediate port. The rest was sent on to Liverpool. By reason of the ship being wrecked the marks on all but a portion of that sent on to Liverpool were obliterated. The plaintiffs were the holders of a bill of lading for forty-three bales, and of these two only were identifiable at Liverpool, and were duly received by them. They had insured the whole parcel, and the action was an action by them against the underwriters, as for a total loss of the forty-one bales. I should add that the unidentifiable portion of the cargo had all been sold (under an arrangement whereby the sale was to be without prejudice to the rights of the parties), and the proceeds divided among the owners who had not received their goods, in proportion to the number of bales short-delivered.

In these facts there are three matters worthy of special notice. In the first place, it was not disputed that all the goods had been duly shipped, and that the loss had been occasioned entirely by the ship being wrecked. In the second place, the goods appear to have been all of the same character, so that it was only a question of the number of bales belonging to each particular owner. In the third place, the action was one of insurance, and the sole question was whether the plaintiffs were entitled to say that there had been a total loss of the forty-one missing bales. There was no question of breach of contract to deliver. It was, therefore, open to the Court to regard the case as one in which, by reason of the perils of the sea and from no other cause, it came about, first, that the goods became indistinguishably

¹ L. R., 3 C. P. 427.

mixed, and, secondly, that a portion of this mixed mass was lost. Under July 18, 1913, those circumstances the owners of the goods were clearly entitled to take up the position of having become co-owners of the mixed mass, and of every part of it, and therefore of the surviving portion of it, and seeing that the goods were all of the same quality, this was the only position they could take up in fairness to the underwriters. Everything had been done consistently with this view, and all that the Court decided was that this was the proper view to take of the matter; and if the judgment be carefully read, it will, in my opinion, appear that the Court arrived at its decision from the considerations that I have enumerated above, and did not purport or intend to make any addition to the law as to the effect of *commixtio* as previously enunciated by recognized authority.

The case of *Smurthwaite v. Hannay*¹ is of a different character. In that case bales of cotton were shipped by several shippers upon a general ship for carriage to Liverpool, and upon arrival it was found that the number of bales landed fell short of those shipped, and that the marks upon some of the bales so landed had become obliterated, so that identification was impossible. These latter bales were sold and their proceeds distributed proportionately among the several consignees who had received short delivery. It would seem that all the bales were treated as being similar.

Under these circumstances sixteen holders of bills of lading joined in one action against the shipowners, claiming damages for non-delivery of the specified number of bales. The defendants applied to stay the action on the ground that neither Order XVI., rule 1, nor Order XVIII., rule 1, justified the joinder of such causes of action. The sole question before the Court, therefore, was as to the construction of these rules. The Court of Appeal had decided in favour of the plaintiffs, and from that judgment the defendants appealed to this House. In the result the appeal was allowed, and it was decided that on the true construction of the rules in question the various holders of the bills of lading could not combine as co-plaintiffs in one and the same action.

In the course of the argument counsel for the appellants suggested that unless holders of bills of lading could thus join in one action, they would be placed in a position of some difficulty, because the defendants might attribute a sufficient number of the unmarked bales to the particular plaintiff suing, and so meet his claim. I have some difficulty in appreciating the legitimacy of such an argument, when the sole point before the Court was as to the construction of the language of certain rules. There is certainly no presumption that such rules are sufficient to prevent difficulties arising in practice, and it is evident that Lord Russell did not base his opinion on any such ground, for he says: "The argument of convenience was strongly pressed upon your Lordships. I am by no means certain that that argument has in the facts of this case much weight, but whether it has or has not, it cannot be regarded, if, as I think, the Orders and Rules do not authorize that joinder of plaintiffs which has here been attempted."

Nevertheless, it is true that he does say in his judgment that the difficulty suggested by the plaintiffs is not a real one, because the defendants

¹ [1894] A. C. 494.

July 18, 1913. could only attribute to each single owner of a bill of lading a proportion of the unidentified bales in answer to their claim for non-delivery. Under the circumstances of the case this could be nothing other than *obiter dictum*. It was doubtless justified in that particular case by the fact that it was common ground that all the bales were similar, and that the parties had been acting on the basis of their being owners in common of the unidentified bales, seeing that the proceeds of the sale of those bales had been divided amongst them proportionately. Under these circumstances no objection could be made to the statement that they were owners of the unidentifiable bales in proportion to their respective interests. But if the noble and learned Lord intended to go further than the circumstances of that case, and to say that a tender of a proportion of unidentifiable bales is to the extent of that number of bales an answer to a claim of the holder of a bill of lading for short delivery, I am of opinion that the dictum was erroneous and cannot be justified. But I see no reason for thinking that his Lordship intended to lay down any such principle, or that he had before his mind the general case of short delivery under bills of lading.

For these reasons I am of opinion that this appeal ought to be allowed.

INTERLOCUTOR of the Second Division reversed, and interlocutor of the Sheriff-substitute restored.

BEVERIDGE, GREIG, & Co.—ALEX. MORISON & Co., W.S.—LINKLATER ADDISON, & BROWN—ELDER & AIKMAN, W.S.

CASES

DECIDED IN

THE COURT OF JUSTICIARY.

1912-1913.

JOHN T. M'LEAN (Customs and Excise Officer, Newton-Stewart),
Complainer (Appellant).—*Sol.-Gen. Anderson—J. A. T. Robertson.*
JAMES JOHNSTON, Respondent.—*W. Mitchell.*

No. 1.
Oct. 19, 1912.

Statutory Offences—Game Laws—Dealing in game without licence—Time within which prosecution may be brought—Game Licences Act, 1860 (23 and 24 Vict. cap. 90), secs. 3, 13, 14—Game Act, 1831 (1 and 2 Will. IV. cap. 32), sec. 41—Excise Act, 1848 (11 and 12 Vict. cap. 118), sec. 3.

M'Lean v. Johnston.

Held that prosecutions for dealing in game without a licence in contravention of the Game Licences Act, 1860, and for the recovery of the penalties imposed by the Act, are timeously brought if instituted within six months of the alleged offences.

JAMES JOHNSTON, rabbit trapper, Creebridge, was charged in the Sheriff Court at Wigtown on a summary complaint at the instance of John T. M'Lean, officer of customs and excise at Newton-Stewart, prosecuting by order of the Commissioners of Customs and Excise. The charge against the accused was that he had purchased and sold, or otherwise dealt in game without the licence required by the Game Licences Act, 1860 (23 and 24 Vict. cap. 90), sec. 14, contrary to the said Act, as amended by the Revenue (No. 2) Act, 1861 (24 and 25 Vict. cap. 91), sec. 17.* The dates of the alleged offences set forth in the complaint were 1st, 14th, and 20th September 1911.

HIGH COURT.
Lord Dundas.
Lord Salvesen.
Lord Guthrie.

* The Game Act, 1831 (1 and 2 Will. IV. cap. 32), enacts:—Sec. 41. "The prosecution for every offence punishable upon summary conviction, by virtue of this Act, shall be commenced within three calendar months after the commission of the offence."

The Excise Act, 1848 (11 and 12 Vict. cap. 118), enacts:—Sec. 3. " . . . Every information exhibited by order of the Commissioners of Excise for the recovery of any penalty imposed, . . . under or by virtue of any Act or Acts relating to any duties under the collection and management of the Commissioners of Excise or of the Commissioners of Customs, may be exhibited before the . . . Justice or Justices of the Peace, at any time within six calendar months after the offence or offences alleged in such information have been committed. . . ."

The Game Licences Act, 1860 (23 and 24 Vict. cap. 90), enacts:—

Sec. 3. "The duties by this Act granted shall be under the management of the Commissioners of Inland Revenue, and shall be deemed to be excise duties; and all the powers, provisions, clauses, regulations and directions contained in any Act relating to excise duties or to penalties under Excise Acts, and now or hereafter in force, shall respectively be of full force and effect with respect to the duties by this Act granted, and to the penalties hereby imposed, so far as the same are or may be applicable, and shall

Oct. 19, 1912. The complaint was brought on 27th February 1912.

M'Lean v.
Johnston.

In the Sheriff Court the respondent stated the following objection to the competency of the complaint viz. :—That under section 41 of the Game Act, 1831,¹ as incorporated into the Game Licences Act, 1860,² by section 13 of the latter Act, the complaint ought to have been brought within three months of the commission of the offences complained of and that, as that period had now expired, the complaint should be dismissed.

The complainer maintained that section 13 of the Game Licences Act of 1860² did not incorporate section 41 of the Game Act, 1831¹; that the procedure in connection with the recovery of penalties was regulated by section 3 of the Excise Act, 1848,³ and that the complaint was competent within six months of the commission of the offence.

The Sheriff-substitute (Watson) was of opinion that the Game Licences Act, 1860,² section 13, incorporated the Game Act, 1831,¹ section 41, without any recognition of the Excise Act, 1848,³ and that as the provision of section 3 of the last-mentioned Act was inconsis-

be observed, applied, and enforced for and in the collecting, securing, and recovering of the said duties and penalties hereby granted and imposed respectively, and otherwise in relation thereto, so far as the same shall be consistent with and not superseded by the express provisions of this Act, as fully and effectually as if the same had been herein repeated and specially enacted in this Act, with reference to the said last-mentioned duties and penalties respectively."

Sec. 13. " . . . All the clauses, provisions, and penalties contained in" the Game Act, 1831, and the Act 2 and 3 Vict. cap. 35, or either of them, "relating to dealers in game, and to the selling of game, either by or to such dealers or others, shall, so far as the same are consistent with the express provisions of this Act, and as the same are altered or amended by this Act, extend to and be of full force and effect in and throughout the whole of the United Kingdom, and shall be observed, applied, and enforced as if the same, so altered or amended and made consistent with the express provisions of this Act, had been herein repeated and specially enacted. Provided always that no person shall be authorised to sell game to any licensed dealer unless he shall have taken out a three pound licence under this Act."

Sec. 14. "Every person who shall have obtained any licence to deal in game from the Justices of the Peace, under the provisions of the said two several Acts in the preceding clause mentioned, shall annually and during the continuance of such licence, and before he shall be empowered to deal in game under such licence, obtain a further licence to deal in game under this Act, on payment of the duty hereby charged thereon; and if any person shall purchase or sell or otherwise deal in game before he shall obtain a licence to deal in game under the provisions of this Act, he shall forfeit the sum of £20."

The Revenue (No. 2) Act, 1861 (24 and 25 Vict. cap. 91), enacts, sec. 17, that the penalty imposed by the Game Licences Act, 1860, sec. 14, "shall be incurred by every person who under the provisions of the said Acts" referred to in sec. 14 of the 1860 Act "ought to obtain a licence from the Justices of the Peace to deal in game, and who shall purchase or sell or otherwise deal in game before he shall obtain a proper excise licence under the provisions of the Game Licences Act, 1860, whether he shall have obtained a licence from the said Justices or not. . . ."

¹ 1 and 2 Will. IV. cap. 32.

² 23 and 24 Vict. cap. 90.

³ 11 and 12 Vict. cap. 118.

tent with the provision of section 41 of the Act of 1831 and therefore with the incorporating section of the Act of 1860, the more recent enactment must prevail; and accordingly sustained the objection and dismissed the complaint. Oct. 18, 1912.
M'Lean v. Johnston.

The complainer appealed on a stated case. The question of law was:—"Whether the said objection to the competency of the complaint was rightly sustained?"

The case was heard on 17th July 1912.

Argued for the appellant;—The Sheriff-substitute's decision was wrong. The Act of 1831 was originally confined in its operation to England, and was of force in Scotland only in so far as it was incorporated in the Act of 1860. Section 41 of the Act of 1831, however, did not fall within the description of clauses contained in the incorporating section—section 13—of the Act of 1860. On the other hand, section 3 of the latter Act had the effect of making section 3 of the Excise Act, 1848, applicable; and as the Act of 1860 could not be construed as containing two inconsistent limitations as to the time within which prosecutions might be brought, section 3 of the Act of 1848 must be held to be the ruling provision. If the Act of 1860 were held not to afford a clear time-limit for prosecutions, then section 26 of the Summary Jurisdiction (Scotland) Act, 1908, would apply. The time-limit provided by that section was six months, and, therefore, on this view, the prosecution was timeous.

Argued for the respondent;—Section 3 of the Act of 1860 was in general terms and did not expressly refer to the Act of 1848. On the other hand, section 13 of the 1860 Act explicitly incorporated the clauses of the Act of 1831 except in so far as these were inconsistent with the provisions of the incorporating Act—which could not be affirmed of section 41. This section must be regarded, therefore, as one of the sections of the latter Act. This appeared also from the amending Act—Revenue (No. 2) Act, 1861,—for section 17 of that Act provided that in prosecutions it should be necessary to refer only to the Act of 1860, which indicated that all the regulations as to prosecutions were to be found in that Act. If this were so, then the time-limit in the Act of 1848 was superseded by that contained in the later Act.

At advising on 19th October 1912, the opinion of the Court (consisting of Lord Dundas, Lord Salvesen, and Lord Guthrie) was delivered by

LORD DUNDAS.—The only point we have here to decide is, within what period must a complaint be brought for alleged contraventions of the Game Licences Act, 1860, by dealing in game without a licence, in order to comply with the statutory limitation of time in that regard; and this question in its turn depends upon what is the ruling enactment concerning the limitation. If it is, as the respondent contends, and the Sheriff-substitute has held, section 41 of the Act 1 and 2 Will. IV. cap. 32, the period limited is three months, and this complaint was brought too late. If, on the other hand, the Crown is right in maintaining that the point is governed by 11 and 12 Vict. cap. 118, section 3, then the complaint was timeously brought, being within six months of the alleged contraventions. The question is not an easy one to decide for there are difficulties in affirming either of the views contended for, but I have come to the conclusion that the Sheriff-substitute was wrong, and that the argument for the Crown must prevail.

Oct. 19, 1912. The respondent is charged with contravening the Game Licences Act, 1860, whereby he is liable to a penalty of £20. Section 3 of that Act provides, *inter alia*, that "all the powers, provisions, clauses, regulations, and directions contained in any Act relating to excise duties or to penalties under Excise Acts, and now or hereafter in force, shall respectively be of full force and effect with respect to the duties by this Act granted, and to the penalties hereby imposed, so far as the same are or may be applicable, and shall be observed, applied, and enforced for and in the collecting, securing, and recovering of the said duties and penalties hereby granted and imposed respectively, and otherwise in relation thereto, so far as the same shall be consistent with and not superseded by the express provisions of this Act, as fully and effectually as if the same had been herein repeated and specially enacted in this Act, with reference to the said last-mentioned duties and penalties respectively." These are wide words. Turning to 11 and 12 Vict. cap. 118 (the Excise Act, 1848), one finds that it enacts (section 3) that "every information exhibited by order of the Commissioners of Excise for the recovery of any penalty imposed, or for the condemnation of any seizure made as forfeited under or by virtue of any Act or Acts relating to any duties under the collection and management of the . . . Commissioners of Customs may be exhibited before the . . . Justice or Justices of the Peace at any time within six calendar months after the offence or offences alleged in such information have been committed, or the goods, commodities, chattels, or things therein alleged to have been forfeited, have been seized, and all such proceedings shall be afterwards had thereupon as by law directed, anything in any other Act or Acts of Parliament to the contrary thereof notwithstanding." The Sheriff Court—not the Justice of Peace Court—is now the tribunal for trial of cases like the present; but, subject to that alteration, I think this complaint falls within the scope of the section just quoted, which applies to Scotland, and has never been repealed, and which must, I consider, be held as covered (whether designedly or not) by the language of section 3 of the Act of 1860. The enactment of 1848 occurs, no doubt, in a somewhat curious collocation; and the history of the statute (11 and 12 Vict. cap. 118) is worth noting. It was originally entitled: "An Act to explain and amend the law as to the licence required for the letting of post-horses to hire in Ireland, and the law respecting proceedings for duties and penalties under the post-horse, stage, and hackney carriage Acts in the United Kingdom." The first branch of this title was repealed by the Statute Law Revision Act, 1891; and five years later the Act received the short title the Excise Act 1848 (Short Titles Act, 1896, 59 and 60 Vict. cap. 14). Section 1 was repealed by statute law revision in 1875; section 2, in part, in 1875 and 1891; and section 3, in part, in 1891; but the remainder of section 3, conceived in the terms above quoted, stands on the statute book as a subsisting enactment under the title of the Excise Act, 1848. It is remarkable that this Act seems to have escaped the notice of our text-writers upon the game laws. I can find no mention of it either in Sheriff Forbes Irvine's book, or in Mr Tait's later publication. But the existence of section 3 was expressly recognised by Parliament in 1896; and I think it must also be held to have been imported into the legislation of 1860 by section 3 of 23 and 24 Vict. cap. 90,

already referred to. If this view is correct, the ruling provision as to time-limit for proceedings like the present is six months; and this complaint was timeously brought.

Oct. 19, 1912.
M'Lean v.
Johnston.

Lord Dundas.

The respondent's counsel urged that the time limitation here applicable is not six but three months, because the ruling enactment is section 41 of 1 and 2 Will. IV. cap. 32, incorporated (as he contended) by section 13 of the Game Licences Act, 1860. Section 41, so far as not repealed by the Statute Law Revision Act, 1891, provides that "the prosecution for every offence punishable upon summary conviction by virtue of this Act shall be commenced within three calendar months after the commission of the offence." The statute 1 and 2 Will. IV. cap. 32, was originally a purely English Act; but by section 13 of the Game Licences Act, 1860, its provisions were to some extent made applicable to Scotland. That section provides, *inter alia*, that "all the clauses, provisions, and penalties contained in" 1 and 2 Will. IV. cap. 32, "relating to dealers in game, and to the selling of game, either by or to such dealers or others, shall, so far as the same are consistent with the express provisions of this Act, and as the same are altered or amended by this Act, extend to and be of full force and effect in and throughout the whole of the United Kingdom, and shall be observed, applied, and enforced as if the same, so altered or amended and made consistent with the express provisions of this Act, had been herein repeated and specially enacted." I am unable to read these words as importing an incorporation of section 41. In the first place, I think, as already explained, that upon a sound construction of section 3 of the Excise Act, 1848, and section 3 of the Game Licences Act, 1860, the subsisting limitation of time is that prescribed by the former of these sections. If that is so, one can hardly suppose that section 41 of 1 and 2 Will. IV. cap. 32 was also incorporated in the Act of 1860, for it would be manifestly inconsistent with section 3 of the Excise Act, 1848. But I think, further, that the meaning and purpose of section 13 of the Game Licences Act, 1860, is amply satisfied without reference to section 41 at all; and I observe that neither of the learned text-writers already mentioned includes that section amongst those which, in their view, were incorporated by section 13 of the Act of 1860. Thus Mr Tait says: "The provisions of 1 and 2 Will. IV. cap. 32, referred to in section 13 are sections 17, 18, 21, 22, and 25 to 29 inclusive." It seems to me that section 41 cannot reasonably be described as falling among the "clauses, provisions, and penalties contained in" 1 and 2 Will. IV. cap. 32, "relating to dealers in game and to the selling of game."

For these reasons I have come to the conclusion that the limit of time within which complaints like the present must be brought is six months, and that we ought to answer the question put to us in the negative. The same result would be reached, looking to the terms of section 26 of the Summary Jurisdiction Act, 1908, if we were to hold that neither section 41 of 1 and 2 Will. IV. cap. 32, nor section 3 of the Excise Act, 1848, had ruling force; but, as already stated, I consider that this cannot be affirmed of the last-mentioned section.

THE COURT answered the question of law in the negative.

R. PRINGLE, W.S.—CARMICHAEL & MILLER, W.S.—Agents.

No. 2.

Nov. 19, 1912.

M'Court v.
H. M. Advocate.JOHN M'COURT, Appellant.—*Latta*.HIS MAJESTY'S ADVOCATE, Respondent.—*Sol.-Gen. Anderson*
—*Morton, A.-D.**Crime—Habitual Criminality—Proof of age—Prevention of Crime Act, 1908 (8 Edw. VII. cap. 59), sec. 10 (2).*

The Prevention of Crime Act, 1908, enacts :—Sec. 10 (2). "A person shall not be found to be a habitual criminal unless the jury finds on evidence (a) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime . . . and that he is leading persistently a dishonest or criminal life."

Held that in proceedings under this Act the evidence of a police officer that an accused person had, after his apprehension, stated his age to be forty-four, was not, without corroboration, sufficient proof of the accused's age; and a verdict of habitual criminality obtained on that evidence alone as to age *recalled*.

COURT OF
CRIMINAL
APPEAL.
Lord Justice-
Clerk.
Lord Dundas.
Lord Guthrie.

JOHN M'COURT was tried at the Circuit Court at Glasgow on 25th June 1912 on an indictment charging him with assault and robbery and with being a habitual criminal. The jury having returned a verdict of guilty as to the charge of assault and robbery, evidence was led as to his habitual criminality. Five previous convictions of crime, one in each of the years 1896, 1898, 1905, and two in 1911, were proved. The only evidence as to the accused's age was that of a police-constable who deposed that the accused after apprehension gave his age as forty-four at the police-office.

The jury having found the accused guilty on the charge of habitual criminality, sentence of seven years' preventive detention was passed. The accused presented a note of appeal in which he craved the Court to set aside the verdict on the ground that it was not proved at the trial that he was sixteen years of age at the date of the earliest of the three last convictions.

The appeal was heard before the Court of Appeal on 19th November 1912.

At the hearing the undernoted authorities were cited.¹

LORD JUSTICE-CLERK.—This statute is a highly penal one; it adds considerably to the period of confinement, to which a person is exposed upon conviction of a particular crime, on its being shown that he has been at least three times previously convicted and that he was sixteen years of age at the time of the first of these previous convictions. That is a kind of inquiry which must be dealt with very carefully and strictly. I do not suppose that in nineteen cases out of twenty there will be any difficulty in proving conclusively that the prisoner's age, at the date of the first of the convictions, was more than sixteen years, but the proof must be conclusive. In this case I am obliged to say I do not think the proof was conclusive. It is one of the essential points to be found by the jury that the man was sixteen years of age

¹ *For the appellant*.—H. M. Advocate v. Martin & Robb, (1842) 1 Broun, 382; Lockwood v. Walker, 1910 S. C. (J.) 3, 6 Adam 124; Hume on Crimes (3rd ed.), vol. ii., pp. 383, 319. *For the respondent*.—Lees v. Macdonald, (1893) 20 R. (J.) 55, per Lord Justice-Clerk Macdonald, at p. 57, 3 White, 468.

at the time of the first of the previous convictions. In this particular case Nov. 19, 1912. there was no evidence as to the age of the prisoner except the statement of a police-constable that the prisoner told him that he was forty-four years of age. That kind of evidence requires corroboration. It is quite plain that some very slight circumstance might cause the constable to mistake what the prisoner said. It seems that there was another witness who was expected to give corroborative evidence, but he failed to do so. In these circumstances it cannot be maintained that there was sufficient evidence to entitle the jury to find that the prisoner was sixteen years of age at the time of the first previous conviction. It was suggested that a jury by looking at the prisoner's appearance might be satisfied that he was forty-four years of age. While it is obvious that, by looking at the prisoner's appearance, one might come to be of opinion that he was forty-four years of age, I cannot hold that it has been proved that he was that age, and the burden of proving it was upon the public prosecutor. I am of opinion that the appeal should be sustained.

LORD DUNDAS.—I have come with regret, but without difficulty, to the same conclusion. Section 10 (2) of the Prevention of Crime Act, 1908, provides that a person shall not be found to be a habitual criminal unless the jury "finds on evidence" that since attaining the age of sixteen he has had a certain number of previous convictions, and that he is leading persistently a dishonest or criminal life. There is no dispute that a sufficient number of previous convictions is here proved; nor that the prisoner was leading persistently a dishonest or criminal life. But it is said that it is not proved that he was sixteen years of age at the date of the first of the three previous convictions. What proof is there? We have only the evidence of one police-officer proceeding on a statement by the panel. That will not do by itself; but it is suggested that the jury might supplement that evidence by their own impression derived from the appearance of the panel. I do not think the jury's impression could be taken as corroborative evidence. In a very recent case in this Court,¹ where the important age was not that of the prisoner but of the victim, it was held that the Magistrate's opinion that the child looked like a child of eleven was no corroboration at all. Where the Legislature intends to permit physical appearance to be taken into account, it can say so. For example, the Criminal Lunatics Custody Act, 1800,² section 2, provides that, if "such person shall appear to the jury . . . to be insane," certain consequences shall follow. Here, however, the jury must "find on evidence"; and I do not think that in this case the evidence was sufficient to entitle the jury to find that the panel was sixteen years of age at the time of the first of the convictions.

LORD GUTHRIE.—I am of the same opinion. It is quite immaterial in this case that it was proved that the prisoner was three times previously convicted of a crime, unless it was also found that he was sixteen years of age at the time of the first of the three convictions. Now, there was no

¹ Lockwood v. Walker, 1910 S. C. (J.) 3, 6 Adam, 124.

² 39 and 40 Geo. III. cap. 94.

Nov. 19, 1912. sufficient evidence to entitle the jury to come to that finding. I think this is a case, if ever there was one, for applying the general rule that an essential element in a case can only be proved by the evidence of two witnesses or of one witness supplemented by corroborative evidence, oral or documentary.

M'Court v. H. M. Advocate. —

Lord Guthrie. Appearances are always liable to be deceptive, and especially among the criminal classes where the constitution has been broken down by excess and hardship. Also the circumstances under which the statement of his age was made by the prisoner to the police-constable were peculiarly open to error. In my opinion the appeal ought to be sustained.

THE COURT pronounced the following interlocutor:—"The Lords of the Court of Appeal . . . Recall the verdict of the jury appealed against: Quash the order for preventive detention pronounced upon the appellant, and decern: Find the appellant entitled to expenses which modify to seven guineas . . ."

G. M. GRIER, Solicitor—SIR WILLIAM S. HALDANE, W.S., Crown Agent—Agents.

No. 3.

Nov. 19, 1912.

Lockwood v. Chartered Institute of Patent Agents.

JOSEPH LOCKWOOD, Complainer (Appellant).—*Paton*.
THE CHARTERED INSTITUTE OF PATENT AGENTS AND ANOTHER,
Respondents.—*Wilson, K.C.—Hon. W. Watson*.

Statutory Offences—Patents and Designs Act, 1907 (7 Edw. VII. cap. 29), sec. 84—Unregistered person describing himself as patent agent—Complaint—Instance—Private prosecutor—Title to prosecute—Expenses—Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 52.

The Chartered Institute of Patent Agents has an interest, and therefore a title, to prosecute, with the concurrence of the procurator-fiscal, a summary complaint charging an accused with contravening the Patents and Designs Act, 1907, sec. 84, by describing himself as a patent agent without being registered; and, as the Institute in such proceedings is not "prosecuting in the public interest," expenses may be awarded to it in terms of the Summary Jurisdiction (Scotland) Act, 1908, sec. 52.

Statutory Offences—Patents and Designs Act, 1907 (7 Edw. VII. cap. 29), sec. 84—Unregistered person describing himself as patent agent—Person calling himself "British and Foreign" patent agent.

The Patents and Designs Act, 1907, sec. 84, prohibits under a penalty any person from describing himself as a patent agent unless he is registered as such agent in pursuance of the Act; and provides that "in this section 'patent agent' means exclusively an agent for obtaining patents in the United Kingdom."

Held that a person who, without being registered, had used the title of "British and Foreign" patent agent, had described himself as a patent agent within the meaning of the section; and accordingly was guilty of a contravention thereof.

HIGH COURT.
Lord Justice-Clerk.
Lord Dundas.
Lord Guthrie.

JOSEPH LOCKWOOD was charged in the Sheriff Court at Glasgow on a summary complaint at the instance of the Chartered Institute of Patent Agents, incorporated by royal charter and having its head office at Staple Inn Buildings, London, and Henry H. Graham, its secretary and registrar, with the consent and concurrence of James N. Hart, Procurator-fiscal of Court. The charge against the accused

was:—"That during the months of December 1911 and February Nov. 18, 1912. 1912, and at a time when you were not registered as a patent agent, in pursuance of the Patents and Designs Act, 1907, you did describe Lockwood v. Chartered Institute of Patent Agents. yourself as a patent agent in a letter, dated 8th December 1911, bearing to be signed by you, which was addressed and posted in Glasgow to 'Messrs W. P. Thompson & Co., 6 Lord Street, Liverpool,' and which was received by the said Messrs W. P. Thompson & Co. on or about 9th December 1911, in which letter you designed yourself as 'Joseph Lockwood, Patent, Design, and Trade Mark Agent'"; and also in two other letters sent by the accused to other persons, dated respectively 23rd December 1911 and 27th February 1912, in which letters the accused designed himself as in the letter of 8th December 1911, "and all this you did contrary to the said Act, section 84, whereby you are liable to a penalty not exceeding twenty pounds, and in default in payment to imprisonment in terms of sections 47 and 48 of the Summary Jurisdiction (Scotland) Act, 1908, and you are also liable to pay to the complainers the expenses of the present complaint and the proceedings therein."*

At the calling of the complaint the agent for the accused stated, *inter alia*, the following objections to the complaint:—" (1) That the complainers have no title or interest to prosecute; (2) that the complaint is irrelevant, in respect that accused is not charged as having acted as an agent for obtaining patents in the United Kingdom." The Sheriff-substitute (Taylor) having repelled these objections, the accused pleaded not guilty. At the trial the letters libelled in the complaint were lodged. These all bore printed at the head of them the words "British and Foreign.—Joseph Lockwood, Patent, Design, and Trade Mark Agent." No further designation of the accused appeared in the letters.

The accused was convicted and sentenced to pay a fine of £7 of penalty, with £3 of expenses, and, in default of payment, to thirty days' imprisonment; and "in respect it appeared that the reasonable expenses of the complainers' witnesses, together with the other expenses, exceeded the sum of £3 in which accused was found liable, the Court, on the motion of the complainers' agent, directed the penalty to be paid to the complainers to be applied by them in payment *pro tanto* of the expenses of their witnesses."

The accused thereupon brought a bill of suspension in which he

* The Patents and Designs Act, 1907 (7 Edw. VII. cap. 29), enacts:—Sec. 84. "(1) A person shall not be entitled to describe himself as a patent agent, whether by advertisement, by description on his place of business, by any document issued by him, or otherwise, unless he is registered as a patent agent in pursuance of this Act or an Act repealed by this Act. (3) If any person knowingly describes himself as a patent agent in contravention of this section he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding twenty pounds. (4) In this section 'patent agent' means exclusively an agent for obtaining patents in the United Kingdom."

The Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), enacts:—Sec. 52. ". . . Expenses may be awarded to or against any private prosecutor, but shall not be awarded to or against any person prosecuting in the public interest, unless the statute or order under which proceedings may be taken directly or by implication authorises such award, but the Court may direct the expenses incurred by any prosecutor, public or private, to be met in whole or in part out of any penalty imposed. . . ."

Nov. 19, 1912. pleaded, *inter alia*;—1. The said conviction ought to be suspended, in respect (1) that the present respondents had no title to prosecute said complaint; and (2) that said complaint is irrelevant. 2. Said conviction ought to be suspended, in respect (a) that no evidence at all was adduced against the complainer that he described himself exclusively as an agent for obtaining patents in the United Kingdom; (b) that the documents produced by the complainer proved the contrary; and (c) the documents produced in support of the complaint do not bear out the charge; and (d) that the Sheriff-substitute refused to consider or look at the productions lodged by the complainer at the trial. 3. There being no warrant in the statute libelled in the complaint for the imposition of expenses, the sentence *quoad* the expenses should be quashed.

Lockwood v.
Chartered
Institute of
Patent
Agents.

The case was heard on 19th November 1912.

Argued for the complainer;—(1) The Institute had no title to prosecute. It was not mentioned in the Patents and Designs Act, and no power to prosecute was conferred on it. The regulations made by the Board of Trade merely imposed certain duties on, and gave certain rights to, the Institute as to the keeping of the register of agents, and specified the qualification of persons for registration, and made no reference to prosecutions by the Institute. The Institute in reality was merely the depositary of the register. In this respect the Patents and Designs Act was entirely different from the statute considered in *Bremridge v. Smith*.¹ Nor could it be said that the Institute had any interest to prosecute.² The prosecution was clearly in the interest of the public. (2) The Institute should have sisted a mandatory, or found caution, as otherwise the complainer could not enforce a decree for expenses if he were successful. The Judgments Extension Act, 1868,³ did not apply to criminal cases, and the Inferior Courts Judgments Extension Act, 1882,⁴ would not apply as the present case did not fall within the class of actions described in section 10 thereof. (3) The complaint was irrelevant. From the terms of the definition of "patent agent" in section 84 (4) of the Act it appeared that the section would not be contravened unless the accused had held himself out as practising solely in the United Kingdom. But here the complainer had described himself in the documents libelled as practising both in Britain and abroad, and the complaint was therefore irrelevant. (4) The Sheriff-substitute was wrong in awarding expenses to the Institute. The Institute was prosecuting in the public interest and, therefore, could not get expenses, there being no provision in the Patents and Designs Act taking the case out of the ordinary rule.⁵

Argued for the respondents;—(1) As the statute did not exclude the Institute from prosecuting, it was entitled to prosecute if it had an interest to do so,⁶ and here it was plain that the Institute had an

¹ (1902) 4 F. (J.) 50, 3 Adam, 565.

² *Great North of Scotland Railway Co. v. Anderson*, (1897) 25 R. (J.) 14, 2 Adam, 381.

³ 31 and 32 Vict. cap. 54.

⁴ 45 and 46 Vict. cap. 31.

⁵ Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 52; *Murphy v. M'Donald*, (1898) 25 R. (J.) 95, 2 Adam, 571; *Banks v. Welsh*, (1899) 2 F. (J.) 11, 3 Adam, 82; *MacKirdy v. M'Kendrick*, (1897) 25 R. (J.) 49, 2 Adam, 435.

⁶ *Burns v. Turner*, (1897) 25 R. (J.) 38, 2 Adam, 450; *Wilson v. M'Laughlin*, 1907 S. C. (J.) 61, 5 Adam, 284.

interest. (2) It was too late to raise any question as to the sisting Nov. 19, 1912.
 of a mandatary. (3) As the accused had held himself out as practising in Britain, and had no licence, he had contravened the Act. Lockwood v. Chartered Institute of Patent Agents.
 It was immaterial that he had held himself out as practising also in other countries. Accordingly the objection to the relevancy of the complaint could not be sustained. (4) Under section 52 of the Summary Jurisdiction Act, it was within the power of the Sheriff-substitute to award expenses, and he had rightly exercised the power.

LORD DUNDAS.—This is a bill of suspension against a conviction following on a complaint at the instance of the Chartered Institute of Patent Agents in London, and Mr Graham, their secretary and registrar, with the consent of the Procurator-fiscal of Court. The appellant is charged that during certain months, which are specified, at a time when he was not registered as a patent agent in pursuance of the Patents and Designs Act, 1907, he did describe himself as a patent agent. Then there are three letters libelled in which that is said to have been done; and that is all alleged to have been done contrary to the said Act, section 84. A conviction followed, and a fine was imposed, and now there is a bill of suspension.

Mr Paton for the suspender has stated several points which we must consider, but I have come to think that there is no real substance in any of them. It was urged that the Institute had no title, because no interest, to prosecute; and that this was really a prosecution which ought to have been instituted and conducted by the Procurator-fiscal as public prosecutor in the public interest. I do not think that is the case. I do not think this is a prosecution in the public interest in any proper sense. It is a prosecution by this Institute who have certain rights and interests which, I think, are certainly affected in this matter, and which they are entitled to protect. Their rights and interests, no doubt, may affect the well-being or interests of the public, but they are, none the less, the rights and interests of this association. It seems, from what we have heard, that this is really the sequel of a well-known litigation in this Court and in the House of Lords between the prosecutors on the one hand, and the appellant on the other hand, in time past, in which the present appellant was ultimately unsuccessful, and in which it was decided that the Institute were entitled to charge certain fees which he refused, and, as I understand, still refuses to pay. That matter of the fees we must take to have been settled by the ultimate tribunal of the land, and when one gets to fees one gets to money questions, and I think it is clear that the Institute have a sufficient interest to prosecute in this matter. If one supposes that the whole members of the Institute—everybody who is entered upon that register of which we have heard—were to complain of this matter, would they not have a title and an interest collectively? And if so, it is difficult to see why the Institute itself should not bring this prosecution. So much for the first point.

The second point, I think, was barely stateable. It simply was that the Institute, being an English company and domiciled in England, ought to have sisted a mandatary or found caution. But no such motion was made in the Court below, and there is nothing to suggest that, if it had been

Nov. 19, 1912. made, it might not have been acceded to by the Institute. I think there is nothing in that point.

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Lord Dundas.

The third point is based upon the alleged irrelevancy of the complaint. As I have said, the complaint is that, during a certain time, when he was not registered as a patent agent, Mr Lockwood described himself as a patent agent contrary to section 84. Mr Paton pointed out that the letters upon which the libel specially proceeds are headed, each and all of them, in print, with the words "British and Foreign—Joseph Lockwood, Patent, Design, and Trade Mark Agent," and he argued that that is sufficient to show that Mr Lockwood was not holding himself out as a patent agent within the meaning of section 84, because, by subsection 4 of that section, "patent agent" in this section is defined as meaning "exclusively an agent for obtaining patents in the United Kingdom." The contention was that if a man's practice is not confined exclusively to the United Kingdom, he is not liable to prosecution for describing himself as a patent agent. This will not do. The wording of the subsection is, I think, unfortunate, but I take its meaning to be that a man would not be within the section unless he was an agent for obtaining patents in the United Kingdom. If that reading of the subsection be right, as I think it is, this objection fails.

Lastly, there was a short question raised about expenses in the Court below. It was conceded that, if Mr Wilson was right in his contention upon the first point—that this was not truly a prosecution in the public interest—then this objection must fail. As I think Mr Wilson is right in that matter, this objection does fail.

I am therefore for refusing the bill of suspension.

LORD GUTHRIE.—I am of the same opinion. On the first question, Mr Paton made a very plausible case to start with. He pointed out that the Chartered Institute of Patent Agents—the prosecutors (through the agency of their secretary) here—are not named in the Act. He also pointed out that there is no express power to anybody in the Act to prosecute, not even the Board of Trade who are named. Then turning to the rules framed by the Board of Trade, in pursuance of the Act, he showed that, while the existence of the Chartered Institute is recognised and certain duties are assigned to them, they do not get any power to prosecute. The only power expressly given is in rule 5, where they are to have power to appoint a registrar who is to keep a register, and even in regard to that, he is to be subject not only to the Institute but also to the Board of Trade. But then they are not prevented from prosecuting; they are not limited to the duties imposed upon them by rule 5. And the question, therefore, comes to be, is there anything to prevent them from coming forward as private prosecutors for any interest they may have?

It is admitted that, if the only interest is that of the public, if there is no private interest, then you cannot have a private prosecution, the prosecution must be by the public prosecutor—the fiscal—who alone can bring a complaint. But, in this case, I agree with your Lordship in thinking that the result of the statute and the rules is to create in the Chartered Institute an interest in connection with the register which they make and keep. It is not disputed that section 84 cannot be construed as based

merely in the public interest, because, if the public interest alone had been Nov. 19, 1912.
 in view, you would have expected the section to prevent anyone from practising as a patent agent except under the restriction of the statute, but the Lockwood v.
 section does not do so, it merely prevents people who practise as patent agents the Chartered
 from advertising themselves in a particular way unless they are registered. Patent Institute of
 Agents.

I therefore concur in thinking that the interest of the Chartered Institute Lord Guthrie.
 is sufficient and is of a private nature, and, therefore, that they were entitled to bring the prosecution. And it is not disputed by the appellant here that they would be, in that case, entitled to prosecute.

On the question of caution and the question arising under section 84 (4), I concur with your Lordship.

LORD JUSTICE-CLERK.—The views your Lordships have expressed have my entire concurrence.

THE COURT refused the bill.

ROSS & ROSS, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

JAMES G. CONNELL, Complainer.—*MacRobert*.
 ROBERT P. MITCHELL (Procurator-Fiscal, Dumbarton), Respondent.
 —*Sol.-Gen. Anderson—Gillon*.

No. 4.

Nov. 20, 1912.

Statutory Offences—Motor car—Charge of driving “recklessly or negligently” Connell v.
 —*Motor Car Act, 1903 (3 Edw. VII. cap. 36), sec. 1—Complaint—Relevance—General conviction on alternative charges.* Mitchell.

The Motor Car Act, 1903, sec. 1, enacts that any person driving a “motor car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public,” shall be guilty of an offence under the Act. Schedule C to the Summary Jurisdiction (Scotland) Act, 1908, contains the following form of complaint:—“You did drive a motor car recklessly (or negligently), and knock down and injure C. D., contrary to the Motor Car Act, 1903, sec. 1.”

The driver of a motor car was charged on a summary complaint with driving his car “recklessly or negligently,” whereby it collided with another car, contrary to the Motor Car Act, 1903, sec. 1. The accused was found “guilty as libelled.”

Held that the complaint was irrelevant, in respect that, not being in the form provided by the Summary Jurisdiction Act, it contained alternative charges without adequate specification; and that a general conviction following on such charges was bad.

Observed (per the Lord Justice-Clerk) that while it is open to a prosecutor to select one or other of the wrongous ways of driving mentioned in the Motor Car Act, or to charge more than one of them cumulatively, he cannot insert them disjunctively in a complaint and charge the accused generally with driving in one or other of these wrongous ways.

Procedure—Objections—Noting of objections in the record—Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 41.

Held that failure to note objections taken in the course of proceedings under a summary complaint, as provided for by sec. 41 of the Summary Jurisdiction (Scotland) Act, 1908, vitiates the whole proceedings following on the complaint.

Question whether objections can be competently noted, not in the minutes of procedure, but by a reference in the minutes to a paper apart.

Nov. 20, 1912. **JAMES G. CONNELL** was charged in the Sheriff Court at Dumbarton on a summary complaint at the instance of R. P. Mitchell, Procurator-fiscal. The charge in the complaint was that, on 27th August 1912, on a public highway between Helensburgh and Luss, "you did drive a motor car recklessly or negligently, whereby said car collided with another car then being driven on said highway by John Guthrie, motor car driver, Clyde Street, Helensburgh aforesaid, whereby the said car was damaged, and the occupants thereof, viz., Frederick Nolan Baker, Captain in the Royal Garrison Artillery, Port-Glasgow, and Charles Stewart Sinclair, dentist, Lorne House, Helensburgh, were injured in their persons; contrary to the Motor Car Act, 1903, section 1."*

Connell v.
Mitchell.

HIGH COURT.
Lord Justice-
Clerk.
Lord Dundas.
Lord Guthrie.

The minutes of procedure in the case bore that on 3rd October 1912 "compeared the accused, and the complaint being read over to him, the agent for accused stated objections per paper apart. The Court repelled the objections, and accused pled not guilty, and evidence was led. . . . *Eo die*.—The Court found the accused guilty as libelled." The Sheriff-substitute (Macdiarmid) imposed a fine of £2.

Connell brought a bill of suspension in which he averred that his law-agent took objection to the relevancy and want of specification of the complaint; that the Sheriff-substitute repelled the objection; and that he was requested to note the objection. Connell also averred:—"By section 41 of the Summary Jurisdiction Act, 1908,† it is provided that any objection to the relevancy of the complaint is to be noted in the record, if either party desires it. The complainer's law-agent asked that the objection taken by him should be noted. This has not been done, as appears from the record itself. . . . The said complaint charges the complainer alternatively with having driven the car recklessly or negligently. No specification is given of the circumstances of the case. No indication is given of the nature of the recklessness or negligence. The complainer was greatly prejudiced in his defence, as he did not know the nature of the charge he had to meet. Further, the form of complaint did not follow the form set forth in Schedule C of the said Summary Jurisdiction Act, 1908.‡ The complainer was charged with alternative offences. The Sheriff-substitute found the accused guilty as libelled. The conviction was accordingly bad."

Answers were lodged for the respondent in which he averred that the only objection taken to the complaint was that it was lacking in specification. He admitted that the record contained no note of objections, and averred, *inter alia*:—"At no time during the proceedings did the complainer's law-agent ask the Sheriff-substitute to note his objection to the want of specification. He did intimate that in the event of his client being convicted he might appeal by asking for a stated case; but although handed a form by the Sheriff-clerk for note of any objection he might desire to take and for return thereafter, he never returned said form."

* Quoted in the rubric.

† The Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), enacts:—Sec. 41. " . . . In the event of any objections being stated to the competency or relevancy of the complaint or proceedings, or to the competency or admissibility of evidence, such objections shall, if either party desires it, be noted in the record."

‡ Quoted in the rubric.

The complainer pleaded;—The warrant and sentence in question ought to be suspended in respect (1) that the complaint was irrelevant and wanting in specification; (2) that the Sheriff-substitute failed to note the objection taken in the record; (3) that the complaint libelled alternative offences, and that the said warrant and sentence found the complainer guilty of the offence charged; (4) that there was no evidence justifying the same.

The case was heard on 20th November 1912. At the hearing the undernoted authorities were referred to.¹ No paper apart containing the accused's objections was produced.

LORD JUSTICE-CLERK.—This is a bill of suspension in which the complainer seeks to suspend a sentence imposed on him in the Sheriff Court at Dumbarton for a contravention of section 1 of the Motor Car Act, 1903. The charge in the complaint is that "you did drive a motor car recklessly or negligently" on a highway near Helensburgh whereby the car collided with another car; and one of the objections pleaded in the bill of suspension is "that the complaint libelled alternative offences, and that the said warrant and sentence found the complainer guilty of the offence charged."

Now, it was urged on behalf of the respondent that the charge was not alternative, but really constituted one charge. I cannot accept that view. The section of the Motor Car Act on which the complaint is based provides:—"If any person drives a motor car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually is at the time or which might reasonably be expected to be on the highway, that person shall be guilty of an offence under this Act." Now, if the words "recklessly" and "negligently" are not alternative, it would follow that the other words used in the section are also not alternative; and, therefore, if the argument of the respondent is sound it would be quite competent to charge a person with driving a car "recklessly or negligently, or at a speed or in a manner which is dangerous to the public," and a general conviction following on such a charge would be good.

A number of cases were cited in which, it was said, an alternative charge had been held good, but these cases are all distinguishable from the

¹ For the complainer.—Dunn v. Mitchell, 1911 S. C. (J.) 46, 6 Adam, 365; Summary Jurisdiction (Scotland) Act, 1908, sec. 41 and Schedule C. For the respondent.—Austin's Jurisprudence, (5th ed.) vol. i., 432, vol. ii., 1059; Bevan on Negligence, (3rd ed.) 1; Addison's Law of Torts, (8th ed.) 703; Pollock's Law of Torts, (9th ed.) 449; Holland's Jurisprudence, (11th ed.) 109; Murray's New English Dictionary *sub voce* "Recklessness"; Dunn v. Mitchell, 1911 S. C. (J.) 46, 6 Adam, 365; Stenhouse v. Dykes, 1908 S. C. (J.) 61, 5 Adam, 553; M'Dade v. Henshilwood, (1868) 1 Coup. 67; Caldwell v. Baker, (1856) 18 D. 315; King v. Kidd, (1903) 6 F. (J.) 1, 4 Adam, 275; Teesdale v. H. M. Advocate, (1896) 23 R. (J.) 73, 2 Adam, 137; Gemmell v. Weir & Patrick, (1897) 24 R. (J.) 23, 2 Adam, 227; McGiveran v. Auld, (1894) 21 R. (J.) 69, 1 Adam, 448; O'Neill v. Campbell, (1883) 10 R. (J.) 76, 5 Coup. 305; Bruce v. Linton, (1861) 24 D. 184; De Banzie v. Peebles, (1875) 2 R. (J.) 22, 3 Coup. 89; Charleson v. Duffie, (1881) 8 R. (J.) 34, 4 Coup. 470; Murray v. M'Dougall, (1883) 10 R. (J.) 42, 5 Coup. 215.

Nov. 20, 1912. present. In one of the cases, for example, the accused was charged with
Connell v. loitering in a street "for the purpose of bookmaking or betting or wagering
Mitchell. or agreeing to bet or wager," and this charge was held to be unobjection-
able. But plainly there the Act said to be contravened—the Street
Lord Justice- Betting Act, 1906—made it an offence to loiter for any or all of these
Clerk. purposes, and if the prosecutor proved that the accused had loitered for
any or all of these purposes, it did not matter which, then the accused was
guilty of an offence under the Act. In the same way if a person is charged
with trespassing in pursuit of game it is quite immaterial if the prosecutor
inserts in the complaint a description of various kinds of game, such as
deer, grouse, partridge, &c., because the gist of the offence is the tres-
passing, and the words are descriptive merely of the accused's purpose in
trespassing.

But that cannot be said to be the case here. The accused was driving
his car along a public highway. That is a perfectly lawful act; the
accused was not, therefore, *versans in illicito*. All that the Motor Car Act
provides is that if a person drives his car in one or other of certain ways
he shall be guilty of an offence. It is quite clear to my mind, therefore,
that while it is open to a prosecutor to select one or other of the wrongous
ways of driving mentioned in the Act, or to charge more than one of
them cumulatively if he thinks he can prove more than one, he cannot
insert them disjunctively in a complaint and charge the accused generally
with driving in one or other of these wrongous manners.

I should have reached this conclusion apart altogether from the Summary
Jurisdiction Act; but that Act appears to me to put the matter beyond
question. It gives certain forms of complaint, and the form dealing with
offences against the Motor Act is this:—"You did drive a motor car
recklessly (*or negligently*) and knock down and injure C D, contrary to the
Motor Car Act, 1903, section 1." Now the brackets, and the "*or*" being
in italics, clearly indicate that either the word "recklessly" or the word
"negligently" may be used; and to say that it is permissible to delete the
brackets and cancel the italics, and use the phrase "recklessly or negli-
gently," appears to me to be an extravagant proposition.

This is enough for the decision of the case, but I should like to refer to
another objection which is taken here. It appears that an objection to the
complaint was stated in the Court below. Of this objection, however,
there is no record in the minutes of procedure, and there is nothing to show
what it was. All that appears in the minutes is that "the agent for the
accused stated objections per paper apart." Whether it is sufficient to
record an objection in a paper apart I need not pause to consider—it is
certainly not a practice to be commended. But here there is no paper
apart, and that in itself is a fatal blot in the procedure. It is a simple
enough thing to record an objection, and if this is not done then the proce-
dure is altogether vitiated. But it is unnecessary to proceed on this objec-
tion, because, as I have stated, the other point is enough. It is impossible
to read the Act without seeing that the words "recklessly" *or* "negligently"
are alternative, and a charge which uses them both is bad. Further, I may
add, that a general conviction following on a charge so framed could not
be sustained.

LORD DUNDAS.—I entirely agree. I think that each and every one of Nov. 20, 1912. the three grounds of suspension would afford a sufficient basis for quashing ^{Connell v.} this conviction. The first is that the complaint is irrelevant and wanting ^{Mitchell.} in specification. The complainer is charged with driving his car “recklessly or negligently.” That complaint is certainly not in the form prescribed by the Act of 1908; because it is clear that the form of the Schedule contemplates driving “recklessly” and driving “negligently” as two distinct offences, one or other of which may be libelled according to circumstances. I shall not attempt to follow the lucubrations of Mr Gillon as to the distinction which (it appears) may or may not exist between the two adverbs in what I suppose he would call “the subjective mentality of the perpetrator,” or elsewhere. I do not at all say that a prosecutor may not competently libel an alternative charge of this sort; but if he does, I think that he would have to give ample specification of what he meant by each of the alternative charges libelled. In that event, the libel would be altogether outside of the form provided in the Schedule to the Act of 1908. Even when the charge is made of “negligent” driving only, it was suggested by Lord Ardwall in the case of *Dunn v. Mitchell*,¹ and I agree with the suggestion, that prosecutors should consider whether they ought not to give some specification as to what they mean to charge the accused with. But however that may be, I am clear, with your Lordship, that the complaint as here framed will not do, either under the Act of 1908 or the Motor Car Act, 1903.

On the second point it is enough to say that it sufficiently appears from the minutes of procedure that an objection was stated for the accused, and that that objection is not noted as it ought to have been in terms of section 41 of the Act. What exactly the objection was I am not certain, but I gather that it was an objection founded on want of specification, probably identical with that on which we heard argument.

Lastly, as I consider the form of the charge to be truly alternative, as already said, it follows that the conviction, being a general one, must, in my opinion, fail.

LORD GUTHRIE.—I agree. I think Mr MacRobert's objections are good objections, and that they have substance in them—the objection as to the form of the complaint, the objection as to the form of conviction, and the objection as to the failure to note at the proper time in the proper way the objection taken to the charge. Mr Gillon's argument was directed to show that there was no difference in law between recklessness and negligence. Whatever be the view in England the distinction is certainly well recognised in Scottish practice. But however that may be, it is not the question. The question is one arising on the terms of two statutes, the statute of 1903 and the statute of 1908, and I agree with what your Lordship has said as to the clear distinction contemplated in both these statutes between recklessness and negligence. I also think that the general conviction cannot stand.

THE COURT passed the bill and suspended the conviction and sentence complained of *simpliciter*.

CAMPBELL FAILL, S.S.C.—SIR WILLIAM S. HALDANE, Crown Agent—Agents.

¹ 1911 S. C. (J.) 46, 6 Adam 365.

Nov. 20, 1912. present. In one of the cases, for example, the accused was charged with loitering in a street "for the purpose of bookmaking or betting or wagering or agreeing to bet or wager," and this charge was held to be unobjectionable. But plainly there the Act said to be contravened—the Street Betting Act, 1906—made it an offence to loiter for any or all of these purposes, and if the prosecutor proved that the accused had loitered for any or all of these purposes, it did not matter which, then the accused was guilty of an offence under the Act. In the same way if a person is charged with trespassing in pursuit of game it is quite immaterial if the prosecutor inserts in the complaint a description of various kinds of game, such as deer, grouse, partridge, &c., because the gist of the offence is the trespassing, and the words are descriptive merely of the accused's purpose in trespassing.

Connell v.
Mitchell.

Lord Justice-
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I should have reached this conclusion apart altogether from the Summary Jurisdiction Act; but that Act appears to me to put the matter beyond question. It gives certain forms of complaint, and the form dealing with offences against the Motor Act is this:—"You did drive a motor car recklessly (*or negligently*) and knock down and injure C D, contrary to the Motor Car Act, 1903, section 1." Now the brackets, and the "*or*" being in italics, clearly indicate that either the word "recklessly" or the word "negligently" may be used; and to say that it is permissible to delete the brackets and cancel the italics, and use the phrase "recklessly or negligently," appears to me to be an extravagant proposition.

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LORD GUTHRIE.—I agree. I think Mr MacRobert's objections are good objections, and that they have substance in them—the objection as to the form of the complaint, the objection as to the form of conviction, and the objection as to the failure to note at the proper time in the proper way the objection taken to the charge. Mr Gillon's argument was directed to show that there was no difference in law between recklessness and negligence. Whatever be the view in England the distinction is certainly well recognised in Scottish practice. But however that may be, it is not the question. The question is one arising on the terms of two statutes, the statute of 1903 and the statute of 1908, and I agree with what your Lordship has said as to the clear distinction contemplated in both these statutes between recklessness and negligence. I also think that the general conviction cannot stand.

THE COURT passed the bill and suspended the conviction and sentence complained of *simpliciter*.

CAMPBELL FAILL, S.S.C.—SIR WILLIAM S. HALDANE, Crown Agent—Agents.

¹ 1911 S. C. (J.) 46, 6 Adam 365.

No. 5.

WILLIAM NICOLL, Appellant.—*Forbes*.REVEREND JOHN STRACHAN, Respondent.—*Normand*.

Nov. 21, 1912.

Nicoll v.
Strachan.*Statutory Offence—Game Laws—Trespass in pursuit of game—Retrieving dead or wounded game—Game (Scotland) Act, 1832 (2 and 3 Will. IV. cap. 68), sec. 1.*

Held that where a rabbit after being shot on the public road ran into private ground and there fell dead or moribund, the shooter, in sending his dog into the private ground to retrieve it, did not commit a trespass "in search or pursuit of" game within the meaning of sec. 1 of the Game (Scotland) Act, 1832.

HIGH COURT.
Lord Justice-
Clerk.
Lord Dundas.
Lord Guthrie.

WILLIAM NICOLL, gamekeeper, Cortachy, was charged in the Sheriff Court at Forfar on a summary complaint at the instance of the Rev. John Strachan, the Manse, Cortachy. The charge in the complaint was that the accused on 17th May 1912 in the day time trespassed on part of the glebe of Cortachy in search or pursuit of game or rabbits, and that without leave of the complainer, contrary to the Game (Scotland) Act, 1832, section 1.*

The accused having been convicted, appealed on a stated case.

The facts were set forth by the Sheriff-substitute (Lee) in the stated case as follows:—"For the facts I accepted the appellant's own statement, finding it proved that while walking along the public road between a wood belonging to his employer and the respondent's glebe, he saw a rabbit, chased by the respondent's dog from the said wood, cross the road; that as it crossed he took a snap shot with his gun at it; that the rabbit succeeded in crossing the road, entered the glebe, and having run for some distance over a grass field in the glebe, fell; and that he then sent his retriever dog into the glebe to recover the rabbit. It appeared that the appellant's employer had for many years been permitted by the respondent to shoot over the glebe, either by himself or by his servants, but that that privilege had in recent years been withdrawn by the respondent. I held that the practice of retrieving wounded game over the march, which was alleged to be universally recognised, depends, where it exists, partly on courtesy extended by one proprietor to another, and partly on the recognition of the inhumanity of abandoning a wounded animal, but not on any legal right, and that as the rabbit in question had entered the respondent's land alive, the appellant was guilty of a trespass in thereafter pursuing it. I accordingly convicted."

The question of law was:—"Whether I was right in holding that in the circumstances stated the appellant was guilty of a trespass under the Game (Scotland) Act, 1832, section 1?"

The case was heard on 21st November 1912. At the hearing the undernoted authorities were referred to.¹

* The Game (Scotland) Act, 1832 (2 and 3 Will. IV. cap. 68), which was known before the date of the Short Titles Act, 1896, as the Day Trespass Act, 1832, enacts:—Sec. 1. "If any person whatsoever shall commit any trespass by entering or being in the daytime upon any land without leave of the proprietor in search or pursuit of game or of . . . conies, such person shall, on being summarily convicted thereof," forfeit and pay a penalty.

¹ *For the Appellant*.—Macdonald v. Maclean, (1879) 6 R. (J.) 14; Kenyon v. Hart, (1865) 34 L. J. (M. C.) 87, *per* Blackburn, J., at p. 89; Donald v.

LORD JUSTICE-CLERK.—I do not think that this case presents any serious difficulty. It is true that the Sheriff is final upon the facts, but it is of the essence of an appeal by stated case that the Sheriff states the facts and this Court decides whether upon the facts which he has found proved the Sheriff's finding in law is right, in other words, whether the Sheriff could, upon the facts found, legally pronounce the decision he has given. Nov. 21, 1912.
Nicoll v.
Strachan.

I am satisfied that the Sheriff has made a mistake here. It is clear that the appellant had a perfect right to shoot ground game, and while it might not be quite in accordance with sporting practice and, indeed was, strictly speaking, illegal to shoot at game upon, or in the immediate vicinity of, a public road, he nevertheless was otherwise doing nothing which in my opinion could be characterised as illegal.

In this case the accused shot at and hit a rabbit upon the public road. It ran through the hedge and dropped apparently dead in the respondent's field. Seeing this, the accused sent his dog to retrieve the rabbit, which was showing no signs of life. I think we must assume that the animal was dead; but whether that be so or not, in my opinion it makes no difference to the decision of the case. It is sufficient that the animal was wounded and no longer able to make its escape.

I cannot accept the proposition that, when a man shoots an animal which goes a few yards into neighbouring ground and then appears to fall helpless, he becomes a trespasser if he crosses the march or sends his dog to pick up the game and it turns out to be alive. It has not been so held in the decisions. There is nothing of the nature of pursuit of game when one only crosses the march to pick up an animal or bird which is helpless and apparently dead. I do not leave out of consideration the sound *dictum* of Lord Adam,¹ that "a person may have a right to be on lands and yet if, after entering upon them, he proceeds to commit illegal acts, he may be convicted of being on the lands for an illegal purpose." For example, he may be upon the land for the purpose of scaring crows or shooting rabbits. If partridges or pheasants get up and he shoots at them he in that moment becomes an offender by pursuing game.

In this case we are dealing with something quite distinct from these offences which I have figured. The Sheriff does not suggest that the appellant went on the lands with any intention of pursuing game. He was merely seeking by means of his dog to take possession of an animal which was apparently dead or moribund. And, in my opinion, he was committing no offence in so doing.

I have come to this conclusion independently of decided cases but consideration of these confirms me in my view. I leave out of account the class of case referred to by Lord Adam. The offence with which the appellant was charged is, in the words of Lord Justice-Clerk Moncreiff,² "that of committing a trespass by entering or being, in the daytime, upon any land without leave of the proprietor in search or pursuit of game, or of

Boddan, (1828) Syme, 303; Lawrie v. M'Arthur, (1880) 8 R. (J.) 2, 4 Coup. 346. *For the Respondent*.—Maxwell v. Marsland, (1889) 16 R. (J.) 48, 2 White, 176; Rankine on Land Ownership, (4th ed.) 154 *et seq.*

¹ Maxwell v. Marsland, 16 R. (J.), at p. 51, 2 White, 176.

² Macdonald v. Maclean, 6 R. (J.) 14.

Nov. 21, 1912. deer, and a number of other wild animals enumerated." The statement of the law there laid down is unanswerable. A man who is on the land looking for something he has shot does not commit a trespass in pursuit of game unless by overt act he shoots at or otherwise tries to capture game there. In this connection I should refer to two important statements which I find in the opinions of Lord Justice-Clerk Boyle and Lord Mackenzie in the case of *Donald v. Boddan*¹ which was cited to us. The Lord Justice-Clerk says (p. 310): "In prosecutions for acts strictly penal, we must look narrowly to the facts which are proved in support of the charge, and in doing so in this case, we can find no grounds for holding that the defender was shooting or hunting on Danevale Park. The hare was severely wounded. He saw it dodge across into some whin bushes, forty or fifty yards over the march, and his going first to the farmer's house for a dog, takes away the possibility of his having entered with intention to hunt or hawk." Lord Mackenzie adds: "The presumption here is that he believed the hare to be dead, and that he entered, not to chase, but to find." All these words, with the exception of what is said about the dog, apply with equal force to the present case. Accordingly, I think that we should answer the question in the case in the negative.

Nicoll v.
Strachan.

Lord Justice-
Clerk.

LORD DUNDAS.—I agree with your Lordship. The question is whether on the facts found proved by the Sheriff-substitute the appellant was guilty of a trespass under the Game (Scotland) Act, 1832, section 1. The case is not stated with perfect clearness, but I think we must take it that the rabbit was shot at upon the public road—I do not pause to consider whether it was a proper thing for the appellant to fire at ground game on a public road—that it entered the respondent's land and there fell dead or moribund and helpless; and that the appellant's dog retrieved it.

The Act of 1832 was passed to prevent "trespasses upon property by persons in pursuit of game"; and section 1 enacts that "if any person whatsoever shall commit any trespass by entering or being, in the daytime, upon any land, without leave of the proprietor, in search or pursuit of game," he shall, upon summary conviction, be liable to the penalties provided by the Act. According to the fair meaning of the words quoted, I do not think that a man who picks up a rabbit, shot in the manner described, and lying dead or helpless within someone else's private ground, should be held guilty of a "trespass in search or pursuit of game." The cases of *Kenyon*² and *Macdonald*,³ to which we have been referred, seem to corroborate this view, if authority is wanted.

LORD GUTHRIE.—I am of the same opinion. The case is not very satisfactorily stated. It is said that the rabbit entered the glebe and fell; it is not stated whether it was dead. It is also said that the dog was sent for the rabbit; but it does not appear from the case that the rabbit was retrieved. It is stated that the rabbit entered the respondent's ground alive, and it is difficult to see how it could have done so in any other condition. I think, however, we must take it that the rabbit was actually

¹ Syme, 303.

² 34 L. J. (M. C.) 87.

³ 6 R. (J.) 14.

retrieved, after it had fled into ground where the appellant had no right to Nov. 21, 1912.
 go. Mr Normand admitted, I think, that he would have no case if the rabbit was actually dead when the dog was sent to retrieve it. In my ^{Nicoll v.} ~~Strachan.~~
 opinion he must also fail if the rabbit was moribund or apparently dead. ^{Lord Guthrie.}
 We were referred to a passage in Mr Rankine's Law of Land Ownership from which it would appear, according to Mr Normand's contention, that it was an offence to pursue across the boundary game which was only wounded, though shot on the sportsman's own side of the march. It is clear, however, from the passage quoted to us and from the case cited by Mr Rankine in support of his statement,¹ that what is meant is that an offence is committed by pursuing game which is plainly only slightly wounded and not otherwise. Accordingly, on the facts as they have been stated to us, I agree with your Lordships that the question should be answered in the negative.

THE COURT answered the question of law in the negative, sustained the appeal, and quashed the conviction.

A. MENZIES, S.S.C.—ALLAN LOWSON & HOOD, S.S.C.—Agents.

JOHN J. M'INTYRE (Police Court Procurator-Fiscal, Glasgow),
 Complainer (Appellant).—*A. O. M. Mackenzie, K.C.—Crawford.*
 KENNETH E. M'PHERSON, Respondent.

No. 6.

Nov. 21, 1912.

Statutory Offences—Tramways—Refusal to pay tramway fare—Glasgow Corporation Tramways Acts—Breach of bye-laws of Glasgow Corporation—Complaint—Relevancy—Statute.

M'Intyre v.
 M'Pherson.

The bye-laws and regulations made by the Town-Council of Glasgow in terms of their Tramways Acts contain the following provisions :—
 Bye-law No. 3 provides that every passenger shall pay his legal fare to the tramway conductor, but imposes no penalty for failure to do so. Bye-law No. 4 provides that any person evading or attempting to evade payment of his fare shall be liable to the penalties prescribed in these bye-laws. Bye-law No. 26 provides that any person committing a breach of the bye-laws shall be liable to a specified fine.

A complaint charging the accused with failing or refusing to pay a tramway fare contrary to bye-law No. 3 was dismissed as irrelevant by the magistrate, on the ground that no offence was constituted by that bye-law the only offence as to fares being evasion of payment under bye-law No. 4.

Held that bye-law No. 3, read, as it must be, along with bye-law No. 26, constituted an offence, and that the complaint was relevant.

KENNETH E. M'PHERSON was charged in the Central Police Court of Glasgow on a summary complaint at the instance of John J. M'Intyre, Procurator-fiscal. The charge in the complaint was that the accused did on 20th April 1912, while a passenger in a Glasgow Corporation tramway car, "fail or refuse to pay upon demand to" the car conductor "the legal fare for the distance so travelled" by him, "as specified in the table of fares exhibited in said tramway car, contrary to the bye-laws and regulations made by the Lord Provost, Magistrates, and Town-Council of Glasgow, under the powers con-

HIGH COURT.
 Lord Justice-
 Clerk.
 Lord Dundas.
 Lord Guthrie.

¹ Donald v. Boddan, Syme, 303.

Nov. 21, 1912. *ferred by the Glasgow Corporation Tramways Acts, 1870 to 1893, and duly confirmed by the Sheriff of Lanarkshire on 6th June 1894, and continuing in force under and in virtue of the Glasgow Corporation (Tramways Consolidation) Order Confirmation Act, 1905, and the Glasgow Corporation (Tramways Consolidation) Order, 1905, sections 54, 57, 58, 78, and 88 thereof, and particularly bye-law No. 3 of said bye-laws.* . . .*

M'Intyre v.
M'Pherson.

The Stipendiary Magistrate (Neilson) having dismissed the complaint as irrelevant, the complainer obtained a stated case for appeal.

The case set forth:—"In my opinion the terms of bye-law 3 are not operative for a prosecution except through bye-law 4. There is no offence of failing to pay a fare on demand. The only offence constituted is that of evading payment, or attempting to evade payment, for which accordingly it is necessary to libel bye-law 4. The express offence under bye-law 4 (c) is inconsistent with and supercedes a general offence under bye-law 3. Their co-existence would infer two different offences, one under bye-law 3 of failing to pay not amounting to evasion of payment, and the other under bye-law 4 of the offence of evading payment. Bye-law 4, in my opinion, governs and restricts bye-law 3.

"Two duties of a passenger are dealt with in bye-law 3; they are (first) to pay the fare upon demand, and (second) to accept a ticket. But under bye-law 4 (b) it is clear that failure to accept a ticket under bye-law 3 is not *per se* an offence, as the case is provided for and a remedy furnished under bye-law 4 (b). Similarly, in my view, bye-law 4 (c) makes it clear that failure to pay the fare under bye-law 3 is not *per se* an offence in view of the express provision of a penalty for evading payment. Moreover, the power to detain a passenger expressly conferred by bye-law 4 (c) arises only in the case of a passenger evading payment of his fare. The distinction involved

* These bye-laws and regulations provide, *inter alia* :—" (3) Every passenger shall, upon demand, pay to the conductor, or other duly authorised officer of the Corporation, the legal fare for the journey, as specified in the table of fares exhibited in the car, and a ticket corresponding thereto shall be delivered to such passenger by the conductor, and such passenger shall accept such ticket. . . . (4) (a) Every passenger shall show his ticket to any duly authorised officer of the Corporation when required by him so to do. (b) Any passenger failing or refusing to accept or to show his ticket as aforesaid shall be required to pay the fare from the place whence the car by which such passenger is conveyed started to the end of his journey, and in default of payment of such fare shall be liable to the penalty prescribed by these bye-laws. (c) Any person travelling, or having travelled in any car who evades or attempts to evade payment of his fare, or any person who, having paid his fare for a certain distance, knowingly proceeds in any such car beyond that distance without paying the additional fare for the additional distance, and with intent to evade payment thereof, shall be liable to the penalty prescribed by these bye-laws. And it shall be lawful for any officer or servant of the Corporation, and all persons called by him to his assistance, to seize and detain any such passenger whose name or residence is unknown to such officer or servant, until such passenger can be conveniently taken before a magistrate, or until he be otherwise discharged in due course of law. . . . (26) Any person offending against, or committing a breach of, these bye-laws and regulations, or any part thereof, shall be liable to a penalty not exceeding forty shillings, provided always that the Judge or Judges before whom any penalty is sought to be recovered may order the whole or part only of the same to be paid, or may remit the whole."

is more than a technicality, and is of public concern. Temporary inability to pay a fare on demand is an occasional accident of common life when there is no desire whatever to evade payment. The bye-laws as I read them recognise this, and reserve penal consequences for cases of *mens rea*.

Nov. 21, 1912.

M'Intyre v.
M'Pherson.

"Holding that bye-law 4, both as regards the taking of a ticket and the payment of the fare, is the only provision applicable in a prosecution, and excludes proceedings solely libelled under bye-law 3, I dismissed the charge as irrelevant.

"The objection to want of specification of the amount of the fare I did not think necessary to consider."

The questions of law were :—" (1) Was the complaint relevant ? (2) Was the specification as regards the fare sufficient ? "

The appeal was heard on 21st November 1912. At the hearing the respondent did not appear.

LORD DUNDAS.—This is an appeal by way of stated case against a deliverance of the Stipendiary Magistrate in Glasgow, by which he found a certain complaint irrelevant, and dismissed it. The complaint that is brought against Mr M'Pherson is that, while a passenger in a Glasgow tramway car, he failed or refused to pay upon demand to the conductor of the car the legal fare for the distance travelled by him ; and that is said to have been in contravention of the bye-laws and regulations made by the Magistrates of Glasgow under their statutory powers, and particularly of bye-law 3. The bye-laws are produced, and we have them before us.

I think the result arrived at was wrong. The learned Stipendiary states that in his opinion the terms of bye-law 3 are not operative for a prosecution except through bye-law 4 ; and that there is no offence of failing to pay a fare on demand. I differ from the Magistrate. I think that bye-law 3 does constitute an offence if read along with bye-law 26, as, in my judgment, it must be. The scheme of the bye-laws, as it seems to me, is not to fence each bye-law as it is mentioned with the sanction of a penalty expressly and severally, but to group all the offences together under clause 26, with one common clause of penalty applicable to all. In bye-law 3 we read that every passenger shall, upon demand, pay to the conductor the legal fare. It is quite true that that bye-law by itself does not contain any sanction by way of penalty ; but when we come to bye-law 26 we find that any person offending against, or committing a breach of, these bye-laws and regulations, or any part thereof, shall be liable to a penalty. Certainly bye-law 3 is part of the bye-laws and regulations.

The Magistrate goes on to say that the only offence constituted is that of evading payment, or attempting to evade payment, for which accordingly it is necessary to libel bye-law 4. As I have already said, I do not agree with that, because I think there is a separate offence constituted by bye-law 3. The Magistrate proceeds to say that the co-existence of the two bye-laws would infer two different offences, one under bye-law 3 of failing to pay, not amounting to evasion of payment, and the other under bye-law 4 of the offence of evading payment. I think there are two offences, and I think they are quite distinct, the one, that which is struck at by bye-law 3, is refusal to pay on demand, and the other in bye-law 4 is evasion of payment, which seems to me to be quite a different thing, and which

Nov. 21, 1912. might be practised or attempted in a variety of manners, which it is unnecessary to specify but which might easily be conjectured. One can imagine, for example, that a person might stand upon the car, and delay making payment of his fare, and then might slip off the car, or attempt to do so, and thus evade, or attempt to evade, payment. That might be done although there had not been a demand. The two things are quite distinct the one from the other.

M'Intyre v.
M'Pherson.
Lord Dundas.

The Magistrate goes on to say that temporary inability to pay a fare on demand is an occasional accident of common life when there is no desire whatever to evade payment. That, I take it, may be true enough. But then he says: "The bye-laws, as I read them, recognise this, and reserve penal consequences for cases of *mens rea*." I think there is a *non sequitur* about that. It seems to me that, if there were a *bona fide* case of temporary inability to pay from some accidental cause, it is almost inconceivable that a prosecution would be brought at all. One cannot but suppose that the authorities would have too much sense to bring it, but if it were brought, I think one could rely on the good sense of the Glasgow Magistrates to throw the case out. It seems to me that the existence of *mens rea* is implied in bye-law 3 as in the other bye-laws. On the other hand, the result of the Stipendiary's decision would be, it appears to me, to read bye-law 3 out of the bye-laws altogether. I think that would be a misfortune, because it seems to be a useful enough and reasonable enough bye-law in itself. When one looks at the bye-laws as a whole, I think one can see that the basis of the decision of the Court below is wrong, because, as I have pointed out, there are a number of offences which have not specially attached to each of them the sanction of a penalty, and which, unless they can be read along with section 26, would be rendered futile, and might as well be struck out. Mr Mackenzie went through a number of them, but one may just instance by way of example bye-laws 2, 7, 11, and 14, to go no further. I think that way of putting the matter amounts almost to a *reductio ad absurdum* of the decision against which this appeal is taken. I am, therefore, for answering the first question in the affirmative.

With regard to the second question, I do not propose to say much. The objection to the specification of the complaint consisted in this, that while the respondent is charged with failing to pay his legal fare for the distance travelled by him as specified in the table of fares exhibited in the tramway car, the complaint does not specifically inform him of the amount of the fare—whether a penny or a halfpenny, or any other sum. The Stipendiary did not think it necessary to consider that point, and, of course, he had no need to do so because he thought the complaint was otherwise bad. I do not think it is the least necessary for us to consider it very closely or in detail; but, so far as I see, it is not a sufficient ground for holding this complaint irrelevant. I think, therefore, we may answer the second question also in the affirmative.

LORD GUTHRIE.—I am of the same opinion. The Stipendiary, in one part of his statement, seems to put the matter as if, in addition to libelling bye-law 3, bye-law 4 should have been libelled. But I think that what he means is rather that, if there is an offence at all, it only arises under bye-

law 4. The Stipendiary does not found on bye-law 26, but it is clear that Nov. 21, 1912. he cannot have ignored it altogether, because bye-law 4, subsection (c), to M'Intyre v. which he refers, leads necessarily to bye-law 26. It says that the offender M'Pherson. shall be liable to the penalty prescribed by these bye-laws; and it names Lord Guthrie. no special penalties, but throws you at once on bye-law 26.

The bye-laws are curiously framed. In bye-laws 4, 9, 17, 18, and 21 special penalties are prescribed, but it does not therefore follow that, where by other bye-laws a duty is put upon the passenger which he is bound to fulfil, they are not meant to be read along with bye-law 26. Bye-law 3 puts two duties on the passenger, first, to pay the fare, and, second, to accept a ticket. If the passenger does not perform these duties he offends against the bye-law, and bye-law 26 says that in that case he shall be liable to a particular penalty. I therefore agree that the Stipendiary, who seems to have been very properly anxious that this passenger, who had no legal advice, should not be prejudiced thereby, has been misled by a supposed difficulty, which, if the bye-laws be properly read, is no difficulty at all. On the matter of the specification, I concur.

Lord Justice-CLERK.—I am of the same opinion. I think it is impossible to look at these bye-laws without seeing that bye-law 26 is intended to apply to a number of cases which are given in the previous bye-laws, and I am unable to conceive any reason why it should not apply to bye-law 3, in which the duty is imposed upon a passenger of paying his fare and accepting a ticket. It is the obvious duty of every person riding in a public carriage to pay the fare and to accept a ticket, which is necessary for the purpose of inspection. I have not the slightest doubt that bye-law 26 does apply.

The only thing which might lead one to a contrary opinion is that in certain of the bye-laws reference is expressly made to penalties prescribed by the bye-laws. For example, in bye-law 21 it is said the offender "shall be liable to the penalty hereinafter provided." But then that bye-law does not refer to people on a tramcar; it relates only to the orderly conduct of street traffic, the driver of a tramcar being entitled to order everybody out of the way of his car under penalty of punishment. Tramway traffic could not be carried on in any other way. Then in others of the bye-laws it is assumed that a breach of them is punishable under bye-law 26. For example, bye-law 16 provides that a person swearing or using obscene or offensive language "shall, in addition to incurring the penalty hereinafter provided, forfeit his fare, and be summarily removed from the car." And in bye-law 17 it is provided that any person who shall do any damage to a car "shall, in addition to the penalty prescribed by these bye-laws and regulations, be liable to pay the amount of damage done in consequence." It seems to me very plain that it is a necessary implication from these two bye-laws that in every case where a breach of a bye-law is committed a penalty is exigible in respect of the breach, whereas in these two particular cases you have not only the penalty to be exacted, but other penalties as well—in one case the forfeiture of the fare and removal from the car, and in the other liability to pay damage.

I agree with your Lordships that the Stipendiary Magistrate has erred

Nov. 21, 1912. in holding, as he does, that there is no offence in bye-law 3 without going to bye-law 4 (c). As regards the other matter, it is unnecessary to say anything further than what your Lordships have said already.

M'Intyre v.
M'Pherson.

THE COURT sustained the appeal, and answered both questions of law in the affirmative.

CAMPBELL & SMITH, S.S.C., Agents.

No. 7. BENJAMIN TIGHE (Customs and Excise Officer, Glasgow), Appellant.

—*Sol.-Gen. Anderson—J. A. T. Robertson.*

Nov. 22, 1912.

JAMES HAY WILSON, Respondent.—*D. M. Wilson.*

Tighe v.
Wilson.

Statutory Offences—Revenue—Obstructing Revenue Officer—Inland Revenue Regulation Act, 1890 (53 and 54 Vict. cap. 21), sec. 11—Complaint—Relevancy—Specification of statutes.

The Inland Revenue Regulation Act, 1890, sec. 11, imposes a penalty on any person who obstructs an officer "employed in relation to Inland Revenue in the execution of his duty or of any of the powers or authorities by law given to the officer."

The Regulations made by the Commissioners of Custom and Excise under sec. 84 (6) of the Finance (1909-10) Act, 1910, apply to motor spirit the provisions of sec. 112 of the Spirits Act, 1880, under which every dealer in spirits is bound to keep a stock-book open to inspection by any officer of excise.

A licensed dealer in motor spirit was charged under a summary complaint which set forth that the accused did, contrary to the Inland Revenue Act, 1890, sec. 11, obstruct an officer of customs and excise in the execution of his duty by refusing to show him the motor spirit stock-book kept by the accused. The Sheriff-substitute having dismissed the complaint as irrelevant in respect that the Finance (1909-10) Act, 1910, and relative regulations were not libelled—

Held that it was unnecessary to libel these; and that, as the section creating the offence and the manner in which the offence had been committed were set forth, the complaint was relevant.

HIGH COURT. JAMES HAY WILSON, licensed dealer in motor spirit, Glasgow, was charged in the Sheriff Court at Glasgow on a summary complaint at the instance of Benjamin Tighe, officer of customs and excise at Glasgow. The charge against the accused was "that on 12th June 1912, in your premises at 6 Nithsdale Street aforesaid, you did obstruct, molest, and hinder William Meldrum Smith, 8 Abbotsford Place, Glasgow, he being an officer of customs and excise, and a person employed in relation to the revenue of the United Kingdom, imposed as duties of excise, in the execution of his duty, by pushing him from near the counter towards the door of the premises, and by refusing to allow him to inspect the motor spirit stock-book kept by you, contrary to the Inland Revenue Regulation Act, 1890, section 11."

The Sheriff-substitute (Boyd) having dismissed the complaint, the complainer appealed on a stated case. The case set forth that, objections to the relevancy of the complaint having been stated and repelled, the accused pleaded not guilty, and that evidence was led. The case also stated:—"The first witness for the prosecution was the said William Meldrum Smith, and he deponed that the obligation to keep a motor spirit stock-book was contained in the Finance (1909-10) Act, 1910, and the Regulations, dated 29th July 1910, made by the

Lord Justice-
Clerk.
Lord Dundas.
Lord Guthrie.

Commissioners of Customs and Excise under section 84 (6) of the said Act, which Regulations incorporated the 112th and 113th sections of the Spirits Act, 1880, and made them applicable to motor spirit.* He produced the said Regulations, a form of notice relative to motor spirit (a copy of which notice he deponed had been sent to the respondent), and a duplicate of the motor spirit dealer's licence issued to the respondent.

Tighe v. Wilson.

"After hearing this witness, I held that the Finance (1909-10) Act, 1910, and relative Regulations should have been libelled, and dismissed the complaint in respect that, as framed, it did not constitute a contravention of the Inland Revenue Regulation Act, 1890, section 11."

The question of law was:—"Is the complaint relevant without specification of the Finance (1909-10) Act, 1910, and Regulations above referred to?"

The appeal was heard on 22nd November 1912.

Argued for the appellant;—The complaint was relevant. Under section 19 (1) of the Summary Jurisdiction (Scotland) Act, 1908, it was sufficient to set forth the offence in the words of the statute contravened; but the prosecutor here had done more for he had given the particulars desiderated in *Renton v. Ramage*.¹ The offence charged was obstruction of the officer in the discharge of his duty. That offence was created by the statute libelled; and the regulations and statutes which the Sheriff-substitute held should have been libelled were not essential to the charge.

Argued for the respondent;—But for the Act of 1910 and relative regulations the respondent's conduct could not be a contravention of the 1880 Act. The 1910 Act and relative regulations were, therefore, essential to the charge. There was no obstruction of the officer unless the respondent was under a duty to exhibit his stock-book,

* The Inland Revenue Regulation Act, 1890 (53 and 54 Vict. cap. 21), enacts:—Sec. 11. "If any person by himself or by any person in his employ obstructs, molests, or hinders—(a) an officer or any person employed in relation to inland revenue in the execution of his duty, or of any of the powers or authorities by law given to the officer or person; or (b) any person acting in the aid of an officer or any person so employed; he shall for every such offence incur a fine of one hundred pounds."

The Spirits Act, 1880 (43 and 44 Vict. cap. 24), enacts:—

Sec. 112. "(1) Every rectifier, dealer, and retailer must provide himself with and keep a stock book according to a pattern to be obtained on application to the proper officer, and must, on receiving any spirits, and also on sending out or delivering any spirits required to be accompanied by a certificate, enter in his stock book the particulars specified in that behalf in the Fourth Schedule. . . . (3) He must keep the stock book in his premises, open to inspection by any officer, and must allow any officer to make any entry therein or take any extract therefrom."

Sec. 113. "If a rectifier, dealer, or retailer (a) fails to obtain, provide, keep, produce, or return a certificate book or a stock book as by this Act required . . . or (b) hinders or obstructs any officer in examining a certificate book or a stock book . . . he shall for each offence incur a fine of one hundred pounds."

This section is made applicable to motor spirit by Regulations, dated 29th July 1910, made by the Commissioners of Customs and Excise under sec 84 (6) of the Finance (1909-10) Act, 1910 (10 Edw. VII. cap. 8).

¹ 1910 S. C. (J.) 100, 6 Adam, 266.

Nov. 22, 1912. and the proper mode of charging the respondent would have been to libel that he had refused to show a book which he was bound to keep and produce in terms of a specified statute or regulation. The case of *Macrorie v. Bird*¹ was precisely in point.

Tighe v.
Wilson.

LORD JUSTICE-CLERK.—This case at first sight presented a certain amount of complication, but I have come, and I think your Lordships have come, to the conclusion that it is much simpler than it appeared to be. In the Inland Revenue Regulation Act of 1890 it is made an offence to “obstruct, hinder, or molest” an officer of the revenue engaged in the execution of his duty, and if that is done a penalty is incurred.

Now, where a charge is made that A B, being an officer of the Customs and Revenue Department, was on a particular occasion, contrary to the Inland Revenue Regulation Act, 1890, section 11, obstructed or hindered or molested in the execution of his duty, then, if it is stated what that duty was, I think the prosecutor has done all that is required of him. I take it that that clause of the statute of 1890 must apply, not merely to the officer’s duties under the law as it stood at that date, but that it necessarily applies to such further duties as may subsequently be laid on him. The duties vary from time to time; some may be cancelled and others may be added; but if it is alleged by the prosecutor that an officer was engaged in the execution of his duty in doing an act which is specified and which is undoubtedly within his duties, then nothing more is required. I cannot see that it is necessary to do more than state what the act done was, and thereafter to add that the officer was obstructed in the execution of that act contrary to the Inland Revenue Regulation Act of 1890, section 11. The prosecutor is bound—not indeed necessarily at the first stage of the case, though he could do it quite well then, and it is the essence of the case he has got to prove—to state that what the accused is charged with is contrary to some specified Act and section. Well the prosecutor has done that here. He has set forth that the accused has committed a breach of an Act, and he states that in the very words of the Act, and, according to the recent Act of Parliament, that of itself would have been in the ordinary case quite sufficient. But here, most properly and almost necessarily, something more was set forth, because, of course, in the case of the obstruction of an officer of revenue in the execution of his duty, as in the case of a police officer in the execution of his duty, it is only fair to the accused to state how he obstructed the officer.

In this particular case the prosecutor gives the accused distinct intimation that it was by pushing the officer—which is, of course, obstructing him—and by refusing to allow him to examine a motor spirit book which he, as an officer of revenue, was entitled to examine. The accused was a person who had a licence to sell motor spirit, and if he had a licence to sell motor spirit, surely he must have known the conditions on which his licence rested. He gets the notice that he was obstructing by refusing to allow his motor spirit book to be inspected. That is quite a sufficient intimation to him of what he is charged with to entitle the prosecutor to ask for the penalty. Of course, if at the trial he can come forward and say that

¹ 1911 S. C. (J.) 105, 6 Adam, 527.

he never was a dealer in motor spirit, that he never took out a licence Nov. 22, 1912. which subjected him to the rules and regulations made under the Act of Parliament requiring him to keep such a book, then he would be acquitted on the merits. But I cannot see how it could be said that what he is charged with here is a breach of the regulations. The regulations required him to do certain things and to refrain from certain other things. But the accused did not commit any breach of the regulations as regards his motor spirit book, either by not producing it or by not keeping it in order, or so on. He may have kept his book in perfect order. He may have been in every respect free from blame regarding anything he was doing or had done. All that may well be; for the charge is not that the regulations were infringed, but that the Act of 1890 was contravened. Notice is clearly given that it is a contravention of the Act of 1890 that is charged. It seems to me that that is perfectly sufficient, and that we must hold here that the Sheriff erred in disposing of the case as he did.

LORD DUNDAS.—I am of the same opinion. I agree in thinking that the complexity of this matter is more apparent than real. The charge is really one of obstructing an officer in the execution of his duty. The words of section 11 of the Act of 1890 are echoed, and the penalty imposed by that section is sought to be recovered. I see no need for more in the complaint. We have nothing here to do with the Finance Act of 1910 or the regulations made under it. Motor spirit is only introduced into the complaint in connection with the description of a book which it is alleged the officer was obstructed from examining or inspecting. That seems to me to end the matter. I should only like to add, since the case of *Macrorie*¹ has been so much commented upon, that I have no wish to alter or modify anything that I there said; but the present case is obviously different; and *Macrorie's* case¹ can be useful here only by way of contrast. I agree with your Lordship in thinking that the question ought to be answered in the affirmative.

LORD GUTHRIE.—I am of the same opinion. I think the ground stated by your Lordships is sufficient, namely, that the Finance Act of 1910 and the regulations under it, which it is said should have been libelled as well as the Act, are not in question. The case of *Macrorie*,¹ to which we were referred, does not apply. There were two essential points there:—first, the section which had been libelled was limited to carriages as defined by the Act of 1869, and excluded the idea of motor cars altogether; and secondly, as Lord Dundas said in his judgment, “the sole section libelled, namely, section 22 of the Revenue Act of 1869, neither creates an offence nor imposes any penalty therefor.” It is clear that neither of these points arises in this case.

THE COURT answered the question in the affirmative.

ROBERT PRINGLE, W.S.—PATRICK & JAMES, S.S.C.—Agents.

¹ 1911 S. C. (J.) 105, 6 Adam, 527.

No. 8.

WILLIAM HOUSTON ROGER, Appellant.—*Horne, K.C.—Fenton.*

Nov. 23, 1912.

JAMES POLLOCK STEVENSON (Procurator-Fiscal, Kilmarnock).—

*Sol.-Gen. Anderson—Gillon, A.-D.*Roger v.
Stevenson.

Statutory Offences—Coal mine—Maximum period of consecutive underground employment—Coal Mines Regulation Act, 1908 (8 Edw. VII. cap. 57), section 1 (1) (2) and (7)—Workmen working in shifts—Applicability of provisions to firemen.

The Coal Mines Regulation Act, 1908, enacts, sec. 1, subsec. 1, that a workman shall not be below ground for more than eight hours during any consecutive twenty-four; subsec. 2, that there is no contravention of this provision in the case of a workman working in a shift, if the period between the times at which the last workman in the shift leaves the surface and the first workman in the shift returns to the surface does not exceed eight hours; subsec. 7, proviso (a) that in the case of a fireman the maximum period for which he may be below ground is nine hours and a half.

Held that the provisions of sec. 1, subsecs. 1 and 2, apply to firemen (with the modification that in their case nine and a half hours is to be substituted in each subsection for eight hours); and accordingly, that there had been no contravention of the Act in the case of two firemen, members of a shift, who had been underground for more than fifteen hours, in respect that less than nine and a half hours had elapsed between the time when the last member of the shift left the surface and the first member returned thereto.

Observed that the question whether men are working in shifts or not is a question of fact for the Judge who tries the case, and is to be determined on a strict view of the definition of a shift contained in sec. 1 of the Act.

HIGH COURT. ON 3rd January 1912 William Houston Roger, manager of the Lord Justice-General. Montgomeryfield Colliery, Ayrshire, was charged in the Sheriff Court Lord Kinneir. at Kilmarnock on a complaint at the instance of James Pollock Lord Mac-
kenzie. Stevenson, Procurator-fiscal, with the concurrence of the Home Secretary, which set forth that being the manager of the mine, he "did on . . . (2) 24th October . . . (5) on 3rd November all in the year 1911, fail to cause a register to be kept at said colliery, being a mine within the meaning of the Act first hereinafter mentioned, in the form prescribed by the Secretary of State, containing the particulars prescribed by him, made and certified by the owner, agent, manager, or under manager of the said mine, with respect to the cases in which the persons named in column 1 of the schedule hereto annexed, all workmen employed in the said mine, were below ground therein for the purpose of their work, and of going to and from their work, during the period specified in column 2 of said schedule, and the cause thereof, contrary to the Coal Mines Regulation Act, 1908, section 2 (1)." *

* The Coal Mines Regulation Act, 1908 (8 Edw. VII. cap. 57), enacts:—

Sec. 1. "(1) . . . A workman shall not be below ground in a mine for the purpose of his work, and of going to and from his work, for more than eight hours during any consecutive twenty-four hours. (2) No contravention of the foregoing provisions shall be deemed to take place in the case of a workman working in a shift if the period between the times at which the last workman in the shift leaves the surface and the first work-

The schedule referred to contained the following entries :—

Nov. 23, 1912.

COLUMN I. Workmen Employed in said Mine.	COLUMN II. Period Workmen were Employed in said Mine.
<i>2nd Charge.</i>	
Allan M'Murtrie, Townfoot, Dreghorn, .	From 6.5 A.M. till 3.25 P.M. on 24th October 1911.
Stewart Jones, Greenwood Rows, Dreghorn,	Do.
James Hunter, Greenwood Rows, aforesaid,	Do.
John Matthews, Cotton Row, Irvine, .	Do.
<i>5th Charge.</i>	
Arthur Clemenson, Annick Road, Irvine, .	From 4.15 A.M. till 7.30 P.M. on 3rd November 1911.
James Scollick, Main Street, Dreghorn, .	Do.

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On 26th January 1911 the Sheriff-substitute (D. J. Mackenzie) found the accused guilty as libelled, so far as regarded the second and fifth charges, and sentenced him to a fine of £1, being 10s. for each contravention, and in default of payment to ten days' imprisonment.

The accused obtained a stated case for appeal, which set forth :—

"The following facts were found proved :—(*Second Charge*).—(1) That on 24th October 1911, a miner named Allan M'Murtrie was below ground for the time specified in the schedule to the complaint, namely, from 6.5 A.M. till 3.25 P.M.; that the same applies to the other three miners mentioned, namely, Jones, Hunter, and Matthews. . . . (3) That on 13th November 1911 Mr Masterton, Inspector of Mines, visited the said colliery and inspected the said register at which time no cause was entered in the register for these miners being below ground for the period specified. (*Fifth Charge*).—(4) That the men Clemenson and Scollick, both firemen mentioned in the schedule to the complaint under the 5th charge, on 3rd November 1911, left the surface not later than 4.15 A.M. and returned to the surface at 7.30 P.M., and were thus below ground for the period of 15½ hours, and that the cause of the detention of said men below ground for that

man in the shift returns to the surface does not exceed eight hours . . .

(7) For the purposes of this Act the expression 'workman' means any person employed in a mine below ground, who is not an official of the mine (other than a fireman, examiner, or deputy), . . . and any number of workmen whose hours for beginning and terminating work in the mine are approximately the same shall be deemed to be a shift of workmen. Provided that—(a) In the case of a fireman . . . the maximum period for which he may be below ground under this Act shall be nine hours and a half; . . .

Sec. 2. "(1) The owner, agent, or manager of every mine . . . shall cause a register to be kept in the form prescribed by the Secretary of State, and containing the particulars prescribed by him with respect to the times at which men are lowered into and raised from the mine, and the cases in which any man is below ground for more than the time fixed by this Act, and the cause thereof, and the register shall be open to inspection by the inspector."

Nov. 23, 1912. period was not entered in the register at the date of the inspector's visit. (5) That on 24th October 1911 the men worked in a shift, the last man of which shift left the surface at 6.5 A.M. and the first man recorded as having returned to the surface did so at 8.30 A.M."

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The register kept under the Act at the pit was produced, and the parties were at variance as to whether it did or did not show that the firemen mentioned in the fifth charge were working in a shift.

The following question of law was put for the decision of the Court:—" (2) Whether the men mentioned in charges (2) and (5) should be held to have been below ground for more than the time fixed by the Act of 1908, so as to render it necessary that the cause of their being so should have been entered in the register in accordance with clause 2 (1) of the Act?"

The appeal was heard on 21st June 1912, when the Solicitor-General intimated that he could not support the conviction on the second charge, seeing that the workmen there mentioned were working in a shift, and that less than eight hours had elapsed between the last man leaving, and the first man returning to, the surface. The argument therefore was confined to the fifth charge.

Argued for the appellant;—It must be taken that the men in question were working in a shift, though there was no definite finding of the Sheriff-substitute to that effect. This was the reasonable inference from the register, and there was no finding by the Sheriff-substitute that they were not so working. The effect of section 1 (7) was to extend the maximum of hours allowed below ground, in the case of firemen, to nine and a half hours, and in their case, therefore, "nine and a half hours" must be read for "eight hours" in section 1 (1) and (2). In the present case it appeared from the register that the times of the completion of lowering and the commencement of raising of this shift were 4.15 A.M. and 1.5 P.M. respectively, the interval between these times being eight hours and fifty minutes. There was, therefore, no contravention of section 1, and the conviction should be quashed.

Argued for the respondent;—Under section 1 (7) firemen were in a class by themselves, and in no case, save that of life-saving, might they be detained below ground for longer than nine and a half hours. The provisions of section 1 (1) and (2) did not apply to firemen. They did not, as matter of fact, work in shifts, nor was there any finding in the case that they were so doing. The Sheriff was entitled to consider all evidence on this point, not only that of the register. Had it been proved to him that these men were working in a shift, he would have made a statement to that effect in the case, as he had done with regard to the miners mentioned in the second charge.

The Court remitted back to the Sheriff-substitute to find whether the two firemen in respect of whom the conviction was obtained on the fifth charge were working in a shift.

The Sheriff-substitute reported that the men in question were "members of a shift in the sense of the Coal Mines Regulation Act, 1908." The register showed that the last member of the shift left the surface at 4.15 A.M. and the first returned at 1.5 P.M.

The appeal was further heard on 13th July, when the Court quashed the conviction and intimated that the opinions of the Judges would be delivered at a later date.

On 23rd November 1912 the opinion of the Court (consisting of

the Lord Justice-General, Lord Kinnear, and Lord Mackenzie) was Nov. 23, 1912 delivered by

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LORD MACKENZIE.—[After referring to section 2 (1) of the Coal Mines Regulation Act, 1908]—This is a prosecution for a contravention of this subsection, the charge against the appellant, who is manager of the Montgomeryfield Colliery, being that there were on certain specified dates "workmen" employed in the mine who were below ground for more than the time fixed by the Act, and that no cause was entered in the register at the date of the inspector's visit for these miners being below ground for the periods specified. The Sheriff-substitute has found the appellant guilty of a contravention of the subsection in respect of charges two and five, the other charges being held not proven. The Act provides—[His Lordship quoted section 1 (1) and (2), and, with regard to the second charge, stated that, in view of the fact that less than eight hours had elapsed between the last member of the shift leaving the surface and the first member returning thereto, it was impossible to hold that the miners had been below ground for more than the time fixed by the Act].

The fifth charge deals with two firemen. On 3rd November 1911 they left the surface not later than 4.15 A.M., and returned to the surface at 7.30 P.M. They were thus below ground for fifteen and a quarter hours, and the Sheriff-substitute has found that the cause of the detention of these men below ground for that period was not entered in the register at the date of the inspector's visit.

Now section 1 (7) provides that the expression "workman" means "any person employed in a mine below ground, who is not an official of the mine (other than a fireman, examiner, or deputy), or a mechanic or horse-keeper, or a person engaged solely in surveying or measuring"; provided that "(a) in the case of a fireman . . . the maximum period for which he may be below ground under this Act shall be nine hours and a half." The effect of this subsection is that a fireman is a "workman" for the purposes of the Act. The provisions of section 1 (1) and (2) therefore apply to him, with the modification that nine and a half hours is to be read into these subsections when they are to be applied to the case of a fireman, instead of eight hours which is the period applicable to the ordinary workman. Accordingly, if firemen are working in a shift, then if the period between the times at which the last fireman leaves the surface and the first fireman returns to the surface does not exceed nine and a half hours, then there is no contravention of section 1 (1). The difficulty felt at the first hearing of this appeal was as to whether the two firemen in question were members of a shift or not. We now have the report from the Sheriff-substitute that they were members of a shift in the sense of the Coal Mines Regulation Act, 1908, and with reference to column 1 of the excerpt from the register which is headed, "name or description of shift and number going into the mine." It appears from the register that the number of firemen composing this shift was four; that the last fireman in the shift left the surface at 4.15 A.M., and that the first fireman in the shift to return to the surface did so at 1.5 P.M. The period between these is only eight hours and fifty minutes. The firemen in question were thus not below

Nov. 23, 1912. ground for more than the time fixed by the Act, and the conviction must be quashed.

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It should be pointed out that the question whether these firemen were working in a shift or not is a question of fact for the Judge who tries the case, and in arriving at a conclusion on this point he must be guided by the provisions of section 1 (7), which enacts, "any number of workmen whose hours for beginning and terminating work in the mine are approximately the same shall be deemed to be a shift of workmen." It is obvious that unless a strict view is taken of the words "whose hours for beginning and terminating work in the mine are approximately the same," the Act may be made a dead letter, for by indefinitely prolonging the time of lowering the members of a shift, the time when the last workman leaves the surface and the first workman returns might never exceed eight hours.

THE COURT answered the second question in law in the negative, sustained the appeal, and quashed the conviction.

SIMPSON & MARWICK, W.S.—Sir WILLIAM S. HALDANE, W.S., Crown Agent—
Agents.

No. 9.

THE SUMMERLEE IRON COMPANY, LIMITED, Appellants.—

Macmillan, K.C.—Strain.

Dec. 21, 1912.

WILLIAM THOMSON (Procurator-Fiscal, Hamilton), Respondent.—

Sol.-Gen. Anderson—R. C. Henderson.

Summerlee
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Thomson.

Statutory Offences—Truck Act, 1831 (1 and 2 Will. IV. cap. 37), secs. 2, 3, and 23—Contract as to manner in which wages are to be "laid out or expended"—Payment of wages in coin—Deduction for rent—Contract authorising retention of wages for sums to become due for occupation of house after right of occupation ceases—Master and Servant.

The Truck Act, 1831, section 2, makes illegal any contract between an artificer and his employer containing provisions made directly or indirectly respecting "the manner in which" the artificer's wages "shall be laid out or expended." Section 3 enacts that "the entire amount of the wages earned by or payable to any artificer" shall be actually paid "in the current coin of this realm, and not otherwise," and every payment in respect of wages "by the delivering to him of goods or otherwise than in the current coin aforesaid except as hereinafter mentioned," is declared illegal. Section 23 provides that nothing in the Act shall extend to prevent any employer "from making or contracting to make any stoppage or deduction" from the wages of any artificer for the rent of any house demised to the artificer by the employer.

A company let to its employees houses for the period of their employment with the company. At each fortnightly pay-day the employees signed receipts for their wages, which contained a clause authorising the deduction of their house rent from their future wages, and also this clause:—"In the event of my leaving your employment I authorise you to retain whatever moneys are in your hands until I remove from your house."

On 1st March 1912 the employees left the employment owing to a strike, and from the wages payable on that day the company, in virtue of the authority granted in the receipts signed on the preceding pay-day (16th February), withheld in the case of each employee a sum as

against what might thereafter become due for the occupation of his Dec. 21, 1912. house.

Held that the contract of 16th February, and the retention of part of the wages on 1st March, were both illegal, in respect (1) (*following* *Williams v. North's Navigation Collieries* (1889), *Limited*, [1906] A. C. 136) that they were in contravention respectively of sections 2 and 3 of the Truck Act; and (2) (*following* *M. Farlane v. Birrell*, (1888) 16 R. (J.) 28, 2 White, 126) that they did not fall within the exception in section 23, seeing that, the tenancies having determined with the employment, any sums due after 1st March were not rent, but damages for illegal occupation.

THE SUMMERLEE IRON COMPANY, LIMITED, were charged in the Sheriff Court at Hamilton on a summary complaint at the instance of William Thomson, procurator-fiscal. The charge against the Company was:—"That on or about 16th February 1912, at the colliery office at your No. 3 Pit, Orbiston Colliery, otherwise known as Bells-hill Colliery, situated at Bellshill, in the parish of Bothwell, you did contract with each of John Balmer senior, miner, residing at 10 New Orbiston Rows, Thomas Dorans senior, oncostman, residing at 19 New Orbiston Rows, and Charles Greer, miner, residing at 5 New Orbiston Rows, all at Crossgates, Bellshill, aforesaid, and working the said John Balmer senior and Thomas Dorans senior at your said pit, and the said Charles Greer at your Old Orbiston Pit, Bellshill, during the fortnight ending 24th February 1912, that you should be entitled, in the event of their severally leaving your employment, to retain whatever moneys were then in your hands until they severally removed from the houses respectively occupied by them and belonging to you, and that for rent of, and obligations connected with and arising out of their occupation of, said houses for the period subsequent to their leaving your employment, and on 1st and 2nd March 1912, at your said colliery office, you did contract with each of the said John Balmer senior, Thomas Dorans senior, and Charles Greer that you should stop and deduct, and did stop and deduct, from the wages due on said 1st March 1912 to each of them for their work in your employment at your said pits as aforesaid during the fortnight ended on said 24th February 1912 the sum of £1 for rent and other obligations connected with and arising out of their occupation severally of said houses for the period subsequent to 29th February 1912, when they severally ceased to be employed by you, and did fail to pay in the current coin of the realm to each of them the entire amount of the wages earned by and then payable to them severally in respect of the labour done by them respectively at said pits during the fortnight ended on said 24th February 1912, all contrary to the Truck Act, 1831, sections 2 and 3, whereby you are liable to the penalties applicable to a first offence set forth in section 9 of said Act."*

HIGH COURT.
Lord Justice-Clerk.
Lord Dundas.
Lord Guthrie.

* The Truck Act, 1831 (1 and 2 Will. IV. cap. 37), enacts:—

Sec. 2. "If in any contract hereafter to be made between any artificer . . . and his employer, any provision shall be made directly or indirectly, respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void."

Sec. 3. ". . . The entire amount of the wages earned by or payable

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The Sheriff-substitute (Hay Shennan), after a proof, found the charge of contracting on 1st and 2nd March 1912 to stop and deduct from the wages then due not proven, and *quoad ultra* found the Company guilty as libelled, and imposed a fine of £3.

The Company appealed on a stated case. The case set forth :—

“The following facts were proved :—During the month of February 1912 John Balmer senior and Thomas Dorans were employed by the appellants as miner and oncostman respectively in their No. 3 Pit, Orbiston Colliery, and Charles Greer was employed by them as a miner at their Old Orbiston Pit.

“Each of them lived in a house which was the property of the Company, and they were bound to leave the houses when they left the Company’s employment. In each case the rent was 7s. 8d. per fortnight, the amount being deducted from the wages at the fortnightly pay. At each pay the men signed a receipt in the following terms :—‘Received payment of the above balance, being payment in full of all wages due to me up to this date; and I hereby authorise you to deduct from my future wages the amount of my house rent, and in the event of my leaving your employment, I authorise you to retain whatever moneys are in your hands until I remove from your house; also the sums paid by you for medicine and medical attendance to me; likewise the price of any coals, materials, tools, or implements to be furnished by you to me, the charge for sharpening or repairing tools, and any cash advanced to me.’

“On 16th February 1912 Balmer, Dorans, and Greer signed receipts in the above terms for the pay ending 10th February 1912. In each case 7s. 8d. was deducted for rent down to 10th February, in accordance with the written authority given in the receipt for the previous fortnight.

“On 1st March these men came out on strike in common with all the miners of the country. On that day (which was the next pay-day after 16th February) pay-slips were issued to each of these three men for the pay ending 24th February. Deduction was made for the rent due down to 24th February in accordance with the written authority given on the pay-slip of 16th February. But the appellants had instructed their cashier to retain on 1st March the full wages of workmen occupying Company houses as security for rent accruing after 24th February, and on the said date these workmen were informed by the manager of the pit that their wages were retained

to any artificer . . . in respect of any labour by him done . . . shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be, and is hereby declared, illegal, null, and void.”

Sec. 23. “Nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer, or agent of any such employer, from . . . demising to any artificer . . . the whole or any part of any tenement at any rent to be thereon reserved; . . . nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent . . . Provided always, that such stoppage or deduction . . . shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer.”

for this purpose. Accordingly, before issuing the pay-slip the cashier wrote the word 'Rent' in pencil opposite the net amount of the wages due to Balmer, Dorans, and Greer respectively, and payment was refused on 1st March. On Balmer presenting his pay-slip at the pay-office the cashier put it back saying 'that is rent.' But, as the result of an interview between a deputation of the men and the appellants' manager, the appellants on 2nd March 1912 paid each of the men any surplus of wages over £1 each, intimating that they retained £1 for rent. The men did not consent to the money being so retained, but desired payment in full. Accordingly, on 2nd March Balmer received 4s., and the appellants retained £1, being the balance of the wages due to him. Similarly Dorans received 5s. 2d., and Greer received 10s. 10d., the appellants in each case retaining £1.

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"On 6th March 1912 each of the men got payment in full for the period from 24th February to 29th February, the last day on which they had been at work. No deduction was then made for rent, but a full fortnight since 24th February had not then elapsed.

"The custom in this district is that when a man proposes to leave his employment he gives notice to the foreman on the day he is leaving, lifts his graith, and returns his 'pins' (or tallies), receiving back the deposit of 1s. from the cashier. His right to remain in the house ceases, and he is not entitled to the further service of the colliery doctor. Neither Balmer nor Dorans nor Greer took any of the steps usually taken by men who are leaving. They gave no individual notice to the foreman, but it was common knowledge that the men were not to resume work on 1st March. Balmer and Greer, who were miners, left their graith in their working-places, and they did not return their 'pins.' All three men remained in occupancy of their houses, and Greer had the services of the colliery doctor for his wife. They did not expect the strike to last long, and they expected to be taken back to their old positions. But they did no work during the strike, and the appellants were under no obligation to reinstate them. These men received strike pay from the Union during the strike.

"They resumed work on 8th April 1912. The first pay was on 26th April for the period ending 20th April. The men then owed the appellants for the occupancy of their houses for the eight weeks from 24th February to 20th April, the amount calculated at 7s. 8d. per fortnight, being in each case £1, 10s. 8d. At the pay on 26th April 10s. 8d. was in each case deducted for rent, the appellants imputing the £1 retained on 2nd March in payment of the balance. The appellants in the first instance treated the £1 retained in each case in their books as 'unpaid wages,' and transferred it to the rent account after the men started work in April."

The question of law was:—"On the facts proved was I warranted in convicting the accused?"

The case was heard before the High Court on 19th and 20th November 1912.

Argued for the appellants;—(1) The first charge libelled a contravention of section 2 of the Truck Act, 1831. To that charge there were two answers. In the first place, the section struck at contracts as to the manner, &c., in which wages were to be "laid out or expended." There was no such contract here. The contract merely authorised postponement of payment of the wages, the money in the meantime being carried to a suspense account. The wages were, and

Dec. 21, 1912. remained, the property of the workmen ; and the mere withholding of payment was not a laying out or expending of the money. *M'Farlane v. Birrell*¹ was distinguishable. That was a contract as to the application of the wages ; and it was admitted in argument that the contract fell within section 2 of the Act. In the second place, the contract here was protected by section 23. If there was application of the wages under the contract, it was for rent, which the Act authorised. (2) The third charge labelled non-payment of the wages. But the Act dealt merely with the manner of payment ; it did not seek to enforce payment.² Accordingly, the charge was irrelevant. In *Williams's case*³ the wages were retained as against a debt due to the employer. That was clearly an application of the wages ; it was payment in account, and, therefore, offended against the statute.⁴

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Argued for the respondent ;—(1) Section 2 of the Act prohibited any contract providing “directly or indirectly” as to the expenditure of the wages. Here the contract provided that the wages should be retained and held for a specific purpose. This being so, the contract fell within the prohibition in the section. *M'Farlane v. Birrell*,¹ *Williams's case*,³ and *Lamb v. Great Northern Railway Company*⁵ were distinct authorities in support of the conviction. If the contract fell within the scope of section 2 of the Act it was clear, on the authority of *M'Farlane v. Birrell*,¹ that it was not protected by section 23. (2) Deductions from the wages payable were prohibited by section 3 of the Act.⁶ Payment in coin was required ; and payment in account was not permitted.

At advising on 21st December 1912,—

LORD DUNDAS.—The first branch of the complaint, which the Sheriff-substitute has held proved, charges the appellants that on 16th February 1912 they did contract with certain of their workmen, that they (the appellants) should be entitled, in the event of the workmen severally leaving their employment, to retain whatever moneys were then in the appellants' hands until the workmen removed from the houses respectively occupied by them, and belonging to the appellants, and that for rent of and obligations connected with and arising out of their occupation of the said houses for the period subsequent to their leaving the employment. The clause in the form of each of the workmen's receipts for wages, upon which the charge proceeds as being in contravention of section 2 of the Truck Act, 1831, is as follows :—“And in the event of my leaving your employment, I authorise you to retain whatever moneys are in your hand until I remove from your house.” Section 2 of the Truck Act provides that “if in any contract hereafter to be made between any artificer . . .

¹ (1888) 16 R. (J.) 28, 2 White, 126.

² *Williams v. North's Navigation Collieries* (1889), Limited, [1904] 2 Q. B. 44, at pp. 51, 58, *revd.* [1906] A. C. 136 ; *Hewlett v. Allen*, [1894] A. C. 383, at p. 389.

³ [1904] 2 Q. B. 44, *revd.* [1906] A. C. 136.

⁴ *Hynd v. Spowart & Co.*, (1884) 22 S. L. R. 702, was also referred to.

⁵ [1891] 2 Q. B. 281, at p. 285.

⁶ *Williams v. North's Navigation Collieries* (1889), Limited, [1906] A. C. 136, *per* Lord Atkinson, at p. 145 ; *Hewlett v. Allen*, [1892] 2 Q. B. 662, at p. 666.

and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void." Section 9 imposes penalties on employers entering into contracts or making payments declared by the Act to be illegal. Section 23 makes "particular exceptions to the generality of the law"; and, *inter alia*, excepts and sanctions, "demising to any artificer . . . the whole or any part of any tenement at any rent to be thereon reserved," and "making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent, . . . provided always, that such stoppage or deduction . . . shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer." It can hardly be maintained that the authority to retain moneys in hand when the workman has left the employment is a stoppage or deduction from wages in respect of rent within the meaning of section 23. The contrary was decided by this Court in *M'Farlane v. Birrell*,¹ where the facts bore a strong similarity to those here disclosed. Lord Rutherford Clark stated that "there can be no rent where there is no lease, and no rent can become due after the lease has come to an end." The Lord Justice-Clerk said: "I think it is plain that the sum is not rent in the sense of section 23, but is a deduction intended to cover a sum for the retaining of his house by the miner, when he has no right to do so as a tenant, he having ceased to be in the employment, and therefore having no right to remain." But Mr Macmillan argued with great plausibility that the retention authorised in this case does not amount to a provision, direct or indirect, respecting the manner in which wages due or to become due to the workmen should be "laid out or expended." To retain wages, it was urged, is not to control the manner of their expenditure or outlay; it is at most a temporary appropriation of wages, or a suspension or postponement of payment; it may be a retention for the security of the employer, but that is a perfectly fair and reasonable contract, and one which cannot be held to be struck at by the Act, the true object of which was to prohibit bartering wages for goods. But whatever result one might have reached upon this argument apart from authority, the point seems to me to be conclusively settled against the appellants by the recent decision of the House of Lords in the case of *Williams*.² The rubric bears that "the Truck Act, 1831, does not allow an employer when paying wages to a workman to make any deductions except those expressly sanctioned by the Act." It is true that the case turned principally upon section 3 and not section 2 of the Act; but none the less I think it is an authority upon the construction and effect of the Act as a whole. The House held that the masters were not entitled to set off against wages due to the man a judgment debt for which they held a decree against him, because the Act does not contemplate or allow a striking of accounts between the parties, and payment merely of the balance due upon such an accounting. Lord Lore-

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¹ 16 R. (J.) 28, 2 White, 126.

² [1906] A. C. 136.

Dec. 21, 1912. *burn, L.C.*, with whose opinion Lord Macnaghten expressed his entire agreement, said: "Section 23 provides, with elaborate care, and under strict safeguards, the cases in which debts due from the workman may be deducted from the wages due to the workman when the employer is paying the wages. These provisions would be wholly unnecessary if an employer were already authorised by section 3 to deduct anything that the workman owed him, and to pay in coin merely his balance." Lord Davey, who also agreed, referred with approval to the dicta of A. L. Smith, J. (afterwards M.R.), in *Lamb v. Great Northern Railway Company*,¹ who said that "in sections 2, 3, and 4 of the Act of Will. IV. a drawback is prohibited *per se*, but that a deduction in respect of medicine and medical attendance is allowed under section 23; the Legislature seems undoubtedly to have started by making all drawbacks illegal, but there were some they did not wish to make illegal, and these they legalised by section 23, including a deduction in respect of medicine and medical attendance. The effect of that section is that if there is a contract in writing as to such a drawback, it shall be permitted. That is the meaning of the old Truck Act." It seems to me that the case of *Williams*² must be regarded as an authority for holding that a contract such as we have here, which in effect authorises retention of wages for a specific purpose—*i.e.*, for the security of the employers in the event of a workman continuing in occupation of his house after his tenancy has expired—is struck at by the Act as being a contract which makes provision indirectly respecting the manner in which part of the wages due or to become due shall be expended, seeing that the retention cannot be justified as being a deduction authorised by the exclusive enumeration of section 23.

The other branch of the complaint, upon which the Sheriff has also convicted, deals with the same contract but in a different aspect. It charges the appellants that on 1st and 2nd March 1912 they did stop and deduct from the wages due on 1st March to the workmen for their work done in the employment during the fortnight ending 24th February, the sum of £1 for rent and other obligations connected with and arising out of their occupation of their houses for the period subsequent to 29th February, when the employment ceased; "and did fail to pay in the current coin of the realm to each of them the entire amount of the wages earned by and then payable to them severally in respect of the labour done by them respectively at said pits during the fortnight ended on said 24th February 1912." This is charged as involving a contravention of section 3 of the Truck Act. That section provides "that the entire amount of the wages earned by or payable to any artificer . . . in respect of any labour by him done . . . shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be, and is hereby declared, illegal, null, and void." Mr Macmillan urged that failure to pay wages is not an offence under the Act; and that if wages are not paid, but are retained, stopped,

¹ [1891] 2 Q. B. 281, at p. 285.

² [1906] A. C. 136.

or deducted, it is obvious that they cannot have been paid otherwise than in the current coin of the realm, which is the sole offence struck at by section 3. The argument is superficially plausible and attractive, but on examination it appears to be unsound. The charge is not merely of a failure or refusal to pay wages. This part of the complaint is not, perhaps, perfectly framed; but, read as a consecutive narrative, I think it imports a charge of making payment otherwise than in coin of the realm, for it means that part of the wages, instead of being so paid, was in fact retained and appropriated by the employers, as already explained, for the specific purpose of forming a fund for their further security. The decision in *Williams's case*¹ appears to me to be directly in point, and indeed *a fortiori* of the present case. If the master may not set off his judgment debt, still less can he appropriate part of the wages for a specific purpose of this sort. I think, therefore, that the conviction upon both heads must stand. I confess, however, that I am much in sympathy with the views indicated by Lord Atkinson in *Williams's case*,¹ to the effect that the language of the Truck Act extends in some respects beyond the mischief really aimed at, viz., prohibition of the payment of wages in goods or otherwise than in current coin, and may reach transactions harmless enough in themselves, and not within the spirit of the statute.

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LORD GUTHRIE.—I am of the same opinion. The Sheriff-substitute has found that two out of the three charges brought against the appellants under the Truck Act are proved. The first of these is a pure question of law; the second involves also a question of fact, about which, however, there is no dispute. The points raised for our decision are important, because it is evident that the contract we have here to consider has been framed with a view to avoid the effect of certain cases already decided, in particular, the case of *Williams*,¹ to which Lord Dundas has referred. I am of opinion that the attempt has failed. If the result should be that a contract, beneficial, on the whole, both to employer and employed, and, looking to the objects of the Truck Act, probably not intended to be struck at by the Legislature, is found to be struck at by the terms of the Act, a remedy, and that for the future, can only be obtained from the Legislature. Whether this contract is or is not in that position, I cannot say. It would depend on how it was worked out. If the houses were fairly rented, it would work out advantageously for the workman as well as for the master. If they were over-rented, the result might be unfair for the workman; for, in that case, the owner of the house, being only entitled to damages for illegal occupation of the house after the workman's right to occupy ceased at the termination of his employment, would be receiving more than he was entitled to if he deducted the same amount as that previously paid as rent.

The first charge is aimed at the contract of 16th February 1912, or rather at the portion of it contained in these words: "In the event of my leaving your employment, I authorise you to retain whatever moneys are in your hands until I remove from your house." But it is right to consider at the same time the preceding obligation, namely:—"I hereby authorise

¹ [1906] A. C. 136.

Dec. 21, 1912. you to deduct from my future wages the amount of my house rent." Taking the two clauses together, it is evident that the appellants have endeavoured, in three particulars, to obscure the breach of the Truck Act, which they have committed. In the first place, they introduce the word "retain," as applicable to payment for house occupation after the cessation of employment, instead of the word "deduct," which is used immediately before, in reference to house rent. This has obviously been done to enable them to maintain the argument, which was forcibly urged by Mr Macmillan, that mere retention, without specification of the purpose for which the money is retained, cannot constitute an offence against a statute, which declares illegal, null, and void "any provision . . . made directly or indirectly respecting . . . the manner in which the . . . wages due or to become due to any such artificer shall be laid out or expended." But, construing the agreement, it seems to me clear that the retention contemplated is for a specific purpose, namely, in security against the contingency of the workman, after leaving the master's employment, continuing to occupy his former master's house. In the second place, care is taken to avoid the appearance of retaining or deducting wages, by the use of the phrase "whatever moneys are in your hands." But it is clear that this expression, which necessarily involves construction, not only includes, but primarily refers to, wages. In the third place, when the object for which the money is to be retained is ascertained, by construction, to be payment for the use of a house occupied after employment has ceased, it is found to be associated, in the immediately preceding clause, with house rent. But it is not rent at all, but damages for illegal occupation, as was found in the case of *M'Farlane v. Birrell*.¹

When stripped of these disguises, the contract of 16th February appears to me to be, as is charged in the complaint, in breach of the second section of the Truck Act. This follows from the reasoning of the noble and learned Lords in the case of *Williams*.² That was a stronger case than the present for exemption from the statute. Although the employer held a decree against his workman for payment of a debt, it was found that he was not entitled to set off the amount of the decree against wages due to the workman by deducting it from these wages. The case of *Hevolett v. Allen*³ decided that such a deduction could have been validly made, had there been an antecedent agreement covering it. But, in the absence of such an agreement, it was held, in *Williams's* case,² that such deduction would be in breach of the statute. Now it appears to me that the two main points in the argument which induced the Court of Appeal to hold the deduction to be legal, a decision which was reversed in the House of Lords, were those urged by the appellants in the present case, namely, first, that the contract of 16th February does not violate the primary purpose of the statute, that of prohibiting the payment of wages in goods supplied by or through the employer, and, second, that the Act did not strike at failure to pay wages, which is all that this contract involves, but at payment in an illegal manner.

¹ 16 R. (J.) 28, 2 White, 126.

² [1906] A. C. 136.

³ [1894] A. C. 383.

No doubt the question did not arise in *Williams's* case,¹ as here, under Dec. 21, 1912. section 2 of the Truck Act, but under section 3, for no contract had been entered into bearing on the matter. But the House of Lords adopted and approved the opinion of Lord Justice Bowen in *Hewlett v. Allen*,² where he said: "Payment in account will not do." It follows that, if actual payment, in a case not excepted by sections 23 and 24, otherwise than in current coin, is struck at by section 3, a contract in a certain contingency to make or allow to be made such payment is struck at by section 2.

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On the second charge found proved by the Sheriff-substitute, under the third section of the Truck Act, I think the case is ruled by the case of *Williams*¹ already referred to.

LORD JUSTICE-CLERK.—Your Lordships being agreed, I have, according to the constitution of the Court, no vote, but I desire to say that while I express myself as consenting to the judgment, I do so entirely in respect of the decisions pronounced in the House of Lords, which I cannot but hold, rule the case before us. It is only in deference—a deference I am bound to show—that I yield to these judgments. Had I been free to take my own view, I should have been inclined to hold that the Truck Act did not apply to a case such as that now being dealt with. The purpose of that Act plainly was to put an end to the evils caused by employers, instead of paying what was due to the employees for work done, tendering to them, in lieu of the money wages agreed upon, articles of manufacture, professedly of the value represented by the sum due, or any part of it,—a system which led to scandalous abuses, employees being practically defrauded by being made to take what might or might not truly represent the money due, and which in general practice did not represent the full value. And sometimes goods were foisted on them which they did not wish for, or did not require. Abuses of this description were the reasons influencing Parliament to make it the law that what was to be paid to the servant as wages should be paid in coin of the realm. It appears to me to be a very great stretching of the terms of the Act to make it apply, not to a substitution of something else for money, but to a compulsion upon the employer to pay over the full wages, in cases where the employer may have a good claim against the employee, *e.g.*, where the workman refuses to work for him, but goes on occupying the house which was let to him because he was in the employment, his occupation of the house being legal only while he continues in the employment. Here the parties agreed that in the event of the employee leaving his employment—which, of course, he did when he refused to work—the employer should be entitled to deduct from the wages due sums due for occupation of the employer's house. If that were carried out, would the making of the deduction agreed upon be a failure to pay wages in coin of the realm? If I were in a position to answer that question according to my own judgment, I should be inclined to answer in the negative. There is in such a case no attempt by the employer to induce the workman to accept something other than coin, which is the evil struck at by the statute. The workman has received or taken something of the employer's for which he is undoubtedly

¹ [1906] A. C. 136.

² [1892] 2 Q. B. 662, at p. 666.

Dec. 21, 1912. bound to pay the employer. He takes a benefit by residing in, and holding on to, a house belonging to his employer. The employer is in no way refusing to pay coin. He is only retaining what by bargain he is entitled to retain, as against a debt due to him by the employee. I cannot myself see the ground for holding him to be in breach of the Truck Act.

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Lord Justice-
Clerk.

But the matter has been decided otherwise, and that by the final authority, to which I bow, and therefore I concur in the judgment proposed.

THE COURT answered the question of law in the affirmative, and refused the appeal.

WEBSTER, WILL, & CO., W.S.—SIR WILLIAM S. HALDANE, W.S., Crown Agent—
Agents.

No. 10.

HIS MAJESTY'S ADVOCATE, Respondent.—*Morton, A.-D.*

JOHN SAUNDERS, Appellant.—*Burn Murdoch.*

Mar. 3, 1913.

H. M. Advoca-
te v.
Saunders.

Procedure—Bail—Refusal of bail—Charge of administering poison with intent to murder.

A person charged with administering poison with intent to murder presented a petition to be liberated on bail. The application was opposed by the prosecutor on the ground, *inter alia*, that the precognitions disclosed an aggravated case.

The Sheriff-substitute having *refused* the petition, *held*, on appeal to the High Court of Justiciary, that the petition was rightly refused.

HIGH COURT. JOHN SAUNDERS was charged on indictment with administering poison to his wife with intent to murder her.

Lord Justice-
Clerk.

Having been committed to the prison of Edinburgh he presented a petition to the Sheriff of the Lothians and Peebles for liberation on bail.

The Sheriff-substitute (Macleod) refused the petition.*

Saunders appealed to the High Court of Justiciary, and the appeal was heard before the Lord Justice-Clerk on 3rd March 1913.

It was stated on the appellant's behalf that he had always borne a good character, that he did not desire to avoid his trial and had no intention of leaving the country, and that, as he was a gamekeeper earning £1 a week, it would be impossible for him to leave the country even if he wished to do so. It was further stated that the petitioner's wife was out of danger, so that it was unlikely that a capital charge would be preferred.

* "NOTE.—1. The petitioner is charged with the crime of administering poison to his wife with intent to murder her.

"2. That crime is bailable, *i.e.*, it is the right and duty of the Court to consider whether, in the circumstances of this particular case, bail ought to be granted or refused.

"3. In the light of the result of the analysis, the precognitions disclose a very aggravated case.

"4. The Procurator-fiscal has consulted the Crown officials, and, as instructed by them, he opposes the application on the ground that, if liberated, the applicant would in all likelihood abscond and thus defeat the ends of justice.

"5. In these circumstances it seems to me that I ought to exercise the discretion vested in the Court by refusing the application."

Counsel for the Crown opposed the application, and stated that the Crown papers disclosed an aggravated case. Mar. 8, 1913.

H. M. Advocate v. Saunders.

LORD JUSTICE-CLERK.—So far as I am aware, there has been no case similar to the present one in which bail has been allowed, and I should be very much surprised indeed if there was any precedent for granting this petition. There may be cases, even when the offence is a very heinous one, where the Crown consents to bail being allowed and, when the Crown does consent, the application is always granted. But in cases where the Crown does not consent, and in cases where the information possessed by the prosecutor who has charged the offence points to a very serious crime, I am unable to see how it can be in accordance either with the public interest or with justice to allow bail. An attempt to poison is an approach to the highest crime known to the law; where the victim recovers, the accused is saved from being charged with murder, but, in essence, the crime is the same. Accordingly, for the reasons stated by the Sheriff-substitute, I can see no ground whatever for altering the judgment pronounced by him.

THE COURT dismissed the appeal.*

SIR WILLIAM S. HALDANE, W.S., Crown Agent—WARDEN & GRANT, S.S.C.—Agents.

WALLACE THORNEYCROFT AND ANOTHER, Appellants.—

Horne, K.C.—Leadbetter.

JAMES RENNIE ARCHIBALD (Procurator-Fiscal for Stirling),
Respondent.—*Sol.-Gen. Anderson—R. C. Henderson.*

No. 11.

Mar. 7, 1913.

Thorneycroft
v. Archibald.

Statutory offences—Coal mine—Maximum period of consecutive underground employment—Exceptions—“Meeting danger or apprehended danger”—Coal Mines Regulation Act, 1908 (8 Edw. VII. cap. 57), sec. 1.

The Coal Mines Regulation Act, 1908, enacts, sec. 1 (1), that a workman shall not be below ground for more than eight hours during any consecutive twenty-four, but (2) that no contravention of this provision shall be deemed to take place in the case of any workman who is below ground for the purpose *inter alia* of “meeting any danger or apprehended danger.”

Held that “danger” was limited to danger arising out of some abnormal occurrence, and accordingly that workmen engaged on a Sunday night and Monday morning in repairing falls, such as were expected to occur, and normally did occur, every week when the pit was idle between Saturday and Monday, did not fall within the exception.

WALLACE THORNEYCROFT, managing director of the Plean Colliery Company, Limited, and Peter Inglis, manager of East Plean Colliery, Stirlingshire, belonging to the said Plean Colliery Company, Limited, were charged in the Sheriff Court at Stirling on a complaint at the instance of James Rennie Archibald, procurator-fiscal, which set forth that “on 5th and 6th May 1912, at No. 4 pit, East Plean Colliery, you did connive at Andrew Docherty, pit road repairer [and others], all workmen employed by said Company in said mine, being below ground therein for the purpose of their work and of going to and from

HIGH COURT.
Lord Justice-Clerk.
Lord Dewar.
Lord Hunter.

* The accused was subsequently tried and acquitted.

Mar. 7, 1913. their work for more than eight hours during the consecutive twenty-four hours, commencing at 10 P.M. on Sunday 5th and ending at 10 P.M. on Monday 6th May 1912, viz.:—from 10 P.M. on Sunday 5th to 6 A.M. on Monday 6th May 1912, and from 2.45 P.M. to 10 P.M. on said 6th May 1912: Contrary to the Coal Mines Regulation Act, 1908, sections 1 (1) and 7 (1); whereby you are each liable to the penalty set forth in section 7 (2) of said Act, and in default of payment thereof to imprisonment in terms of section 48 of the Summary Jurisdiction (Scotland) Act, 1908.” *

The accused, after evidence, were convicted by the Sheriff-substitute (Mitchell) and sentenced to a fine or imprisonment.

They craved and obtained a stated case for appeal which set forth that the following facts *inter alia* were admitted or proved:—

“(1) The said Andrew Docherty [and others], all pit road repairers, being workmen employed by said Company in said mine, were below ground in said No. 4 pit for the purpose of their work, and of going to and from their work, for more than eight hours during the consecutive twenty-four hours libelled, viz.:—from 10 P.M. on Sunday 5th to 6 A.M. on Monday 6th May 1912, and from 2.45 P.M. to 10 P.M. on said 6th May 1912, as libelled. (2) The said pit is worked on the single shift system, a full shift working each working day from 6 A.M. till 2 P.M., when alone coal is drawn. In addition there is a repairing shift working each day from 3 P.M. till 11 P.M., and a night shift of a few colliers working in special places at special work from 10 P.M. till 6 A.M. The working was on the long-wall system, and the working face was not advanced at all, or materially, in connection with said night working in special places. (3) The pit is idle every Sunday, and also every alternate Saturday, the idle time extending from 2 P.M. on Friday till 6 A.M. on Monday, or from 2 P.M. on Saturday till 6 A.M. on Monday, on alternate weeks. (4) At the time libelled Saturday had been an idle day, the idle time extending from 2 P.M. on Friday till 6 A.M. on Monday. (5) It was the practice in said pit at the time libelled—and for at least two years before—for a repairing squad or shift to be below ground for the purpose of their work from 10 P.M. on Sunday night to 6 A.M. on Monday morning, and for the same squad of repairers to be below ground for their

* The Coal Mines Regulation Act, 1908 (8 Edw. VII. cap. 57), enacts:—
 Sec. 1 (1). “Subject to the provisions of this Act a workman shall not be below ground in a mine for the purpose of his work, and of going to and from his work, for more than eight hours during any consecutive twenty-four hours. (2) . . . Nor shall any contravention of the foregoing provisions be deemed to take place in the case of any workman who is below ground for the purpose of rendering assistance in the event of accident, or for meeting any danger or apprehended danger, or for dealing with any emergency or work uncompleted through unforeseen circumstances which requires to be dealt with without interruption in order to avoid serious interference with ordinary work in the mine or in any district of the mine. . . . (6) A repairing shift of workmen may, notwithstanding the provisions of this section, for the purpose of avoiding work on Sunday, commence their period of work on Saturday before twenty-four hours have elapsed since the commencement of their last period of work, so long as at least eight hours have elapsed since the termination thereof.”

Sec. 7 enacts that any person who “connives” at a contravention of the Act shall be guilty of an offence, and imposes a particular penalty on the “owner, agent, or manager of the mine” who is guilty of such an offence.

work again between 3 and 11 P.M. on Monday at their usual week-day shift. (6) The men named in the complaint, except two, were regular members of said repairing squad or shift, and were below ground on the dates libelled in the regular course of their duty as members of the squad; and the appellant Peter Inglis knew that said men were such members of said squad or shift, but it was not proved that the appellant Wallace Thorneycroft knew who the members of the squad were. (7) It was the duty of said repairing squad or shift to deal with falls from the roof of the workings in said pit, by removing the fallen material, propping up the roofs where falls had taken place or might be anticipated, and removing stones and material which were likely to fall from the roofs and sides of the workings. (8) When falls have taken place in a pit it is probable that further material which has been loosened will fall unless the roof is secured, and it is necessary that such work as is referred to in No. 7 should be done to insure safe working. (9) Prior to the said repairing squad commencing work on Sunday nights, and during the period when they were at work on such nights, the pit was inspected by firemen, in order among other things to discover any falls from the roof which might have occurred, and any places which might have become insecure and where the fall of material might be anticipated; and it was the duty of the repairing squad to carry out such instructions as might be given to them by said firemen, for the purpose of securing the roof and sides of the workings, so that falls might not take place. On the Sunday night libelled the repairers mentioned in No. 1 *supra* were engaged in this work. On other working days than Monday, as the repairing shift and firemen have not been down all night, the pit is inspected by firemen before the colliers' shift enters at 6 A.M., and if any part of the pit is found to be dangerous the colliers are not allowed to enter it. (10) The object of such prior inspection and the Sunday night work carried out by the repairers under the instructions of the firemen was to make the workings safe for the colliers who were in ordinary course to enter the working places at 6 A.M. on the Monday mornings. (11) There were as a rule more falls from the roof in said pit on Sundays than on other days in the week, which falls required to be dealt with during the Sunday night shifts. The firemen's books, in which the falls are recorded, showed that for the five months, May to September 1912, the percentage of falls on week-days in said pit was about 1·7 while on Sundays it was about 5·9. But otherwise there was no difference between the state of the pit on Sundays and its state on other days. (12) The increased number of falls on Sundays is connected with the idle time from Friday afternoon or Saturday afternoon; but it was not admitted or proved whether said increase was due to the cessation of mining, and the consequent non-advance of the working face causing concentration of roof pressure at one area in this long-wall working, or to the intermission in repairing, nor in what proportion these may have respectively operated. (13) On the said 'idle day,' Saturday, 5th May 1912, though a considerable number of men were in the pit at other work, coal was not being got save by some ten to fifteen men working in special 'developing' places, but their work did not have the effect of causing any substantial advance in the working face. (14) It was not proved that the number or the extent of falls in said pit was unusual, as compared with pits generally or pits in the neighbourhood. (15) The firemen's books showed

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that on Sunday, the 5th of May, there were eight falls in No. 4 pit, one at least of which occurred after 10 o'clock at night; but it was not proved that the falls in said pit requiring to be cleared away by the night shift on the Sunday libelled were unusual in number or extent as compared with falls in said pit on other Sundays before or after; and there was nothing unusual for a Sunday in the condition of the pit on the Sunday libelled, and nothing calling for the attention of the repairers beyond what was to be expected on Sundays. (16) The appellants apprehended, and had reason to apprehend, that falls from the roof would occur during the idle times of the pit, including Sunday nights, and they apprehended, and had reason to apprehend, that such falls would occur between 2 P.M. on Friday, 3rd May, and 6 A.M. on Monday 6th. (17) The appellants apprehended, and had reason to apprehend, that, on such falls occurring, if the roof was not secured and the workings cleared by a repairing squad, the workings would be in a dangerous condition at 6 A.M. on Monday mornings. (18) The appellants had reason to expect that more falls would have to be dealt with on the Sunday night shift libelled (5th May 1912), and so far to apprehend more danger than on week night shifts, but not more than on other Sunday nights, before and after. (19) The appellants personally were not aware that there were any falls in the mine on 5th May, and did not learn of the falls until after that date; and their apprehension of danger was not based on any conditions existing in the pit on that day beyond the conditions on other Sundays. . . . (21) The regular and most convenient time for the repairing squad to go down the pit on week-days was at 3 o'clock, after the firemen who had been on duty since the morning had reported to the firemen who had come on duty for the afternoon, these latter firemen then carrying out, with or through the repairing squad, such repairs as were necessary. If urgent repairs are required on working days after 11 P.M. they are attended to by the night shift of colliers who are at work on these days. (22) On the Monday libelled there was nothing abnormal in the condition of the said pit, and the appellants had no reason to expect more or larger falls or to apprehend more danger for themselves or others in the repairers' foresaid Monday afternoon shift or for the following night shift than in or for other week-day shifts. No fall was reported on the said Monday after 6 A.M. . . ."

The question of law for the opinion of the Court was:—"Was I right in holding, in view of the circumstances above stated, that the appellants had not the benefit of the exceptions in section 1 (2) of the Act, in particular the exception applicable to the case of workmen being below ground for meeting 'any danger or apprehended danger'?"

The case was heard before the High Court on 7th March 1913.

Argued for the appellants;—No offence had been committed, as the men were below ground for the purpose of meeting danger or apprehended danger, or dealing with an emergency.¹ The fact that the danger was of more or less regular recurrence was immaterial, no words of qualification or limitation with regard to danger being found in the section. Subsection (6) of section 1 recognised the necessity of, and permitted, extra underground time in the case of repairers to avoid labour upon Sunday, and as the falls in this pit occurred upon

¹ Coal Mines Regulation Act, 1908, sec. 1 (2).

Sunday the extra time had to be done on Monday. The total underground time of the workmen in the week did not exceed the statutory limit. Mar. 7, 1913.
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Argued for the respondent;—The words of exception in subsection (2) clearly referred to danger of an abnormal and unexpected nature, and not to the ordinary and normal occurrences in a pit. The facts here showed that at the end of every week falls such as those with which these workmen were dealing were to be expected, and had to be repaired. There was nothing abnormal in the events which happened in the pit on the Sunday in question. If the appellants' contention was sound these repairers would be altogether exempt from the protection afforded by the Act. Subsection (6) only permitted an extra shift on Saturday, and could not be extended to cover Monday as well. If any extension were necessary it must be effected by legislation.

LORD JUSTICE-CLERK.—We have had a very able statement from Mr Horne, but I am unable to say that what the Sheriff has held to be a breach of the statute is not a breach of the statute. The statute is intended to prevent miners from being at work more than eight hours in the twenty-four, unless under exceptional and abnormal circumstances. The case made on the part of the appellants is that every Sunday in this pit abnormal circumstances are to be expected. It appears to me, however, that these circumstances in that case cease to be abnormal because they are the regular occurrences that take place on every Sunday. If it be true that the Sunday intervals necessitate more work in the way of repairs than would otherwise be the case, that just means that the pit requires more attention on Monday morning than it does at any other time.

We must distinguish between two things. There is, in the first place, the ordinary attention bestowed on the pit by repairers and brushers, whose business it is—always a more or less dangerous one—to keep the ways and works of the pit in a safe condition. Things are constantly occurring which, although slight at the moment, may, if not attended to, ultimately become dangerous, and it is the regular and ordinary work of the skilled repairer to detect and deal with these occurrences. In the second place, in such pits there are frequent occurrences which are more serious, and which obviously amount to danger or apprehended danger, distinguishable from these ordinary occurrences to which I have referred. Looking at the words of the clause of exceptions in section 1 (2) of the Act and the context in which they occur, I think they do not refer to the danger which will always be present in a pit if it is not looked after, but to some abnormal and exceptionally serious occurrence. The object accordingly of the clause section 1 (2) is plainly to exclude from the prohibition imposed by the Act the case of men who have finished their eight hours' shift, but who, if they left off work, would leave behind them a condition of things tending to exceptional danger. The section permits them to go on and continue working, and make the pit safe where some danger or apprehended danger of a marked kind has supervened. That, of course, is a totally different thing from their being allowed, after they have completed their ordinary eight hours' shift, to begin, after an interval of only eight hours, to work

Mar. 7, 1913. another eight hours' spell. That is the very thing the Act was intended to strike at.

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Lord Justice-
Clerk.

It may be, of course, that in carrying out this Act a little extra expense may be put upon the mineowner. He may have to employ more men for this particular work during the twenty-four hours that follow the Sunday than he would otherwise do, because he cannot use his own repairing squad, who have done their eight hours' work already. He may employ miners to do the work, because we are told that ordinary miners are expected to do such work, as is shown by the statement that "if urgent repairs are required on working days after 11 P.M. they are attended to by the night shift of colliers who are at work on these days." He will, however, have to pay them wages, because they are not winning their own coal, and because, if he did not, they would be thereby losers. That may be his misfortune, but it is one imposed on him by the Act of Parliament, which requires that there shall be provision made for the ordinary repairs of the pit. I must say that I do not understand the idea that because arrangements are made whereby it is necessary for certain men to work more than eight hours unless other men are employed to do the work, that is a reason for excluding the operation of the statute.

The only point which Mr Horne made with some shadow of success was on subsection (6), which allows a repairing shift to commence their period of work on Saturday, before twenty-four hours have elapsed since the commencement of their last period of work, in order to avoid doing work on Sunday, but that does not entitle them, so far as I can see, to do it in any other way than that prescribed—namely, by doing an extra shift on Saturday. It is a different thing altogether to transfer that on to a Monday at the beginning of the week, and give the men sixteen hours' work out of the twenty-four. If there is to be any amendment of this Act it must be done, as the Solicitor-General said, by the Legislature; we cannot interfere with it. For myself I think the Sheriff has made very careful findings indeed, and that on his findings in fact he was justified in coming to the conclusion he did.

LORD DEWAR and LORD HUNTER concurred.

THE COURT answered the question in the affirmative, and dismissed the appeal.

MACPHERSON & MACKAY, S.S.C.—SIR WILLIAM S. HALDANE, W.S., Crown Agent—
Agents.

WILLIAM LEAVACK, Complainer.—*MacRobert*.
JOHN MACLEOD (Burgh Prosecutor, Leith), Respondent.—*Lippe*.

No. 12.

May 27, 1913.

Leavack v.
Macleod.

Procedure—Proof—Oppression—Sentence—Magistrate asking for information from person not witness in case before pronouncing sentence.

In a prosecution in the Police Court for reckless driving it was proved that a lorry driven by the accused had collided with a tramway car. After finding the accused guilty of the offence charged the magistrate inquired of the manager of the tramway company, who was present in Court but who had not been examined as a witness in the case, what was the amount of the damage done to the tramway car, and after the manager had stated the amount the magistrate fined the accused 30s. with the alternative of imprisonment for fifteen days.

Conviction *quashed* on the ground that the information given by the manager was not competently before the magistrate, and that it was impossible to say that his mind might not have been affected thereby in fixing the penalty.

Question whether the same result would have followed had the question been put to the prosecutor.

On 29th January 1913 William Leavack, a carter in Leith, was charged in the Leith Police Court with recklessly driving a horse attached to a lorry. The presiding Magistrate found the accused guilty as libelled and sentenced him to a fine of 30s. with the alternative of imprisonment for fifteen days.

HIGH COURT.
Lord Justice-General.
Lord Kinnear.
Ld. Johnston.

Leavack brought a suspension of this conviction in which it was stated:—(Stat. 3) “ . . . From the evidence it appeared that a tramway car, the property of the Leith Corporation, and the complainant's lorry had come into collision with one another. Thereafter, when both prosecutor and complainant had closed their proofs, and prior to finding the complainant guilty or passing sentence upon complainant, the Magistrate asked the prosecutor the amount of the damage which had been done to the Leith Corporation's tramway car by the collision with the complainant's lorry. The prosecutor replied that he had no information on that point, whereupon the Magistrate called upon Mr Fitzpayne, the manager of the Leith Corporation Tramways, who had made it his business to be in the Court, but who had not been a witness in the case, and had not been sworn, to tell him the damage that the tramcar had sustained. Mr Fitzpayne replied that the damage in question was about thirty shillings. The Magistrate then found complainant guilty of the offence libelled, and fined him thirty shillings with the alternative of fifteen days' imprisonment.” (Stat. 4) “ The complainant maintains that the said pretended warrant or conviction and sentence of 29th January 1913 should be quashed on the ground of corruption and malice and oppression on the part of the Magistrate. The case having been closed, it was incompetent to obtain further evidence thereon; and it was corrupt, oppressive, and malicious of the Magistrate to inquire of and to receive from the manager of the tramways information as to the damage sustained by the said tramcar, said manager not having been either a witness in the cause, nor sworn. . . . Further, the Magistrate in fixing the amount of said fine was guided by the said information obtained as above mentioned, and fixed same with the view of recouping the Corporation for the damage sustained by their tramcar, and he did thereby recover same for said Corporation.”

May 28, 1913.

Renwick v.
M'Dougall.

penalty exceeding £1 but not exceeding £3 being twenty days, whereas the complainer in default of a penalty of £2, 11s. had been sentenced to imprisonment for one month.* Meanwhile three of the Justices had left the Bench and the Courthouse, and of the original Court only Mr M'Call and another Justice remained. The complainer was sent for and brought back into Court, when Mr M'Call intimated to him the mistake which had been made, and said that the sentence of Court would be a fine of £1, with £1, 11s. of expenses, and in default of payment twenty days' imprisonment. The fine already paid by the complainer was not handed back to him before this intimation was made. The sentence as first pronounced was never written out, and did not enter the record of proceedings. The sentence which was recorded was that in which the alternative was twenty days' imprisonment.

The complainer pleaded;—(1) The sentence complained of being irregular and incompetent, the complainer is entitled to suspension as craved. (2) The sentence complained of not having been pronounced by a competent Court should be suspended. (3) The complainer having implemented the sentence pronounced by the Court by which he was tried, the pretended sentence pronounced thereafter by the said two Justices was incompetent and should be suspended.

The case was heard before the High Court on 21st November 1912, when it was remitted to the Sheriff of Roxburgh, Berwick, and Selkirk for inquiry into the facts regarding the trial of the complainer.† It was again heard before the High Court, after the Sheriff had reported, on 19th March 1913, and was sent to a full bench, before whom it was heard on 28th May 1913.

Argued for the complainer;—The sentence originally pronounced

* The Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), enacts:—

Sec. 48. "The periods of imprisonment for non-payment of any sum imposed by any Court of summary criminal jurisdiction as a penalty, or for failure to find caution, shall be regulated thus:—

When the amount adjudged to be paid, or	{	The period of imprisonment for which caution is to be found	{	The period of imprisonment shall not exceed
Exceeds—				

£1, but does not exceed £3,	20 days
-----------------------------	-----------------

Where the Court in imposing any penalty or sum for which caution is to be found does not specify the period of imprisonment in default of payment of such penalty or on failure to find such caution, such period shall be the maximum period applicable to the non-payment of the amount imposed. If in any sentence or extract sentence, the period of imprisonment inserted in default of payment of any penalty or of caution being found is in excess of that competent under this Act, such period of imprisonment shall be held as being reduced to the maximum period under this Act applicable to such default, and the Judge who pronounced such sentence shall have power to order such sentence and extract to be corrected accordingly. . . ."

Sec. 57. "In any proceedings in a Court consisting of more than one Judge the signature of one Judge shall be sufficient in all warrants or other proceedings prior or subsequent to conviction, although the presence and signature of two or more Judges may be necessary to conviction of the offence in respect of which such warrants are granted or procedure takes place, and it shall not be necessary that the Judge so signing shall be one of the Judges trying or dealing with the case otherwise."

† The Sheriff's report is embodied in the foregoing narrative.

was incompetent, in respect that it imposed an alternative penalty of imprisonment for thirty days instead of for twenty. After the complainant had paid his fine, the sentence had been implemented and could not thereafter be altered. If alteration were competent, it could only be at the hands of "the Judge who pronounced" the sentence,¹ namely, the members of Court who tried the cause, or of the High Court acting under section 75 of the Act, as in the case of *Whillans v. Hilson*.² What happened when the complainant was brought back was in effect that he received a new sentence from a new Court which had not tried the cause, and this was the sentence which was put on record. This sentence, which was the one sought to be suspended, was incompetent, because pronounced by a Court which had no jurisdiction to sentence the complainant. At any rate before the new sentence was pronounced the fine which the complainant had paid should have been handed back to him so that he might have had an opportunity of reconsidering whether he would pay the fine or go to prison. On these grounds the sentence should be suspended.

May 28, 1913.
Benwick v.
M'Dougall.

Argued for the respondent;—Even after extract it would have been competent for "the Judge who pronounced" the sentence to correct the error which had been made.³ Much more was it competent for him to correct it before the sentence had been recorded. The "Judge who pronounced" meant the person who was the mouth-piece of the Court, as distinguished from the Court itself, and this appeared both from the context and from the definition clause.⁴ The complainant had been found guilty by the whole Court, who had also determined the amount of the fine. What followed was not the imposition of a new sentence, but the timeous⁵ correction of a mere point of executorial detail,⁶ which one Justice by himself could competently make,⁷ and would have been automatically effected by the statute itself¹ even though it had not been noticed at the time. At least the sentence as recorded was unimpeachable, and the Court would not go behind the record.⁸ It was not even necessary for the record to contain any mention of the period of imprisonment seeing that the fine had been paid at the bar.⁹

LORD JUSTICE-GENERAL.—[After narrating the facts]—The suspender seeks to have the conviction quashed upon the ground that the sentence as recorded was a new sentence pronounced, not by the Court who had tried him, but by certain persons who had been members of that Court. If I thought that was the real state of affairs, he would, I think, be entitled to have the sentence quashed, because undoubtedly a man cannot be tried by one Court and then sentenced by another. But when one comes to look at the matter, I do not think that that is the proper way of describing what

¹ Summary Jurisdiction (Scotland) Act, 1908, sec. 48.

² 1910 S. C. (J.) 1, 6 Adam, 129.

³ Summary Jurisdiction (Scotland) Act, 1908, secs. 48, 54, 55.

⁴ Summary Jurisdiction (Scotland) Act, 1908, sec. 2.

⁵ *Stewart v. Appleby*, (1899) 1 F. (J.) 77, 3 Adam, 6.

⁶ *Mackenzie v. Allan*, (1889) 2 White, 253.

⁷ Summary Jurisdiction (Scotland) Act, 1908, sec. 57.

⁸ *Ex parte Attorney-General*, (1877) 41 J. P. 118.

⁹ Summary Jurisdiction (Scotland) Act, 1908, sec. 53.

May 28, 1913. happened. The sentence as delivered was, first of all, a conviction, and then a penalty of £2, 11s., or thirty days' imprisonment. Now, an error of that sort is provided for by the 48th section itself, which says that the proper period of imprisonment for a penalty of £2, 11s. shall not exceed twenty days. It provides this: "If in any sentence or extract sentence the period of imprisonment inserted in default of payment of any penalty or of caution being found is in excess of that competent under this Act"—which was the case here—"such period of imprisonment shall be held as being reduced to the maximum period under this Act applicable to such default, and the Judge who pronounced such sentence shall have power to order such sentence and extract to be corrected accordingly." Now, I think the effect of that section is not doubtful. It makes the reduction of the period of imprisonment automatic and statutory. It does not make it depend upon any new determination of the Court as to what ought to be, but it is reduced by statute to the maximum period, and the period that is proper, namely in this case to twenty days, and that would have happened whether anything had been done or not. Supposing the error had never been found out, and the sentence had been entered in the record as originally pronounced, namely £2, 11s. penalty or thirty days' imprisonment; nevertheless, the effect of the statute would have been to cut down the period of imprisonment to twenty days, and I have not a doubt that the prisoner, if he had chosen to go to prison and had not paid the fine, could have obtained his liberation at the end of twenty days, either, perhaps, by bringing before the notice of the Prison Commissioners the error that had been made, or, if that was not sufficient, by presenting a bill of suspension and liberation to this Court. The additional words that are put in—"The Judge who pronounced such sentence shall have power to order such sentence and extract to be corrected accordingly"—I think are only inserted in order to save trouble, because it is obvious that if a correction is allowed, then the jailer will have a warrant which is in accordance with the true position of the case, instead of a warrant which is not in accordance with the true position of the case. But I do not find that there is any absolute necessity to have the matter corrected at all, although it is quite right that it should be corrected if it can be corrected. Now, therefore, when I come to the correction, I think one must take that also with the provisions of section 57—[His Lordship read the section]. So that I think by that section the action of one Judge alone was sufficient, provided that what was done was only an executorial act. I think that here the presiding Justice was only performing an executorial act, viz., correcting the sentence and making it accord with what the Act of Parliament automatically arranged. Accordingly, I do not think this sentence was a new sentence at all. It was simply an alteration of the old sentence. I think it is perfectly clear that, if the old sentence had been recorded exactly as it was, the presiding Judge or any one of the Judges could thereafter have put his pen through the thirty and substituted twenty, correcting the sentence in accordance with the Act of Parliament, and I do not think it could possibly make it any worse because they did not go through the form of first writing the thirty days in order to scratch them out but put in twenty days at once. On the whole matter, therefore, I am of opinion that the suspension should be refused.

LORD JUSTICE-CLERK.—When I heard this case for the first time, I con- May 28, 1913.
 fess I had considerable difficulty, and the inclination I had at the time was Renwick v.
 to the view that this conviction could not stand. But having had the M'Dougall.
 advantage of the discussion to-day and of communing with your Lordships,
 I have come to a pretty distinct opinion that I would have been wrong if
 I had acted on that view. What was done here in making the alteration
 was to place upon the record that which had already automatically taken
 place under the statute. The sentence in stating a longer period of im-
 prisonment than the Act allows was a sentence which was bad under the
 statute, and required correction, but the correction was automatically made
 by the statute itself. At the same time it is very desirable that the record
 on which execution takes place should be accurate and in accordance with
 the statute, otherwise awkwardness and even injustice might follow. The
 jailor might, if he did not know the law, keep the prisoner beyond the
 permissible period; and if he did know the law, he might have to go to the
 Prison Commissioners for authority to liberate him. All such complica-
 tion is easily avoided by the record being made to accord with the statutory
 requirements. Now, can the correction be made where the sentence has
 been entered upon the record and signed? I think plainly that it can.
 If so, can a mistake in announcing the sentence be put right when it is
 discovered before recording? I am of opinion that it can. How is this to
 be done? Is there any sound objection to it being done as it was done here?
 I have come to the conclusion upon the grounds stated by your Lordship
 that there was no objection. What was done was purely an executorial act
 for the sake of convenience. It was quite unnecessary to bring together
 the whole bench who originally expressed their opinion upon the case.

There is only one other remark I should like to make. I think it would
 have been better before any alteration was made on the sentence originally
 pronounced if the money had been handed back to the accused at the bar,
 so that he should have had that money in his power in order that he might
 consider whether or not he would pay the fine. In this case I do not think
 that is of much consequence, because in the particular circumstances of the
 case it would probably have made no difference. But I think where a fine has
 been received and where there is difficulty about the recording of the convic-
 tion in a form that was not announced, it is well that the accused should
 have the money back again and that he should have the opportunity of
 considering what he ought to do. In this case the alteration limited the
 term of imprisonment from the term announced. One can conceive a case
 in which a convicted person, if put again in possession of his money on the
 discovery that there had been an error in the term of imprisonment, might,
 on being told that the term of imprisonment was now shorter than that in
 view of which he chose the fine, elect to suffer the shorter period of im-
 prisonment rather than part with his money.

Upon the whole matter I am of the same opinion as your Lordship for
 the reasons expressed by you.

LORD DUNDAS.—My views in this case fluctuated somewhat during the
 argument; but in the end I have come clearly to agree with your Lordship
 in the chair, and that for the reasons you have expressed.

May 28, 1913. LORD JOHNSTON.—I concur, and for this reason in particular. The case is relieved from any difficulty by the fact that the fine was the real or primary penalty imposed, and to it there is no objection possible. The error in announcing the sentence occurred in the ancillary compulsitor of imprisonment failing payment. But it is not necessary (Act of 1908, section 53) that the alternative term of imprisonment should enter the record of sentence, where the fine is paid at the bar. As it was so paid here, the Clerk of Court was relieved of the duty of recording the alternative period of imprisonment when recording the sentence. He did so after the fine was paid, and even if the record had contained an error, the error would have been innocuous. I am far from saying that it is not the duty of the Clerk to keep the presiding magistrate right in the matter of technical details, and, if he has announced a sentence the period of imprisonment added in which does not correspond with the fine imposed, to draw his attention to the mistake and see that it is corrected at the time of recording, and before the record is signed. But it is not necessary in the present case to decide that question, for the insertion by the Clerk of Court, whether correctly or incorrectly, of what he was not required to insert, even though he varied the terms used by the presiding magistrate, cannot, I think, vitiate the conviction.

LORD GUTHRIE.—I am of the same opinion. I take the case as stated by the complainer because the report of the Sheriff really substantiates the complainer's statements and negatives the respondent's answers. The only point that at first impressed me was the academically plausible argument submitted on behalf of the complainer, that he never had the chance of electing whether he would exercise the option of paying the fine or of going to prison for twenty days. It seems to me sufficient to point out that, supposing the proceedings had been unobjectionable, except in respect of the excessive number of days in the sentence (a defect which would have suffered mechanical reduction by force of the statute), he would have been subjected to the same hardship, if hardship it be.

THE COURT refused the suspension.

STEEDMAN, RAMAGE, & Co., W.S.—W. & J. L. OFFICER, W.S.—Agents.

MARGARET GERALD, Appellant.—*Gentles*.
JOHN JAMES M'INTYRE (Police Court Procurator-Fiscal, Glasgow),
Respondent.—*Cooper, K.C.—M. P. Fraser.*

No. 14.
May 30, 1913.

Statutory Offences—Fortune-telling—Jurisdiction—Magistrate in Burgh Police Court—Vagrancy Act, 1824 (5 Geo. IV. cap. 83), sec. 4—Prevention of Crime Act, 1871 (34 and 35 Vict. cap. 112), secs. 15 and 17. Gerald v. M'Intyre.

By the Vagrancy Act, 1824, which applies only to England, it is made an offence, under sec. 4, to profess to tell fortunes by palmistry with intent to deceive. The Prevention of Crime Act, 1871, enacts, sec. 15, that the provisions of the section above mentioned "as amended by this section, shall be in force in Scotland," and sec. 17, that "any offence against this Act" may be prosecuted before a Court of summary jurisdiction.

Held that the expression in the latter section "any offence against this Act" did not apply exclusively to offences contained in the body of the Prevention of Crime Act, but included offences against sec. 4 of the Vagrancy Act, and that accordingly a magistrate sitting in a Burgh Police Court had jurisdiction to try a charge of professing to tell fortunes by palmistry with intent to deceive.

On 19th December 1912 Margaret Gerald was charged in the Police Court in Glasgow, at the instance of John James M'Intyre, Procurator-fiscal, with professing to tell fortunes by palmistry with intent to deceive. HIGH COURT. Lord Justice-General. Lord Kinnear. Ld. Johnston.

The charge bore that the offence was committed "contrary to the Vagrancy Act, 1824, section 4,* as amended and made applicable to Scotland by the Prevention of Crime Act, 1871, section 15,† whereby you are liable to be deemed a rogue and vagabond within the meaning of said Vagrancy Act, 1824, and to be committed to prison with hard labour for any term not exceeding three calendar months."

When the complaint was called before the magistrate a preliminary objection was taken, *inter alia*, of no jurisdiction. The magistrate repelled this objection, and found the accused guilty as libelled and imposed a penalty of 10s. 6d., and, in default of payment, of seven days' imprisonment.

Thereafter, at the request of the accused, he stated a case for the opinion of the High Court upon, *inter alia*, the following question of law:—"(1) Was I right in repelling the plea of no jurisdiction?"

The case was heard before the High Court on 27th May 1913.

Argued for the appellant;—The magistrate had no jurisdiction to try this offence. The offence was one created by section 4 of the Vagrancy Act, 1824, which did not apply to Scotland, and was an offence against that Act. It was not an offence against the Prevention of Crime Act, 1871. All that the latter statute effected, so far as the present case was concerned, was to apply section 4 of the

* The Vagrancy Act, 1824 (5 Geo. IV. cap. 83), applicable only to England, enacts:—Sec. 4. ". . . Every person pretending or professing to tell fortunes . . . by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects shall be deemed a rogue and vagabond within the true intent and meaning of this Act," and authorises certain penalties to be imposed for the offence so created.

† Secs. 15 and 17 of the Prevention of Crime Act, 1871 (34 and 35 Vict. cap. 112), are quoted in the Lord President's opinion.

May 30, 1913. Vagrancy Act to Scotland, that is to say, to provide that the offences there described should be offences in Scotland,¹ but they remained offences against the Vagrancy Act. The expression "offences against this Act," used in section 17 of the Prevention of Crime Act, referred primarily and exclusively to the offences created by that Act,² and accordingly the provision of that section that "any offence against this Act may be prosecuted before a Court of Summary Jurisdiction" did not apply to the present case. Jurisdiction to try statutory offences was confined to Courts of universal jurisdiction, *i.e.*, to the Sheriff Court and the High Court, unless it was expressly conferred upon some other Court.³ In the case of *Smith v. Neilson*⁴ a conviction of this offence obtained in a Police Court was quashed on the ground that the complaint was irrelevant, but the question of jurisdiction was not raised.

Counsel for the respondent were not called upon.

At advising on 30th May 1913,—

LORD JUSTICE-GENERAL.—In this case, although several questions are asked us, the argument was limited to the question of jurisdiction, and the point upon jurisdiction was a very small and sharp one.

The offence of being a rogue and a vagabond was created by the Vagrancy Act, 1824, section 4. That Act did not apply to Scotland; but the provisions of section 4 were amended and extended to Scotland by the 15th section of the Prevention of Crime Act, 1871. Section 15, referring to section 4 of the Vagrancy Act, says:—" . . . The provisions of the said section, as amended by this section, shall be in force in Scotland and Ireland." That, therefore, clearly introduces the offence as an offence in Scotland as well as in England. Then the 17th section of the same Act says this:—"Any offence against this Act may be prosecuted before a Court of summary jurisdiction, as follows:— . . . In Scotland, under the provisions of 'The Summary Procedure Act, 1864,' and any Act amending the same." And then the section goes on to say:—"Court of summary jurisdiction' shall in this Act mean and include any justice or justices of the peace, sheriff or sheriff-substitute, metropolitan or police magistrate, stipendiary, or other magistrate, or officer, by whatever name called, to whom jurisdiction is given by the Acts in this section mentioned or any Acts therein referred to. . . ."

Now practically the whole argument was limited to this very short point. It was said that the provisions of section 17 only apply to an offence against "this Act," that is to say, an offence which is in the body of the Prevention of Crime Act, and that an offence under "this Act" does not include an offence against the Vagrancy Act, which is only made applicable to Scotland by section 15 of the Prevention of Crime Act. I think that is far too narrow a construction, and would be against the principles of ordinary common sense. I think any offence against "this Act" means

¹ Sec. 15; *M'Lean v. Murdoch*, (1882) 10 R. (J.) 34, 5 Coup. 193.

² Secs. 10 to 14.

³ *M'Pherson v. Boyd*, 1907 S. C. (J.) 42, *per* Lord Justice-General Dunedin, at p. 45, 5 Adam, 247.

⁴ (1896) 23 R. (J.) 77, 2 Adam, 145.

any offence which this Act makes an offence. Well, the particular thing charged in this case, which was not an offence before so far as Scotland was concerned, is made an offence by this Act. I am of opinion, therefore, that the ground urged against the conviction here was bad, and that the conviction must stand.

May 30, 1913.
Gerald v.
M'Intyre.
Lord Justice-General.

LORD KINNEAR.—I am entirely of the same opinion. I think it is too clear for argument.

LORD JOHNSTON.—I concur.

THE COURT answered the question of law in the affirmative, and dismissed the appeal.

ST CLAIR SWANSON & MANSON, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

MRS JANE HEATH OR M'LAREN, Complainer.—*Moncrieff, K.C.*—*A. A. Fraser.*

No. 15.

JOHN MACLEOD (Burgh Prosecutor, Leith), Respondent.—*Macmillan, K.C.*—*Lippe.*

May 30, 1913.

M'Laren v.
Macleod.

Statutory Offences—Keeping a brothel—Jurisdiction—Whether charge triable by a single magistrate—Sentence—Criminal Law Amendment Act, 1885 (48 and 49 Vict. cap. 69), sec. 13—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), secs. 403 and 431.

Held (by a full bench) that a charge of keeping a brothel contrary to section 13 of the Criminal Law Amendment Act, 1885, may be tried under section 431 of the Burgh Police (Scotland) Act, 1892, before a single police magistrate; and that the magistrate is entitled to impose on the accused, if found guilty, a sentence of imprisonment for three months.

Observed that proceedings for the offence of keeping a brothel may also be taken under section 403 of the Burgh Police (Scotland) Act, 1892, which provides for trial before the Sheriff, or two police magistrates, and limits the sentence of imprisonment to one of sixty days.

Jurisdiction—Complaint—Relevancy—Necessity of setting forth statute giving jurisdiction.

Held (by a full bench) that it is unnecessary to set forth in a complaint the particular statutory enactment which gives jurisdiction to the Court which tries the accused.

Procedure—Proof—Admissibility of evidence—Hearsay—Evidence of overheard conversations—Conversations part of res gestæ.

In a prosecution for keeping a house as a brothel the prosecutor examined as witnesses two policemen who repeated conversations overheard by them in the house in question. The accused objected to the evidence on the grounds that she was not present when the conversations took place, and that the persons whose conversations were overheard were not examined as witnesses.

Held that the evidence was competent, in respect that it was not led to prove the truth of the matters stated in the conversations, but merely to prove the fact that such conversations took place.

May 30, 1913. **MRS JANE HEATH OR M'LAREN**, Wardie Bank House, Boswall Road, Trinity, Edinburgh, was charged in the Police Court of the burgh of Leith on a complaint under the Summary Jurisdiction (Scotland) Act, 1908, at the instance of John Macleod, burgh prosecutor, which set forth that during certain periods specified "in the house situated in Boswall Road aforesaid, occupied by you, you did keep a brothel, contrary to section 13 of the Criminal Law Amendment Act, 1885, whereby you are liable to a penalty not exceeding Twenty pounds, and in default of payment of said penalty, to imprisonment in terms of the Summary Jurisdiction (Scotland) Act, 1908, or in the discretion of the Court to imprisonment for any term not exceeding three months, with or without hard labour, in terms of the said section 13 of the said Criminal Law Amendment Act, 1885."

M'Laren v. Macleod.

HIGH COURT.
(Full Bench.)
Lord Justice-General.
Lord Justice-Clerk.
Lord Dundas.
Ld. Johnston.
Lord Guthrie.

HIGH COURT.
Lord Justice-General.
Lord Kinnear.
Lord Mackenzie.

At the trial in the Police Court a preliminary objection was taken to the jurisdiction of the Court, which was repelled by the Magistrate (J. H. Leslie Pennell), who, after hearing evidence, found the accused guilty as libelled, and sentenced her to three months' imprisonment.

She brought a bill of suspension in which she averred, *inter alia*: "6. At the trial the solicitor for the complainer objected to evidence being given by Inspector Jefferies and Detective Peebles, witnesses for the prosecutor, regarding conversations alleged to have been overheard by them between two women in the house of complainer, neither of whom were called by the prosecutor as witnesses. Further, the complainer's solicitor objected to such evidence in respect that the complainer was not present when such conversation is alleged to have taken place. The solicitor for the complainer further objected to another conversation alleged by said Inspector Jeffries and Detective Peebles to have taken place between a man and a woman in the house outwith complainer's presence. Neither said man nor woman referred to were produced as witnesses for the respondent. All said objections were repelled by said J. H. Leslie Pennell. Said conversation seriously influenced the said J. H. Leslie Pennell in his judgment."*

She stated the following pleas;—(1) The said Magistrate sitting in said Police Court had no jurisdiction to try said complaint.† (2)

* The following excerpt is taken from the record of proceedings made by the Magistrate:—

"In the course of the examination of Edward Jefferies, police inspector, Leith, a witness in this case, the burgh prosecutor put to him the following question: 'After the second woman entered the room did she complain to the other woman in the room about her trade being prejudiced by the accused introducing "short time" into the house.'

"Accused's agent objected to said questions, 'in respect that accused was not present and neither of parties conversing produced.'

"The Court repelled the objection.

"In the course of the continued examination of the said witness the prosecutor put to him the following question: 'What was the woman in the east bedroom complaining of?'

"Accused's agent objected to said question in respect that accused was not present and neither of parties conversing produced.

"The Court repelled this objection also."

† The Criminal Law Amendment Act, 1885 (48 and 49 Vict. cap. 69), enacts:—Sec. 13. "Any person who—(1) keeps or manages or acts or assists in the management of a brothel, or (2) being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof to be

The complaint is irrelevant. (3) The Magistrate admitted evidence May 30, 1913.
which was incompetent, as in Statement of Fact No. 6.

On 7th March 1913 the case was heard before the Lord Justice-M'Laren v.
MacLeod.
Clerk, Lord Dewar, and Lord Hunter, who, at the conclusion of the argument on the question of jurisdiction, remitted the case to a full bench.

Thereafter on 28th and 30th May 1913 the case was heard before a bench of five Judges (the Lord Justice-General, the Lord Justice-Clerk, Lord Dundas, Lord Johnston, and Lord Guthrie) on this point.

Argued for the complainer;—The Magistrate had no jurisdiction. Keeping a brothel was a statutory offence, and a statutory offence could only be tried by a Court with inherent universal jurisdiction,¹ or by a Court on which jurisdiction was conferred by the statute. The only Courts with inherent universal jurisdiction were the Court of Session and the Sheriff Court. The offence libelled here was a statutory offence constituted by section 13 of the Criminal Law Amendment Act, 1885, but that Act conferred no jurisdiction upon any Court, so that so far as regarded that Act jurisdiction was limited to the Court of Session and the Sheriff Court. It was said, however, that jurisdiction was conferred on the single Magistrate by section 431 of the Burgh Police (Scotland) Act, 1892; that, however, was not the case, because section 431 had to be read along with section 403, and, when so read, it was clear that it was merely explanatory of section 403, as directing the way in which the offence was to be tried by the Sheriff or the *two* Magistrates on whom jurisdiction was expressly conferred by section 403. Under section 403 the maximum penalty which the two Magistrates could impose was sixty days; under section 13 of the Criminal Law Amendment Act, 1885, the maximum penalty was three months; so that the respondent's contention as to the effect of section 431 would lead to the extraordinary result that a single Magistrate could impose a higher penalty than a

used as a brothel or for the purposes of habitual prostitution . . . shall, on summary conviction in manner provided by the Summary Jurisdiction Acts, be liable—(1) to a penalty not exceeding twenty pounds, or in the discretion of the Court to imprisonment for any term not exceeding three months, with or without hard labour. . . .”

The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), enacts:—

Sec. 403. “*Suppression of Brothels.*—The magistrate may . . . grant warrant to enter into . . . any house . . . which . . . the magistrate is satisfied there is reasonable ground for believing to be kept, managed, or used, or suffered to be used, as a brothel; and any constable . . . may take into custody . . . the occupier of such house . . . or any person found therein who either temporarily or permanently manages or assists in the management of such brothel, and every such person shall be liable on conviction before the sheriff or two magistrates of being the occupier of, or of temporarily or permanently managing, or assisting in the management of such brothel, to a penalty not exceeding twenty pounds, or to imprisonment, without the option of a fine, for any period not exceeding sixty days, and failing payment of any such penalty, to imprisonment not exceeding sixty days. . . .”

Sec. 431. “All offences committed within the burgh under the Weights and Measures Acts, 1878 and 1889, and under the Criminal Law Amendment Act, 1885, in so far as it relates to the suppression of brothels, may be tried by the magistrate as police offences under complaint by the burgh prosecutor. . . .”

¹ M'Pherson v. Boyd, 1907 S. C. (J.) 42, 5 Adam, 247.

May 30, 1913. Court of two. It was the reasonable implication¹ of the words of the Acts that two Magistrates were necessary. In any event however, even if it was competent for a single Magistrate to sit, section 431 made it clear that he could only try the offence as "a police offence," which meant that the sentence which he was entitled to impose was limited to the maximum sentence for ordinary police offences, viz., sixty days. Further, and independently, the complaint was bad in that it did not libel section 431 which, it was argued, conferred the jurisdiction. The only section referred to in the complaint was section 13 of the Act of 1885, which certainly did not confer jurisdiction.

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Argued for the respondent;—Admittedly if section 13 of the Criminal Law Amendment Act, 1885, had stood by itself contraventions of the section could only have been tried by the Court of Session or the Sheriff.² But section 13 was supplemented by section 431 of the Act of 1892, which clearly conferred upon a single Magistrate the right to try offences against section 13 of the Act of 1885, and to impose the penalty specified therein, viz., three months. It was not unusual to find a statute permitting a Police Magistrate in the case of some particular crime to impose a sentence greatly in excess of the ordinary Police Court maximum, viz., sixty days.³ It was quite true that proceedings might have been taken under section 403, which in itself contained a complete code entirely independent of the Criminal Law Amendment Act of 1885. In that event the Court would have been the Sheriff, or two Magistrates, and the maximum legal penalty would have been sixty days. The existence, however, of this alternative and independent method of procedure did not affect the method provided for by section 431, and such overlapping legislation was by no means uncommon. While it was necessary to specify the section which constituted the offence it was quite unnecessary and unusual to specify the section which conferred jurisdiction on the Court. It was probable that section 431 was inserted in the Act in consequence of the decision in *Clark and Bendall v. Stuart*.⁴

LORD JUSTICE-GENERAL.—This is a bill of suspension and liberation against a conviction obtained against the suspender upon a complaint in the Police Court of the burgh of Leith, charging her with a contravention of section 13 of the Criminal Law Amendment Act, 1885. That section provides: "Any person who—(1) keeps or manages or acts or assists in the management of a brothel; or (2) being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution . . . shall, on summary conviction in manner provided by the Summary Jurisdiction Acts, be liable—(1) to a penalty not exceeding twenty pounds, or, in the discretion of the Court, to imprisonment for any term not exceeding three months, with or without hard labour. . . ." Upon conviction the suspender was sentenced to a period of three months' imprisonment.

The first objection that is put forward is that the Police Magistrate had no jurisdiction to entertain a complaint under section 13 of the Criminal

¹ *Salomon v. Salomon*, [1897] A. C. 22, Lord Watson, at p. 38.

² *M'Pherson v. Boyd*, 1907 S. C. (J.) 42, 5 Adam, 247.

³ Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 7.

⁴ (1886) 13 R. (J.) 86, 1 White, 191.

Law Amendment Act, 1885. If that section had stood alone I have no May 30, 1913. doubt that this objection would have been good, because the offence being ^{M'Laren v. Macleod.} a new statutory offence, and there being no mention of jurisdiction, it follows from what has been laid down on many occasions, and notably in the case ^{Lord Justice-General.} of *M'Pherson v. Boyd*,¹ that the only Courts possessing jurisdiction would have been those Courts which have an inherent jurisdiction, of which the Police Court is not one. But by section 431 of the Burgh Police Act, 1892, it is provided as follows: "All offences committed within the burgh under the Weights and Measures Acts, 1878 and 1889, and under the Criminal Law Amendment Act, 1885, in so far as it relates to the suppression of brothels, may be tried by the magistrate as police offences under complaint by the burgh prosecutor. . . ." That section appears to me, in plain terms which cannot be avoided, to give a jurisdiction to the Magistrate which otherwise he would not have had.

Two arguments have been advanced against this view. The first was that, inasmuch as section 403 of the same Act provides that it is an offence to keep a brothel and provides for punishment upon conviction before the Sheriff or two Magistrates, it must therefore be held that section 431, which says that the complaint may be tried by "the Magistrate," means that it must be tried in the same way as offences under section 403, that is to say by two Magistrates, and that as this case was not tried by two Magistrates the conviction is bad. I do not think that argument is sound. I think that sections 403 and 431 are perfectly separate and distinct sections. No doubt it comes to this, that there is overlapping legislation, that is to say there are two methods in which you may proceed against the brothel-house keeper; but overlapping legislation, although it may be due to bad draftsmanship which ought not to have occurred, does not invalidate an enactment; and if, when we find there has been overlapping legislation, we were to hold that one or other of the overlapping provisions must go, we should have to make a great inroad upon previous decisions. It seems to me that proceedings could have been taken under section 403, in which case two Magistrates must have sat if the case were not brought before the Sheriff. But the proceedings were equally well taken under section 13 of the Criminal Law Amendment Act, jurisdiction for which is given by section 431.

The next objection advanced by Mr Moncrieff was to this effect:—Inasmuch as section 431 enacts that the case may be tried by the Magistrate as a police offence, that necessarily means that no heavier punishment can be inflicted than is usually given for a police offence. I think that this argument, although ingenious, is not sound. In my opinion the expression "as police offences" merely means that the case may be tried in the Burgh Police Court as other offences are there tried, and there is no rule of law that for a police offence as such *eo nomine* no greater punishment can be given than sixty days' imprisonment. The jurisdiction and powers of all Courts of summary jurisdiction are now regulated by the Summary Jurisdiction (Scotland) Act, 1908, which has superseded the earlier statutes dealing with these matters. Section 7 of the Act of 1908

¹ 1907 S. C. (J.) 42, 5 Adam, 247.

May 30, 1913. provides :—"The jurisdiction and powers of all courts of summary criminal jurisdiction, except in so far as the same may be altered or modified by this or any future Act, shall remain as at the commencement of this Act, and the justice of peace court and justices of the peace, and also any judge of police or burgh magistrate shall, without prejudice to any other or wider powers conferred by statute, be entitled to exercise within their respective jurisdictions power on convicting of a common law offence—(1) to award imprisonment, with or without hard labour, for any period not exceeding sixty days." The words "without prejudice to any other or wider powers conferred by statute" were inserted, I think, with the very purpose of keeping intact the wider powers which may be conferred by some other statute. Here there were larger powers conferred by the Criminal Law Amendment Act of 1885.

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General.

The only other objection to the conviction was that upon the face of the complaint there was no mention of section 431 of the Burgh Police Act, 1892. I do not think there was any need to mention that section. It is, of course, always necessary to mention in the complaint the particular section of the statute which the accused is charged with contravening, because he must be given fair notice of the offence for which he is about to be tried; but I cannot think that it was necessary—nor can I recollect of ever seeing it in our practice—that there should be a citation of the statutes which confer jurisdiction upon the Court trying the offence.

On the whole matter I think that, so far as the objections hitherto urged before us are concerned, the ruling of the Magistrate was perfectly right. I understand that there are other objections upon the merits, and these we shall take up at a separate hearing.

LORD JUSTICE-CLERK.—I concur in the opinion which your Lordship has pronounced. Two points appeared to me to be of importance. The first was the one to which your Lordship last referred, namely whether or not it is necessary in a complaint to set forth the particular statutory enactment under which the Court has jurisdiction to try the case. I am very clearly of opinion that it is not necessary, and that it is not according to our practice to do so.

The only other point which seems to me to have some plausibility arises under section 431. Mr Moncrieff argued that the words "police offences" should be read as limiting the punishment to the ordinary punishment for a police offence. There is some plausibility in this contention, but I am quite satisfied with your Lordship that it is not one which can be reasonably maintained. The Act, which your Lordship has quoted, expressly declares that the powers of the Magistrate, as regards higher punishment than is ordinarily given in the Police Court, shall depend upon the statute which fixes the punishment. We know quite well that in the Police Court there are many cases in which the Police Magistrate, whose ordinary power is limited to sixty days, has nevertheless the power of inflicting a much heavier punishment.

LORD DUNDAS, LORD JOHNSTON, and LORD GUTHRIE concurred.

The case was then heard before the Lord Justice-General, Lord

Kinnear, and Lord Mackenzie, on the question raised by the complainant's third plea in law. May 30, 1913.

Argued for the complainer;—The evidence of the police-constables was incompetent. It was wholly hearsay evidence, and was objectionable on the grounds that the persons who were engaged in the conversations had not been examined as witnesses, and that the conversations had taken place outwith the presence of the accused, who had thus no chance of testing the evidence. The case of *Ewing v. Earl of Mar*,¹ founded on by the respondent, was distinguishable from the present, because in that case one of the two boys, one or other of whom had uttered the exclamation, was dead, and the other could not be found, and the boys at the time the exclamation was uttered formed part of a crowd which could not be summoned to give evidence. Here the constables could have identified the speaker easily.

Argued for the respondent;—The evidence had been properly admitted, and was not "hearsay" of the kind prohibited. It was only being used to prove a fact in the case, viz., that certain conversations had taken place which were part of the *res gestæ*, and which threw light on the character of the house. The evidence was not used for the purpose of proving the truth of any of the facts stated in the conversations. If that had been its purpose it might have been incompetent.²

LORD JUSTICE-GENERAL.—This conviction is objected to on the ground that evidence was improperly admitted. The evidence which was said to be improperly admitted was that of certain constables; while the constables were listening outside this house they heard certain conversations going on between some of the inmates, and the prosecutor asked them what it was they heard. That was objected to upon the ground that it was not said that the accused—the present complainer—was present, and that it was not proposed to call the persons who took part in those conversations. If the matter depended upon the truth of what was said in the conversations, that, I think, would be a good objection; but I take it that those conversations became relevant not in respect of their truth, but of their character. I think they really came into the same category as any noises or exclamations which were heard, and which might have been testified to by those who were watching. The weight that should be given to them is another matter, but I cannot think it was wrong to admit them. I hope that it is clear that there is nothing in this judgment to countenance the idea that hearsay conversations may be used as evidence to prove what is contained in them. I look upon this as a mere question of something that showed what I may call the atmosphere of the place, and nothing more. I think, therefore, the conviction should stand.

LORD KINNEAR.—I entirely concur with your Lordship. I think the evidence was admissible. I do not think it could properly be described as hearsay, although that is no doubt an ambiguous term, because the thing to

¹ (1851) 14 D. 314.

² *Ewing v. Earl of Mar*, 14 D. 314; M'Millan, (1833) Bell's Notes to Hume, 290; Dickson on Evidence, vol. i., p. 191; Taylor on Evidence, (10th ed.) vol. i., pp. 411, 417, were referred to.

May 30, 1913. *be proved is not that the witness heard other people making statements which it is proposed to adduce as testimony in the cause, but simply that he in fact heard certain things. The thing to be proved was that a certain conversation took place. That that was relevant to the question at issue seems to me not doubtful, because the question is whether a house was of a certain character or not, and it is evidence tending to show the affirmative that certain things are done and conversations heard in that house. But if the fact that the conversation took place is relevant at all, there is no difference between the way of proving that fact and the way of proving any other fact. If oral evidence is admissible it must be the direct evidence of witnesses who speak to what they themselves heard or saw. But the evidence of a man who depones that he heard a certain thing said is just as direct and as little to be confounded with hearsay as the evidence of one who depones that he saw a certain thing happen.*

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I agree entirely with your Lordship in the chair that the inference to be drawn from the fact so proved is a totally different matter, but with that we have nothing to do.

LORD MACKENZIE.—I am of the same opinion. The question in the case was as to the character of the house, and that of course depended upon the character of the people who were frequenting it. I take it that the evidence here has a direct bearing upon the character of the people who were engaging in this conversation, and in that way reflected upon the character of the complainer. This is the point of the evidence. We have nothing to do with the truth or falsity of what was said against the complainer during the conversation. I am unable to see that the objection taken that the accused was not present was a good objection.

THE COURT refused the bill.

JOHN ROBERTSON, Solicitor—R. H. MILLER, S.S.C.—Agents.

No. 16.

WILLIAM HODGSON Senior and WILLIAM HODGSON Junior,
Appellants.—*Maclaren.*

June 4, 1913. CHARLES ANGUS MACPHERSON (Police Court Prosecutor, Edinburgh),
Respondent.—*Cooper, K.C.—MacRobert.*

Hodgson v. Macpherson.

Statutory Offences—Betting—Betting-house—Search of suspected houses—Warrant for seizure of documents—Postal orders—Admissibility as evidence—Betting Act, 1853 (16 and 17 Vict. cap. 119), sec. 11.

Held that a search warrant granted under section 11 of the Betting Act, 1853, authorising a constable to seize "all lists, cards, or other documents relating to betting" found in certain premises suspected of being kept as a betting-house, covered postal orders, and that postal orders seized thereunder were admissible as evidence in a case where a person was charged with being the keeper of the betting-house.

Procedure—Proof—Statements of panel—Voluntary statement to police officer.

Opinions that a statement voluntarily made to a police officer by a person suspected of a crime, who has not been cautioned that what he says may be used against him, is not open to the same objections with

regard to its admissibility as evidence against the accused as is a state- June 4, 1913.
ment made by him in answer to questions put by the officer.

Circumstances in which the Court refused to interfere with a conviction where evidence had been led of such a voluntary statement. Hodgson v. Macpherson.

Statutory Offences—Betting—Use of rooms for the receipt of money for purposes of betting—Betting Acts, 1853 (16 and 17 Vict. cap. 119), secs. 1 and 3, and 1874 (37 and 38 Vict. cap. 15), sec. 4.

An accused was charged with contravening the Betting Acts by keeping a room at one address and a room at another address "for the purpose of money . . . being received . . . as the consideration for an undertaking . . . to pay thereafter money on events . . . relating to games. . . ." He was found guilty as libelled.

Held that the conviction was good, although all the money was received and all the correspondence relating to bets was conducted at one room, while the other was used exclusively for settling up accounts.

Stoddart v. Hawke, [1902] 1 K. B. 353, *applied*.

WILLIAM HODGSON senior and William Hodgson junior were charged in the Police Court at Edinburgh on a complaint under the Summary Jurisdiction (Scotland) Act, 1908, at the instance of Charles Angus Macpherson, public prosecutor. The charge in the complaint was:—
"You are charged at the instance of the complainer that you, William Hodgson senior, being the occupier of, or person using, a room or office at 13 St James Square, Edinburgh, and a room or office at 15 Dalziel Place, Edinburgh aforesaid, between 21st January and 1st February 1913, both days inclusive, did open, keep, or use said rooms or offices for the purpose of money or other valuable thing being received by you, or on your behalf, as the consideration for an undertaking, promise, or agreement, express or implied, to pay thereafter money on events or contingencies of or relating to games of football: And you, William Hodgson junior, time above libelled, did assist the said William Hodgson senior in the conduct of the business of said rooms or offices, opened, kept, or used for the purpose aforesaid; contrary to the Betting Act, 1853, sections 1 and 3, as extended to Scotland by the Betting Act, 1874,* and you, William Hodgson senior, have been previously convicted as in the list annexed; whereby you are each liable to the penalties set forth in section 3 of the said Betting Act, 1853."

The accused having pleaded not guilty a proof was led. The Judge of Police found the accused guilty as libelled, and at their request stated a case for appeal.

The case set forth:—

"The following facts were proved or admitted:—That the appel-

* The Betting Act, 1853 (16 and 17 Vict. cap. 119), sec. 1 (as applied to Scotland by the Betting Act, 1874 (37 and 38 Vict. cap. 15), sec. 4), enacts:—
"No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof . . . betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper . . . as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid. . . ."

HIGH COURT.
Lord Kinnear.
Ld. Johnston.
Lord Mac-
kenzie.

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lants are father and son. That during the period libelled the senior appellant was the occupier of a room or office at 15 Dalziel Place, and of another at 13 St James Square, both in Edinburgh. That during the period libelled both premises were watched by the police, who saw a large quantity of correspondence being delivered daily by post at 15 Dalziel Place. That both appellants were frequently seen to go thereafter from 15 Dalziel Place to 13 St James Square with bulky parcels, which the police took to be correspondence, and where they subsequently remained for a considerable time. That on Friday, 24th January 1913, the police obtained a warrant to search said premises at 13 St James Square, in terms of section 11 of the Betting Act, 1853, and on Saturday, 1st February, Inspector John Whyte and Police-constable William Webster proceeded to execute same.* They arrived at 13 St James Square at about 9.30 P.M., and entered the appellants' premises, which consisted of a single apartment fitted up as an office. On the door was a name-plate, bearing the name of the senior appellant. The latter opened the door to the police. Both appellants were engaged in dealing with correspondence. The junior appellant was sitting at a desk engaged in examining the same. Before him was a bundle of football coupons after described. That on entry the inspector informed the appellants that he was in possession of a search warrant. That the senior appellant dispensed with the reading thereof, remarking that he was satisfied it would be in order. That the police officers thereafter examined the papers in the room, which included a large quantity of football betting coupons, postal orders, and envelopes. The coupons and the postal orders were made up in separate piles, and the envelopes were mostly in a waste-paper basket. The envelopes were all addressed to 'Mr William Hodgson, 15 Dalziel Place, Edinburgh,' this superscription being in the great majority of cases lithographed thereon. The coupons each contained, printed on the one side thereof, a list of football matches played, or announced to be played, on said 1st February. They also bore written in ink or pencil the name and address of the sender, figures or marks indicating the team or teams which he backed to win or draw, as the case might be, and a note of the amount sent by him along with the bet. On the other side were printed a number of rules for the guidance of intending bettors, with instructions as to latest hours of postage and similar details. The coupons had a perforated edge, which indicated that another portion had been thereto attached at some anterior date. The individual witnesses—to whom reference is later made—stated that the attachment in the case of the coupons which they identified as having been sent by them, contained, *inter alia*, the name of the senior appellant, and his address as at 15 Dalziel Place, together with a statement of the odds which the senior appellant was prepared to give against clients correctly forecasting the results of the matches. It was also proved that he was in the habit of sending out these coupons entire to his clients. That Inspector White seized under his warrant 34 betting coupons from the pile referred to, and 21 postal orders from the pile of postal orders referred to.

"The agent for the appellants objected to the reception of the postal orders as productions, maintaining that they were incompetently seized under the aforesaid warrant, in respect that there was nothing to indi-

* The warrant authorised the seizure of "all lists, cards, or other documents relating to racing or betting found in said premises."

cate that they fell within the category of 'lists, cards, or other documents relating to racing or betting found in said premises.' I repelled the objection and admitted the said orders as productions, holding (1) that they were documents relating to betting, and competently seized; and (2) that whether competently or incompetently seized they were unexceptionable as evidence against the appellants. June 4, 1913.
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"Many of the postal orders bore the stamp of the post office of towns or districts from which betting coupons, included in the aforementioned bundle of 34, bore to have been dispatched, and in numerous instances the value of said order coincided with the amount of the bet contained in a coupon bearing to be dispatched from the same town or district. Thus, for example, a coupon bearing to be from a client in Saline enclosing a bet of one shilling, obviously corresponded to a postal order for one shilling, bearing the post mark of Saline. That there were also found in the premises a number of 'investment forms,' bearing to be used by the senior appellant in settling with clients. Six of these were seized and produced. Three envelopes were also seized, bearing the lithographed name and address of the senior appellant.

"That while Inspector Whyte and Police-constable Webster were examining the whole documents in said premises with a view to satisfying themselves as to the nature of the transactions in which the appellants were engaged, and with a view to seizure, the senior appellant indicating certain documents said, 'There is no use taking these away, for they refer to my credit business.' Inspector Whyte replied that he accepted the statement, and would not disturb them. It was admitted that the appellants carried on a credit betting business in horse races, and a great quantity of printed and other material, relative to this business, was found on the premises. Immediately thereafter, referring to the football coupons, Inspector Whyte said that he was surprised that the senior appellant was engaged in the football business. Thereupon the said appellant stated that he was sorry he had started it, but that he had done so because some of his clients who did business with him in horse-racing, wanted to start football betting, and had suggested that, if he did not issue coupons, they would transfer their patronage to other bookmakers who were conducting that business. Before making the said statements, the senior appellant had not been cautioned by Inspector Whyte that anything he might say would be used in evidence against him.

"In the course of the examination of Inspector Whyte as a witness for the prosecution, the agent for the appellants objected to the foregoing evidence of the appellants' statements being received in respect of the absence of caution, and he renewed his objection when Police-constable Webster was examined to like effect. I was satisfied that the statements were voluntarily made by the said appellant, and repelled the objection in each instance.

"On the completion of the evidence as to the police observations and raid, four witnesses were examined by the respondent to speak to specific transactions with the senior appellant. It was proved by them that they had had numerous betting transactions on football matches with the senior appellant prior to the date of the police raid, said transactions being conducted by correspondence with him at the premises at 15 Dalziel Place. Several of them had received his coupons from fellow workmen, and after a first transaction thereafter regularly received from the senior appellant coupons bearing his name

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and address as at 15 Dalziel Place aforesaid, with a statement of the odds he was prepared to offer thereto annexed, and enclosed therewith a stamped addressed envelope, bearing lithographed thereon his name and address. Said coupons were similar to the coupons seized by the police. On every occasion on which a bet was sent a postal order was enclosed for the amount thereof. Said coupons were posted prior to the matches being played, and the money was sent on the footing that, if successful, the senders would receive from the appellants the winnings due. When winnings were due they were received early the following week. Each witness identified a coupon which had been sent by him on 31st January or 1st February 1913, relating to the bet then made by him on football matches to be played on said 1st February 1913. Said coupons were among the number seized by the police. Each witness stated that he had enclosed therewith a postal order or orders, for an amount corresponding to the sum invested by him.

"I held that, on the facts proved, the appellants were guilty as libelled. I therefore convicted both appellants. The senior appellant admitted the previous convictions libelled. I fined the senior appellant £100, with the alternative of two months' imprisonment, and the junior appellant £20, with the alternative of ten days' imprisonment."

The questions of law were:—(1) Was I right in repelling the objection to the competency of receiving the postal orders in question as productions? (2) Was I right in repelling the objection to the evidence of Inspector Whyte and Police-constable Webster as to the statements made by the senior appellant on the occasion of the police raid? (3) Did the facts proved infer a contravention of the statute, as libelled?"

The appeal was heard before the High Court on 4th June 1913.

Argued for the appellants;—(1) Postal orders were not *ejusdem generis* with "lists" or "cards," the seizure of which had been authorised; the postal orders had, therefore, been unlawfully seized,¹ and consequently could not be used in evidence.² (2) Evidence of statements made by the senior panel to the police inspector without caution should not have been admitted.³ (3) There was no proof of the offence charged in the complaint having been committed at 13 St James Square. No money was received there, and the place was only used for settling up accounts. All bets were made and all money was received at 15 Dalziel Place, and the transactions were in every respect completed there, the only business done at 13 St James Square being purely accounting. The undernoted cases established the appellants' contention on this point.⁴

Counsel for the respondent were not called upon.

LORD KINNEAR.—There are three different objections stated to this conviction. The charge is of using a room or office at 13 St James Square, Edinburgh, and a room or office at 15 Dalziel Place, Edinburgh, for the

¹ *McLauchlan v. Renton*, (1910) 6 Adam, 378.

² *Ratray v. Ratray*, (1897) 25 R. 315, Lord Trayner, at p. 318.

³ *Lord Advocate v. Hay*, (1858) 3 Irvine, 181, at p. 184; *Lord Advocate v. Millar*, (1859) 3 Irvine, 406.

⁴ *Bradford v. Dawson*, [1897] 1 Q. B. 307; *Davis v. Stephenson*, (1890) 24 Q. B. D. 529; *Stoddart v. Hawke*, [1902] 1 K. B. 353.

purpose of conducting the business of betting—the words of the charge are June 4, 1913. “for the purpose of money or other valuable thing being received by you, ^{Hodgson v.} or on your behalf, as the consideration for an undertaking, promise, or ^{Macpherson.} agreement, express or implied, to pay thereafter money on events or contingencies of or relating to games of football,” that is to say, betting on games of football. The senior appellant, who is charged with this offence, is the occupier of both these rooms, one in St James Square and the other in Dalziel Place. The conviction, however, is challenged upon three different grounds.

In the first place, it is said that in the course of the proof certain postal orders produced by the prosecution, which had been seized by an officer under a search warrant, and which were produced as evidence tending to show that betting had been carried on by the appellant in one or other of these houses, ought not to have been produced, or that the production of these postal orders ought not to have been allowed, because the officer who recovered them was acting in excess of the power given him by his warrant. I do not think myself that he was. It appears to me that, *prima facie*, all the documents that were recovered were admissible to prove the fact in issue. Their decisive value might be determined only in the course of the trial, but they all, *prima facie*, bore upon the matter in issue, and were quite within the words of the warrant as I read it. The warrant enables the officer to seize all lists, cards, or other documents relating to racing or betting found on the premises, and if he finds lists and coupons on the premises, and postal orders and sums of money, I think he is quite entitled to take the postal orders as well as the coupons as being within the scope of his warrant. But, if that were doubtful, I am clearly of opinion that, being seized and produced at the trial, they were quite admissible as evidence, whatever might be their weight, for the purpose of proving the case alleged against the appellant.

The second point taken against the conviction relates to evidence given by a police inspector who had executed the search warrant, and who, in the course of executing it, is said to have remarked to the senior appellant, in reference to the football coupons, that he was surprised that he should be engaged in that kind of business. It is not put in the shape of a question. He did not ask a question demanding an answer, but made an observation on the nature of the appellant's business which it was quite open for the appellant to take no notice of. He made an answer, however, to the effect that he was sorry he had started the business, but that he had done so because some of his clients who did business with him in horse-racing wanted to start football betting, and had suggested that if he did not issue coupons they would transfer their patronage to other book-makers who were conducting that business.

Now it is said that that evidence ought not to have been allowed. I confess I do not find myself in a position to determine whether the question put by the prosecutor in the course of the examination which elicited that statement, was permissible or not. We do not know how the evidence came out. All we know is that the appellant made that statement. I cannot say that I think that that mere fact is in itself sufficient ground for objecting to the conviction. In the first place I think that the question is

June 4, 1913. in a totally different position from those which were considered in the Court of Justiciary, where, upon the trial of persons accused of grave criminal offences, it was held that questions by a criminal officer ought not to have been put, and that answers given to them ought not to have been received as evidence. The ground of judgment in these cases is that a criminal officer is not entitled to examine a person suspected of a crime in order to obtain confessions or admissions from the criminal, and so in fact to obtain from him what is to serve the purpose of a declaration without giving him the protection of the Magistrate, before whom alone declarations have to be taken. That seems to me to be a rule of procedure which is altogether inapplicable to this kind of question. The accused in this case was, or might have been, a witness for himself in the course of the trial. He had every opportunity of disputing what the police officer is alleged to have said he did say, and no injustice can be done by allowing the evidence. The Magistrate says that he is quite satisfied that the remark was made ultroneously by the accused. But, assuming that the evidence ought not to have been led, I do not think that the appellant makes his case even on that assumption, because the judgment proceeds on the facts proved irrespective of the observation of the appellant as to why he had undertaken this trade. There was evidence upon which the Magistrate was entitled, if he was satisfied, to convict.

There is a third objection which goes beyond either of these two. It is said that the alleged contravention is not proved because the charge is of "using a room or office at 13 St James Square, Edinburgh, and a room or office at 15 Dalziel Place, Edinburgh," between certain dates, "for the purpose of money or other valuable thing being received by you, or on your behalf, as the consideration for an undertaking" to pay bets on football matches. It is said that there is no evidence that any bet was made at one of these places, because all that is proved is that the appellant made his bets by correspondence in the house at 15 Dalziel Place, and received answers in that place, and that he only settled up his transactions at 13 St James Square. Accordingly, it is said there is no offence relevantly charged with reference to 13 St James Square at all, because it is not alleged that he received money there or made bets there, but only that he settled his accounts there after getting his money.

I think that objection is unsuccessful, because of the ground of judgment very clearly brought out in the Court of Appeal in England in the case of *Stoddart v. Hawke*,¹ where it was decided that the Betting Act of 1853 creates an offence constituted by keeping a house for the purpose of money being received by or on behalf of the keeper of the house as the consideration for undertakings to pay thereafter money on events relating to horse-races or games, and that to constitute an offence under section 1 it is not necessary that the money should be intended to be received at the house itself, nor need the intended place of receipt be within the United Kingdom. The question was whether a man who kept an office for the purpose of betting in Red Lion Court, Fleet Street, London, was or was not within the scope of the Act, notwithstanding that the money was received not in London

¹ [1902] 1 K. B. 353.

but in Holland. The Court held that the case was within the Act. The June 4, 1913. ground of judgment is given by Lord Alverstone, C.J., who says the defendant was charged with having kept an office for the purpose of money being received by him or on his behalf as a consideration for undertakings of the kind therein prohibited, and that the facts were sufficient to bring the case within the section. And then he says¹ that, "having regard to the preamble of the Act and the judgments in *Powell v. Kempton Park Racecourse Company, Limited*,² the section is to be understood as prohibiting the keeping of a house for the purpose of the receipt of money wherever that receipt may be, and that it would defeat the obvious intention of the Legislature if after the words 'for the purpose of any money or valuable thing being received,' we were to read in the words 'at that house.'" It appears to me that that judgment, which, apart from any weight it may derive from what was said in the House of Lords in the case of *Powell v. Kempton Park Racecourse Company, Limited*,² is itself of great authority, is directly applicable to this case. The charge is not that the appellant used the room at 13 St James Square for the purpose of receiving money in that place, but that he used the room for the purpose of receiving money in respect of the undertakings that he gave, wherever the money might be got. On the whole matter I think that the questions should be answered in the affirmative.

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Macpherson.
Lord Kinnear.

LORD JOHNSTON concurred.

LORD MACKENZIE.—I am of the same opinion. In regard to what was said when Inspector Whyte and Police-constable Webster were on the premises, if it had appeared that either the inspector or the police-constable had put any question or had made any observation for the purpose of getting the Hodgsons to make any statement to be used as evidence against them, it would have been for the Judge trying the case to take care that that evidence was not brought out. There is nothing of that kind on the case as stated to us; indeed, the Judge who tried the case expressly says that he was satisfied that the statement was voluntarily given. With regard to the second question I think there is no ground for interfering with the judgment.

THE COURT answered the questions in the affirmative, and dismissed the appeal.

JOHN N. RAE, S.S.C.—SIR THOMAS HUNTER, W.S.—Agents.

¹ [1902] 1 K. B., at p. 358.

² [1899] A. C. 143, at p. 192.

No. 17.

FERRUCIO LENA, Appellant—*Crabb Watt, K.C.—Lippe.*

June 5, 1913.

JOHN MARR DAVIDSON (Procurator-fiscal, Lanark), Respondent.—*Blackburn, K.C.—Morton.*Lena v.
Davidson.

Statutory Offences—Keeping premises open contrary to bye-law—Ice-cream shops—Respective powers of town and county councils to make bye-laws and impose penalties—Burgh—County—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), secs. 316 and 317—Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), secs. 82 and 97—Burgh Police (Scotland) Amendment Act, 1911 (1 and 2 Geo. V. cap. 51), sec. 1—Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), sec. 57.*

Held that, whereas under the Burgh Police (Scotland) Acts, 1892, 1903, and 1911, town-councils are empowered to make bye-laws in regard to the hours of opening and closing ice-cream shops and other places of public refreshment in burghs, and to impose a penalty for each breach not exceeding forty shillings, county councils under the same Acts and under the Local Government (Scotland) Act, 1889, are empowered to make like bye-laws for counties, but to impose a penalty not exceeding five pounds.

Statutory Offences—Keeping premises open contrary to bye-law—Complaint—Form of complaint—Specification of purposes for which kept open.

A bye-law of a county council made it an offence to keep premises open later than an hour specified. *Held* that a complaint which simply set forth that the accused kept his premises open after the hour specified contrary to the bye-law was relevant, and an objection that the purposes for which they were kept open ought to have been stated *repelled*.

HIGH COURT. FERRUCIO LENA, 46 Rankin Street, Carluke, was charged in the Justice of Peace Court of Lanarkshire on a complaint under the Summary Jurisdiction (Scotland) Act, 1908, at the instance of John Marr Davidson, procurator-fiscal. The charge in the complaint was "that you, being the person registered with the County Council of the county of Lanark, to keep or use the premises occupied by you at 53 High Street, Carluke aforesaid, as a place of public refreshment, in terms of the Burgh Police (Scotland) Act, 1903, sections 82 and 97, duly adopted by the said county council, and as amended by the Burgh Police (Scotland) Amendment Act, 1911, did, on 8th March 1913, after 10 o'clock P.M., keep open your said premises at 53 High Street, Carluke aforesaid, contrary to the bye-laws made under said Burgh Police Acts, and section 57 of the Local Government (Scotland) Act, 1889,* on 7th June 1912, by the said county council, and confirmed by His Majesty's Secretary for Scotland on 2nd January 1913, particularly No. 1 of said bye-laws†; whereby you are liable to the

* The statutes are sufficiently quoted in the opinion of Lord Kinnear.

† The Bye-laws of the County Council of Lanark for Regulating the hours of Opening and Closing of Places of Public Refreshment, &c., provided, *inter alia* :—

"(1) A person registered in terms of section 82 (1) of the Burgh Police (Scotland) Act, 1903, as amended by the Burgh Police (Scotland) Amendment Act, 1911, to keep or use any house, building, part of a building, or other premises as a place for public refreshment shall not keep such premises open or suffer them to be kept open—on Sundays before one o'clock P.M., nor

penalty not exceeding five pounds, and in default of payment, to June 5, 1913. imprisonment in terms of section 48 of the Summary Jurisdiction (Scotland) Act, 1908."

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Davidson.

Objections stated to the competency and to the relevancy of the complaint having been repelled, the accused pleaded guilty, and was fined £3. At his request a case was stated for appeal.

The case set forth:—

"The appellant appeared along with Mr J. K. Murray, writer, Motherwell, who objected to the competency of the complaint on the grounds that (1) the bye-laws are *ultra vires* of the county council; (2) the Act under which they are made does not authorise the county council inflicting a penalty for the non-observance of the bye-laws; and (3) the penalty stated in said bye-laws exceeds the statutory limit.

"The appellant's agent also stated the following objections to the relevancy of the complaint, viz.:—Want of specification in respect it is not stated whether the shop in question was kept open (a) for sale for consumption on the premises; (b) for sale for consumption off the premises; and (c) whether any sale took place at all.

"After the respondent was heard in reply to the objections stated, the Court repelled the same, whereupon the appellant pleaded guilty and was fined three pounds, and in default of payment, twenty days' imprisonment. The fine was paid."

The questions of law were:—" (1) Was the Court right in repelling the foresaid objections as to the competency of the complaint; and (2) Was the Court right in repelling the foresaid objections to the relevancy of the complaint?"

The appeal was heard before the High Court on 4th June 1913.

The arguments addressed to the Court sufficiently appear from the opinion of Lord Kinnear.¹

At advising on 5th June 1913,—

LORD KINNEAR.—This is an appeal against a conviction for breach of certain bye-laws made by the County Council of Lanarkshire for preventing premises, occupied as places of public refreshment, being kept open contrary to the regulations of the bye-laws.

The prosecution is instituted under the Burgh Police Acts, 1903 and 1911; but I think we are concerned only with the Act of 1903, because the Act of 1911 does nothing more for the prosecutor than extend to places of public refreshment provisions which were, under the previous Act, applicable only to places for the sale of ice creams and aerated waters. But I do not understand that there is any dispute that, if the Act of 1903, pro-

later than eight o'clock P.M., and on other days of the week before seven o'clock A.M., nor later than ten o'clock P.M. . . .

"Extent of Bye-laws.

"(4) These bye-laws shall have effect and be in force in the whole county of Lanark, excluding the Royal, Parliamentary, and Police Burghs therein.

"Penalties.

"(5) Every person who shall offend against any of the foregoing bye-laws shall be liable in a penalty not exceeding five pounds for each offence."

¹ The following cases were referred to on the question of the relevancy of the complaint.—*Rossi v. Magistrates of Edinburgh*, (1904) 7 F. (H. L.) 85, Lord Davey, at pp. 87-8; *Auld v. Moretti*, (1902) 4 F. (J.) 101.

June 5, 1918. perly construed would justify this bye-law with reference to ice-cream shops and shops for the sale of aerated waters, the Act of 1911 comes in and makes it a good bye-law with reference to all places of public refreshment. The question, therefore, really is.—What does the Act of 1903 allow?

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Davidson.

Lord Kinnear

Now, there is no appeal upon the merits of this conviction—assuming that the proceedings were competent—because the conviction proceeds upon the confession of the accused, but it is said that the proceedings were incompetent upon various grounds.

The statement of the appellant's objections in the stated case is not perhaps very explicit, but it was very clearly explained to us by his counsel at the bar, and I have no doubt that it was quite clearly explained to the magistrates. The main objection is that the bye-laws were either *ultra vires* of the County Council inasmuch as they are not entitled to inflict any penalty for the non-observance of their prohibition against the keeping open of places of public refreshment, or that, if the County Council were entitled to impose a penalty, the penalty which the bye-law inflicts is beyond the limit allowed by the statute.

Now that of course depends upon the construction of the provisions of the Act of 1903. The enactment upon which the County Council proceeded in making these bye-laws is contained in the 97th section of the Act of 1903. That section allows a county council to adopt certain sections of the Act which in their terms are applicable not to county councils and counties but only to burghs and town-councils and in particular to adopt section 82, which in the marginal note is described as the section relating to "Ice-cream shops, &c., to be registered." Accordingly in order to see what the powers of the County Council are, we must go to section 82, which provides by the first subsection that ice-cream shops are to be registered, and subjects to a penalty anybody who keeps an ice-cream shop which has not been registered. In the second subsection it is enacted that section 316 of the Burgh Police Act of 1892 shall be deemed to confer power on the town-council to make bye-laws in regard to the hours of opening and closing of premises registered under this section, and that the provisions of the Burgh Police Act of 1892 relating to bye-laws and the confirmation and the enforcement thereof shall apply accordingly.

Accordingly that sends us to the Act of 1892, and in particular to section 316. That section allows police commissioners to make bye-laws for certain purposes. The commissioners may, from time to time, make bye-laws as they think fit "for the purposes aftermentioned," and then follows a list (first) of general purposes and (second) of more special sanitary purposes. Now, these purposes had nothing to do with the bye-laws which the town-council is specially authorised to make by section 82 of the 1903 Act. They are bye-laws for different purposes altogether. But what the 1903 Act enacts is that this section, which provides the other things, shall be deemed to confer power to make bye-laws with regard to the opening and closing of the places of refreshment referred to in section 82. Therefore the reference to section 316 of the Act of 1892 is simply for the purpose of bringing in an express power to make bye-laws. The bye-laws which are authorised by a reference to this Act are bye-laws defined not by section 316 itself but expressly defined by section 82. But then

that section provides, as I have said, not only that section 316 of the 1892 June 5, 1913. Act shall be deemed to confer power to make bye-laws on the subject in Lena v. Davidson. question, but that the provisions of that Act relating to bye-laws and the confirmation and enforcement thereof shall apply accordingly.

Lord Kinnear.

Now following upon section 316, which is a bare power to make the bye-laws, there are subsequent sections, which are really consequential and ancillary, by which the bye-laws may be enforced by the imposition of penalties; and in particular the immediately following section 317 enacts that the magistrates and commissioners by the bye-laws authorised by the Act may impose such reasonable penalties as they think fit not exceeding 40s. for each breach of such bye-law. And then there follows a certain series of what I have called ancillary provisions for the registration, confirmation, and enforcement of these bye-laws. The material consideration is that, when you read these two sections together, what the statute of 1903 authorises town-councils to do is to make bye-laws in regard to the hours of opening and closing of the premises registered under that section, and to make such provision for the confirmation and enforcement of these bye-laws as the statute of 1892 allows. The practical effect is that a town-council under this Act may pass bye-laws in regard to the hours of opening and closing of the premises, and may make penalties for punishing the offence of disobeying these bye-laws by a penalty not exceeding 40s. That is the position of the town-council.

Now, as I have said, these provisions, subject to qualifications to which I shall refer immediately, may be adopted by a county council. And the County Council of Lanarkshire has adopted them. But then they have made a bye-law which inflicts a penalty of a much larger amount than that authorised by the Act of 1892, for their penalty is a sum not exceeding £5 instead of not exceeding 40s. The real question—at least the most important question—is, whether that is authorised by their statute or not.

Now, that depends upon the 97th section, which authorises the adoption of the 82nd and provides that a county council may by resolution adopt certain sections of this Act, one of which is section 82, and, after a date to be specified in the resolution the adopted section shall have effect throughout the county, with the substitution of “county” for “burgh” and “county council” for “town-council,” and of the Local Government (Scotland) Act, 1889, and section 57 thereof, for the principal Act, that is for the Burgh Police Act of 1892 and section 316 thereof.

Now in the application of section 97 of the Act of 1903, it does not appear to me to be in the least degree doubtful what Parliament means by that provision. In the first place section 82 is to be adopted for the county; and therefore the first clause, which requires that “every person who shall keep, or suffer to be kept or used,” or who shall use a house “as an ice-cream shop or aerated water shop, without being registered in a register to be kept by the town-council, who are hereby required to keep a register for that purpose,” is liable to a penalty of £5—that is made applicable to the county by simply substituting the words “county council” for the words “town-council.” But then that is not the clause which enables bye-laws to be made. It is the immediately succeeding subsection, subsection 2, and we are to read that according to the prescription of section 97,

June 5, 1913. substituting as we read it the words "57" and "1889" for the words "316" and "principal Act." So far as regards burghs, the 82nd section required
 Lena v. that they should go to section 316 of the principal Act—that is, the Act of
 Davidson. 1892—in order to find their power to make bye-laws in regard to the hours
 Lord Kinnear. of opening and closing the premises, and that the provisions of that Act
 should apply to the enforcement of these bye-laws.

Now, if we read that provision as section 97 requires us to read it, the enactment is: "Section 57 of the Local Government Act of 1889 shall be deemed to confer power on the county council to make bye-laws in regard to the hours of opening and closing of premises registered under this section, . . . and the provisions of the Local Government Act, 1889, relating to bye-laws and the confirmation and enforcement thereof shall apply accordingly." That appears to me to be quite as plain an enactment as words can make it; and therefore if we are to ascertain the powers of the County Council in this matter, we are plainly to go to the Act of 1889.

Now the Local Government Act of 1889 provides in section 57: "(1) The council of a county may from time to time make such bye-laws as to them shall seem meet for the administration of the affairs of the county, for the prevention of vagrancy, and for the prevention and suppression of nuisances not already punishable in a summary manner, . . . and may thereby appoint such penalties, not exceeding in any case £5, as they deem necessary for the punishment of offences against the same." Now it was said upon the construction of that Act, that the purposes for which the county are here empowered to make bye-laws have nothing to do with the hours at which places of public refreshment may be open. It is said that they are confined to bye-laws for the prevention of vagrancy and for the suppression of nuisances and also for the administration of the affairs of the county, and that none of these expressions will cover regulations for fixing the hours during which shops may or may not be kept open. If the question depended upon the construction of that clause taken by itself, I must say that for myself I should have the greatest difficulty in holding that you could bring in a power to restrict the hours of keeping business premises open under any reasonable construction of the words "administration of the affairs of the county," or "prevention of vagrancy," or "the suppression of nuisances." I should, to say the least, have the greatest doubt whether any of these provisions could be made to apply. But then that does not appear to me to be of the slightest consequence in this case, because we are not sent to section 57 for the purpose of discovering the particular regulations which it empowers the county to make. That is fixed by the 82nd section of the Act of 1903. We are not to construe this clause separately as an isolated provision regulating the powers of the county council in this matter, but we are to read it into section 97, which says that section 57 is to be substituted for section 316 and the Local Government Act for the Act of 1892. Section 57 of the Local Government Act shall be deemed to confer power on the county council to make bye-laws in this matter.

Now that appears to me to be an end of the whole question. Whatever construction we might put upon section 57, if we were reading it apart from the later statute and upon its own terms, we are compelled by

the statute of 1903 to deem that it means this particular thing which read—
 ing it by itself without the aid of the later statute we should not under-
 stand it to mean. It is to be held that this clause which empowers the
 county council to make bye-laws defines the purpose for which they may make
 such bye-laws as including, among other things, bye-laws in regard to the
 hours of opening and closing of premises registered under section 82. I
 therefore cannot say that I have any doubt as to the construction of these
 three statutes taken together.

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 Lord Kinnear.

But then it was argued that section 316 of the Act of 1892, which is
 specially excluded from consideration by the 97th section of the 1903 Act,
 is not a section empowering penalties to be made, and that the section
 which authorises bye-laws to be enforced by penalties is section 317 which
 is not mentioned. Now that again, I think, might be a very forcible
 observation if the clause which requires us to read out of the 82nd section
 any reference to the Act of 1892 were limited to section 316 of that Act.
 But it is not so. We are to substitute not only section 57 for section 316,
 but, wherever the provisions of the principal Act are mentioned, we are to
 substitute for the principal Act the Local Government Act of 1889; and
 therefore we are to read that the provisions of that Act are to be applied
 in so far as they relate to the confirmation and enforcement of the bye-laws
 which the section, as adopted by the county council, authorises. The
 original introduction of section 317 into section 82 for this primary purpose
 of authorising bye-laws by a town-council was to enable the bye-laws which
 a town-council might make to be enforced by penalties. It is still neces-
 sary that some provision should be found enabling the bye-laws which the
 county council will make to be enforced by penalties also. But then for
 that purpose we are sent not to the Act of 1892 but to the Act of 1889.
 The terms of that Act seem to me to be quite clear.

Now it is objected with some reason that the result of that reading of the
 Act is to enable a county council to impose very much heavier penalties
 than a town-council may impose for offences of exactly the same kind. It
 is said to be anomalous that keeping an ice-cream shop open in the county
 should be an offence to be punished by a penalty of £5, whereas if it is
 kept open in the town, it is punishable only by a penalty of 40s. I do not
 feel called upon to consider the force of that reasoning at all, nor to con-
 jecture why the Legislature made that distinction between burghs and
 counties. I do not know, and there is nothing in the Act itself to show,
 why the difference is made. I know nothing about it. But the material
 fact is that a difference is made and intended, for Parliament says in the
 first place that the town-council shall enforce penalties under the regulations
 introduced by the Act of 1892; and in the second place that the county
 council shall enforce penalties, not under that Act but under a different
 Act which introduces different penalties. It is absolutely certain, there-
 fore, that Parliament meant, for whatever reason, that the powers of county
 councils in the enforcement of penalties should be different from the powers
 of town-councils within burghs. And the only question for us is to consider
 what the difference is, and that does not seem to me to be a question open
 to controversy. The construction I take to be clear. The objection to the
 competency was therefore rightly repelled by the Court.

June 5, 1913. But then there is a different objection taken. It is said that the complaint is not relevant because it is not sufficiently specific in respect that it does not state whether the shop in question was kept open for sale for consumption on the premises, for sale for consumption off the premises, or whether any sale took place at all. I think the answer to that is obviously that if any of these statements had been introduced into the complaint, they would have been altogether irrelevant. The bye-law does not regulate the consumption of whatever refreshments may be offered for sale in these premises. It has nothing to do with the question whether they are to be consumed on the premises, nor does it prohibit the sale. The express purpose of the bye-law—and the purpose which the statute intends it shall serve—is to prevent the premises being kept open. That is all that the bye-law prevents and that, therefore, is quite rightly all that the prosecutor complains that the appellant has done.

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Davidson.

Lord Kinnear.

We were referred, as an authority, to the case of *Rossi v. Magistrates of Edinburgh*.¹ That case has only a very indirect bearing, but, so far as it is applicable, it appears to me to support the judgment of the Court of Appeal in repelling the objection, because the whole force of the judgment of the House of Lords lies in this, that they say a prohibition to sell a commodity is one thing; a prohibition to keep open premises is another and a different thing; and a statute which authorises magistrates under certain conditions to prohibit a sale, does not thereby authorise them to prevent traders from keeping their premises open. But then that was a decision pronounced upon the construction of an Edinburgh Police Act, and the Lords held, on grounds that are clearly explained, that that Act did not authorise the magistrates to prohibit the keeping open of premises at certain times. But this Act of 1903 does the very thing which that Act did not do, because it expressly authorises a town-council within a burgh and a county council within a county to make bye-laws in regard to the hours of opening and closing of premises registered under the Act and to enforce these bye-laws by providing penalties to be inflicted upon those disobeying them.

On the whole matter, therefore, I am of opinion that the judgment of the Court below is right, and that the questions submitted for the opinion of this Court ought to be answered in the affirmative.

LORD JOHNSTON.—I concur in the judgment your Lordship proposes. Though there is some difficulty on the surface of the case, a careful consideration of the statutes leads, I think, to a clear conclusion which may be shortly stated.

The business of ice-cream shops was placed under regulation by the Burgh Police (Scotland) Act, 1903, which contains a clause (section 54) dealing with the manufacture and sale, and another (section 82) dealing with the registration of such shops and the regulation of their traffic. In particular, section 82, subsection 2, empowers town-councils to enact bye-laws restricting the hours during which such shops may be kept open. This it does by extending the purposes for which bye-laws may be made under section 316 of the principal Burgh Police Act, viz., that of 1892, to include

¹ 7 F. (H. L.) 85.

this additional purpose, and enacting that "the provisions of the principal June 5, 1913. Act relating to bye-laws and the confirmation and enforcement thereof shall apply accordingly." One of these provisions was contained in section 317, ^{Lena v. Davidson.} which empowered the magistrates to impose penalties for the enforcement of their bye-laws, but not exceeding 40s. for each breach of such bye-laws. ^{Ld. Johnston.} Other necessary provisions are contained in sections 318 to 323.

But though properly a Burgh Police Act, the Act of 1903 contained a provision (section 97) which authorised county councils to adopt its 54th and 82nd sections dealing with ice-cream shops or either of them, in which case the adopted section or sections were to have effect throughout the county, as if "county" were substituted for "burgh," and "county council" for "town-council." Had the section stopped there the county council's power of making bye-laws would have depended on the Act of 1903, section 83 (2), and through it upon the principal Burgh Police Act, 1892, section 316, and following sections. But section 97 proceeds to say "with the substitution of the Local Government (Scotland) Act, 1889, and section 57 thereof for the principal Act and section 316 thereof." Turning then to the Local Government Act, 1889, section 57, it will be found that it empowers the county council to make bye-laws on certain subjects enforceable by penalties not exceeding five pounds, with subsidiary provisions, which cover all the matters regarding bye-laws which are dealt with by the principal Burgh Police Act not only in section 316 but also in sections 317 and 323. Consequently the county council, though the mode of conferring the power is unnecessarily confusing, are in fact empowered to deal with ice-cream shops exactly as town-councils are, but under their own bye-laws code, and under no limitation from the terms of the corresponding town-council bye-laws code. Hence, though it may appear anomalous, the county councils are authorised to enact a maximum £5 penalty for an offence for which the town-council can only enact a maximum 40s. penalty.

I therefore think that the county council were not acting *ultra vires* in enacting a maximum £5 penalty in enforcement of the bye-law in question, and that the determination of the Justice of the Peace Court to that effect is sound. There are certain other points submitted to us, but on these I do not think it necessary to add anything.

LORD MACKENZIE.—I am of the same opinion. It is plain from the examination of the statutes which your Lordship in the chair has made that the Legislature did not put county councils and town-councils on the same footing as regards penalties. It would have been a simple and intelligible thing to have made the provisions of section 317 of the 1892 Act applicable to county councils, in which case they would only have been able to impose a penalty of 40s. which is the maximum that can be imposed by a town-council. But the Legislature have not thought fit to do that and this Court cannot do it for them. The result is that it is competent for a county council to impose a penalty of £5 for exactly the same offence as that for which a town-council can impose a fine of only 40s.

THE COURT answered both questions in the affirmative and dismissed the appeal.

No. 18. JOHN SHAW SOUTAR (Procurator-Fiscal, Dunfermline), Appellant.—
Sol.-Gen. Anderson—Wark.

June 10, 1913.

CHARLES CARLOW REID, Respondent.—*Horne, K.C.—W. T. Watson.*

Soutar v.
Reid.

Statutory Offences—Coal mine—Regulations for safety of miners—"Mechanical haulage"—Whether expression applicable to haulage worked by gravity—Coal Mines Act, 1911 (1 and 2 Geo. V. cap. 50), sec. 46 (4).

Held that a system of haulage in use in a mine by which an empty tub was drawn up an incline by the weight of a loaded tub descending on a parallel set of rails and attached to the empty tub by a chain passing round a pulley situated at the top of the incline, was not a system of "mechanical haulage" in the sense of sec. 46 (4) of the Coal Mines Act, 1911, and that accordingly the mineowners were not bound to provide certain safeguards which under the section were compulsory "on every haulage road where mechanical haulage . . . is used."

HIGH COURT. CHARLES CARLOW REID, colliery manager, Cowdenbeath, was charged in the Sheriff Court at Dunfermline on a complaint at the instance of John Shaw Soutar, procurator-fiscal, with the consent of the Home Secretary, which set forth:—"You are charged, at the instance of the complainer, that being district agent of the mine of Hill of Beath, in the parish of Beath and county of Fife, known as No. 1 Dalbeath Pit, belonging to and worked by the Fife Coal Company, Limited, having its registered office at Leven (hereinafter referred to as said pit), you did, on 30th November 1912, on a haulage road in a mine between the Lochgelly Splint Seam and the Kinglassie Seam in said pit, on which road mechanical haulage (not being endless-rope or endless-chain haulage) was used, and the gradient of which exceeded one in twelve, fail to provide and attach to ascending tubs backstays or other suitable contrivances for preventing the said tubs running back; contrary to section 46 (4) (b) of the Coal Mines Act, 1911*; whereby you are guilty of an offence against said Act in terms of section 75 thereof, and are liable to the penalty set forth in section 101 thereof."

The Sheriff-substitute (Umpherston) found the accused not guilty. In a case stated for appeal at the request of the complainer, the Sheriff-substitute made the following statement:—

"I found in fact that (1) The respondent was agent for said pit. (2) The *locus* was part of a mine between two seams in said pit. (3) The portion of the haulage road referred to in the complaint was an

* The Coal Mines Act, 1911 (1 and 2 Geo. V. cap. 50), enacts:—

Sec. 46. "(2) Sufficient and suitable sprags . . . shall be provided and used for the purpose of holding a tub or set of tubs—

"(a) at the top of every incline on which the haulage is worked by gravity; . . .

"(c) on all roads or parts of roads where the gradient exceeds one in twenty, and the haulage is worked by animal power.

"(3) Stop blocks . . . shall be provided at the top of every incline on which the haulage, not being endless-rope or endless-chain haulage, is worked by gravity. . . .

"(4) On every haulage road where mechanical haulage, not being endless-rope or endless-chain haulage, is used, and where the gradient exceeds one in twelve . . .

"(b) there shall be provided and attached to an ascending tub or set of tubs a backstay or other suitable contrivance for preventing the tub running back."

incline about 30 yards long. A fall was being cleared near the top of said incline, and the material was lowered in tubs by means of said incline to the main haulage road, whence it was sent forward to the pit bottom. (4) The road was what is known as a self-acting incline, or wheel brae, or cousie brae, and the gradient of said incline was 1 in 3. (5) There were two lines of rails on said incline—each line being alternately used for the passage of (a) an empty tub, and (b) a loaded tub. (6) The haulage was not endless-rope or endless-chain haulage. (7) The haulage arrangements consisted of (a) a pulley fixed at the top end of the incline; and (b) a chain which passed round the pulley. The loaded tub was attached to one end of said chain at the top of the incline, and the empty tub to the other end of the chain at the foot. As the loaded tub descended under gravity it pulled up the empty tub to the top of the incline. (8) Backstays or other suitable contrivances for preventing the tubs running back were not provided and attached to the ascending tubs. (9) If, in the course of working, the chain broke, even if a backstay were provided on the ascending tub, there was nothing to prevent the full hutch from running away to the bottom of the incline. (10) On 30th November 1912 said chain broke, and both the ascending and descending tub ran away, and James Meldrum, a worker employed on said road, was killed. (11) No mechanical power, as I interpreted that phrase when used in sections 43, 44, 48, and 57 of the Act, viz., power developed by means of some mechanism, was in use to actuate the haulage.

June 10, 1913.
Soutar v.
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"I held in law that the haulage arrangements described in article 7 hereof did not constitute 'mechanical haulage,' and that backstays or other suitable contrivances for preventing tubs running back were not required by the Act."

The questions submitted for the opinion of the Court were:—" (1) Does the system described in article 7 hereof, in operation on said haulage road, constitute mechanical haulage in the sense of section 46 (4) (b) of the Coal Mines Act, 1911? (2) Was it therefore legally necessary to provide and attach to tubs ascending on said haulage road backstays or other suitable contrivances for preventing said tubs running back?"

The case was heard before the High Court on 4th June 1913.

Argued for the appellant;—The system here was one of "mechanical haulage," in the sense of section 46 (4). It would be surprising if it were not, seeing that the object of the section was to provide safeguards for miners, and the system in use here was at least as dangerous as those which the respondent contended alone fell under the expression. The language, however, of the Act was in itself reasonably clear. Two expressions were found in the Act. The ordinary expression used was haulage "by mechanical power."¹ It occurred throughout the Act in connection with and in contrast to haulage by gravity, animal power, or manual labour, and meant haulage where the motive power was a machine. The system here obviously did not fall under that description. The other expression was the one used in section 46, "mechanical haulage." It was a new expression found in this section alone, and used intentionally instead of the ordinary expression elsewhere found in the Act, because it was meant to denote something different, viz., any form of haulage not operated by hand or animal power, and it included haulage by force of gravity. The

¹ Coal Mines Act, 1911, secs. 43 (2), 44 (1), 48, and 57.

June 10, 1913. object was to combine for the purposes of the section systems of haulage which had been differentiated for certain purposes in earlier sections, but between which no distinction could be drawn for the main purpose of the Act, viz., protection of life and limb. The Sheriff-substitute had erred, because he had not apprehended the distinction between the two expressions, and had thought that section 46 (4) was dealing with the first. If it had, his decision would doubtless have been right. He had wrongly interpreted the word "mechanical" as meaning "produced by mechanical power." Such a meaning could not be reconciled with the Act, nor with the ordinary use of language.¹

Soutar v.
Reid.

Argued for the respondent ;—The system was not one of "mechanical haulage" in the sense of section 46 (4). "Mechanical haulage" was merely another expression for "haulage by mechanical power," and did not and could not include haulage by gravity. That it did not do so in this Act was clear from the fact that throughout the Act four different kinds of haulage were recognised, mechanical, hand, animal, and gravity, and in this very section in subsections (2) and (3) haulage by gravity was expressly dealt with. Had it been meant to include haulage by gravity in subsection (4) the language of section 48 of the Act, "haulage by gravity or mechanical power" would have been used. Further special rules for the safety of men engaged in connection with haulage by gravity were to be found elsewhere in the Act, the "hanger on" being required to stand clear of the wheel brae while the tubs were in motion, whereas, as the Sheriff-substitute pointed out in finding 9, the safeguards provided by the subsection here in question would be absolutely useless.

At advising on 10th June 1913,—

LORD KINNEAR.—This is an appeal by the procurator-fiscal of Dunfermline against a judgment of the Sheriff-substitute at Dunfermline by which he has acquitted the respondent of the charge of an offence against the Coal Mines Act, 1911. The particular clause of the Act which is said to have been infringed is the fourth subsection of section 46, which prescribes that "On every haulage road where mechanical haulage, not being endless-rope or endless-chain haulage, is used, and where the gradient exceeds 1 in 12, (a) runaway switches or other suitable contrivances shall be provided, where the use thereof is practicable, to prevent accidents in the event of a tub running away ; (b) there shall be provided and attached to an ascending tub or set of tubs a backstay or other suitable contrivance for preventing the tub running back."

The haulage road in question was not worked by endless-rope or endless-chain, and the case is therefore not within that exception ; but it is said that it was a haulage road where mechanical haulage was used, and that an accident happened through the failure of the mineowners or mine engineers to provide and attach to ascending tubs backstays or other suitable contrivances for preventing the said tubs running back.

The learned Sheriff-substitute describes the apparatus quite clearly in the stated case. He says :—"The haulage arrangements consisted of (a) a pulley fixed at the top end of the incline ; and (b) a chain which passed round the pulley. The loaded tub was attached to one end of said chain at

¹ New English Dictionary, Murray, vol. vi., p. 285, *sub voce* Mechanical, 3.

the top of the incline, and the empty tub to the other end of the chain at June 10, 1913. the foot. As the loaded tub descended under gravity it pulled the empty tub to the top of the incline." Then, that being the construction of the apparatus, he says :—" On 30th November 1912 said chain broke, and both the ascending and descending tub ran away, and James Meldrum, a worker employed on said road, was killed." Soutar v. Reid.
Lord Kinnear.

The question, therefore, is whether in using this apparatus without providing and attaching to the ascending tub a backstay or other suitable contrivance for preventing the tub running back, the colliery manager was in breach of the statutory regulation. That is, of course, a question of the construction of the section in question, having regard to the facts described.

I confess that, if the clause in the statute which we have to construe were taken by itself, I should have some difficulty in accepting the view of the learned Sheriff-substitute. As at present advised, it appears to me that what the learned Sheriff-substitute describes is haulage which is operated by no other force, so far as he shows, except mechanical force. One part of a complex machine by its weight is used to pull up another part of the same complex machine which is much lighter, and I cannot at present see that any force is in operation which is not mechanical. But then I do not think that that is the question we have to decide. We cannot take this particular clause apart from the series of regulations of which it forms a part and interpret it by itself. And for this reason to begin with, the first thing that strikes one in reading the clause itself is that the statute intends to distinguish between one method of hauling, which it calls mechanical, and some other method of hauling. For the purpose of ascertaining the true effect and meaning of that distinction we must go to its description of the other kinds of hauling to which it relates.

Now I think that throughout the whole series of enactments upon this subject we find that the statute distinguishes between three different powers or forces which may be used to effect haulage. It speaks of animal haulage, that is to say haulage worked by animal power; again, as distinguished from that, haulage worked by mechanical power; and again, and separately as something different, haulage worked by gravity. All these three are treated in the statute, as I read it, as different modes of haulage, and in this very section, which we are to apply, the statute begins by prescribing what is to be done upon the haulage roads at which other modes of haulage than mechanical haulage are employed. The first provision is that sufficient and suitable sprags shall be provided and used for the purpose of holding a tub or set of tubs at the top of every incline on which the haulage is worked by gravity. The next is a clause relating to the same kind of haulage—that certain contrivances shall be provided on roads on which haulage is worked by gravity. Therefore you have these two provisions with reference to that mode of haulage. Then comes the next, where it is provided that on every haulage road where mechanical haulage is used certain other and different precautions are to be taken.

I cannot therefore help thinking that the statute has provided a glossary for its own interpretation, and that, when it has made certain definite provisions with reference to haulage roads which are worked by mechanical

June 10, 1918. power on the one hand, and haulage roads which are worked by animal power on the other hand, and again for a third kind of haulage power which it says is worked by gravity, it means that these are to be considered as three different modes of haulage, and that precautions of one kind or another are to be taken according as the one or the other is used.

Soutar v. Reid.
Lord Kinnear.

But then I think we are not here called upon merely to decide the construction of this clause according to the strict meaning of particular words used. The question turns not only upon the meaning of words, but upon the facts of the case, because this particular regulation is only one of a series of very minute and stringent regulations for the underground management of mines, all of them addressed to skilled managers, because the statute begins by providing that there shall be a manager with certain qualifications underground, who shall be responsible for carrying out all these regulations. They are addressed to persons constantly engaged in the operations which the Act describes and skilled in their performance, and they are very various and complicated in their nature, although this particular direction may seem to be simple enough.

Therefore we have to construe a statute addressed to persons skilled in the particular matter in hand, and to be interpreted with reference to the arrangements for working a mine, which are very well known to such skilled persons but which cannot be known to a Court of law unless they are proved in evidence. Now the learned Sheriff-substitute had the means of bringing all these facts before his mind and of pronouncing his judgment with reference not only to the mere interpretation of particular words, but with reference to the whole facts of the case. We in this Court have nothing before us except the particular words of the statute and the short description he has given us of this particular apparatus. I am not prepared, for my part, upon these materials to say that the learned Sheriff-substitute is wrong in a question which involves for its determination an exact knowledge of the facts to which the clause relates, as well as a sound construction of the words of the clause itself.

It was said, and with force, by the Solicitor-General, that this was an Act of Parliament which was intended for the protection of life and limb, and that therefore, in construing it, we must be careful that safeguards which Parliament has enacted for the protection of miners are not disregarded by the managers and the owners of mines. That is perfectly true, but I am afraid it is a consideration which is not very directly conclusive of the particular question we have to determine—indeed, it begs the question. It is a consideration of great importance, if we are to decide whether mineowners or underground managers are to be excused for disregarding regulations which the statute has laid upon them. But the question is whether a particular regulation does or does not provide a safeguard, and I am afraid it does not help us in determining that to say that the statute intended safeguards to be provided. Whether the apparatus which was not employed is a safeguard within the meaning of the statute is the question to be decided. Now, upon that question the Sheriff-substitute has given us a finding in fact which, I think, goes far to exclude the particular argument that I am considering, although I do not say that it is in itself conclusive, because he says that "If, in the course of working, the chain broke, even if

a backstay were provided on the ascending tub, there was nothing to prevent the full hutch from running away to the bottom of the incline." Soutar v. Reid.

On the whole matter, therefore, I am not prepared on any judgment of my own to say that the Sheriff-substitute's judgment was wrong. I think the final consideration that ought to govern the Court in the determination of this matter is this: that it is proposed to inflict a penalty upon the construction of an enactment which creates a punishable offence and subjects the offender to a penalty. I do not think that we can hold that Parliament intended to create an offence and subject persons to penalties by the use of any ambiguous language; and that, at the utmost, all that can be said for the prosecutor's construction of the statute is that, if it is read without reference to the context, it may or may not bear the meaning which he has put upon it. In these circumstances I am of opinion that there are no sufficient grounds for interfering with the Sheriff-substitute's judgment. Lord Kinnear.

LORD JOHNSTON.—The question submitted is, whether the process of hauling an empty tub up an incline by the weight of a loaded tub running down the incline on parallel sets of rails, the tubs being connected by a rope or chain passing over a fixed pulley at the top of the incline, is mechanical haulage in the sense of section 46 (4) of the Coal Mines Act, 1911.

I think that the learned Sheriff-substitute has rightly concluded that it is not.

Haulage is the action or process of hauling. It requires power to effect it. That power must be developed, as distinguished from applied. It may be developed (1) by manual or animal labour, (2) by the attraction of gravity, and (3) by means of mechanical contrivance. These are contrasted in various sections of the Act, though the expressions used occasionally vary. For instance, section 43 (2) speaks of the haulage being "worked by gravity or mechanical power." By the latter phrase is meant power developed by means of mechanism, for strictly there is no such thing as mechanical power.

Now in section 46 there is, as regards haulage, one provision (section 46 (2) (c)) for the case where "the haulage is worked by animal power," another (section 46 (3)) for the case where "the haulage is worked by gravity," and a third (section 46 (4)) for the case "where mechanical haulage is used." I quote in each case the expression adopted by the statute. It is this latter provision with which we are concerned. The turn of phrase of the first and second case is altered in the third case. But the expression "where mechanical haulage is used" is only another way of saying where the haulage is "worked by" mechanical contrivance. In either case it is the animal, gravity, or the mechanical contrivance which develops the power necessary to operate the haulage.

In the method described by the Sheriff-substitute, or, to use the mining term "on the wheel brae," it is not the rope and pulley which develops the power or works the haulage, but the force of gravity, applied through the rope and pulley as its channel, and accordingly I think that the Sheriff-substitute came to a right conclusion in holding that the haulage in question was not mechanical haulage in the sense of section 46 (4) of the Act.

June 10, 1913. I think that confusion has arisen in the mind of the prosecution owing to a misapprehension of the parenthetical words "not being endless-rope or endless-chain haulage," which are found in section 46 (4). That is not a description of mechanical haulage but of haulage, and is equally applicable to gravitation as to mechanical haulage, as is shown by a reference to section 46 (3). The true import of the provision read with its parenthesis is:—On every haulage road where haulage, not being endless-rope or endless-chain haulage, is worked by mechanical contrivance, certain precautions are to be taken. So read the parenthesis creates no difficulty in the way of deciding the question as the Sheriff-substitute has, I think, rightly decided it.

Soutar v.
Reid.

Ld. Johnston.

LORD MACKENZIE.—I agree with your Lordships that the Sheriff-substitute has come to a right conclusion in this case. I may say that I should have been very slow to differ from the conclusion reached by the Judge who had the advantage of hearing the evidence of skilled witnesses on such a question as this. It appears from the papers before us that a number of documents were laid before him, and we were informed by counsel at the bar that he had had the advantage of hearing expert testimony. The provision which he had to construe is one which occurs in a fasciculus of clauses dealing with travelling roads and haulage, and, inasmuch as they are dealing with a provision which imposes a penalty, it would require to be stated in plain language what it was that had to be provided by the mine management.

Now, as your Lordships have pointed out, whatever might *prima facie* be the meaning attached to the expression "mechanical haulage" if it occurred as an isolated term, I think there is quite sufficient material in the clauses, particularly 43, 44, 48, and 57 of the Act, for justifying the conclusion arrived at by the learned Sheriff-substitute after he had had the advantage of having explained to him the practical application of these different provisions. Accordingly I think that the conclusion he has reached is correct.

THE COURT answered both questions in the negative and dismissed the appeal.

SIR WILLIAM S. HALDANE, W.S.—WALLACE & BEGG, W.S.—Agents.

No. 19.

June 10, 1913.

Robson v.
Menzies.

WILLIAM FRIER ROBSON, Pursuer (Appellant).—*T. G. Robertson.*
CHARLES THOMSON MENZIES, Defender (Respondent).—*D. P. Fleming.*

Sheriff—Small-debt procedure—Appeal—Malice and oppression—Deviations from statutory form—Incompetency—Hearing of incompetent evidence—Small Debt (Scotland) Act, 1837 (7 Will. IV. and 1 Vict. cap. 41), sec. 31.

By the Small Debt (Scotland) Act, 1837, an appeal in small-debt cases is only competent when (sec. 31) "founded on the ground of corruption or malice and oppression on the part of the sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the sheriff."

Held that under the above section no appeal was competent unless

in a case where there had been a denial of justice owing to a failure of June 10, 1913. duty on the part of the Sheriff. *Held* further (1) that "malice and oppression" meant malice and oppression in the ordinary signification of the terms, and pointed to something done by the Sheriff from wrong or capricious motives of his own; (2) that the expression "deviations in point of form from the statutory enactments" covered any case in which the Sheriff had denied justice by not allowing the parties a hearing; (3) that "incompetency" referred exclusively to the entertainment by the Sheriff of a cause which he might not competently entertain.

Robson v.
Menzies.

In a small-debt action at the instance of a landlord against his tenant for recovery of a proportion of taxes paid by the pursuer in respect of the subjects let, the parties lodged a minute in which, "to obviate proof thereon," they agreed in admitting the lease and a correspondence which had taken place between their respective agents. The Sheriff-substitute *ex proprio motu* took evidence as to the purpose for which the subjects were let, and thereafter assolized the defender. In an appeal against this judgment on the grounds of (1) incompetency, and (2) malice and oppression, *held* that if the Sheriff had erred in taking the evidence his error was one in law only, and that no appeal lay on either of the grounds stated.

On 21st January 1913 William Frier Robson brought an action in the Small-Debt Court at Duns against Colonel Charles Thomson Menzies, in which the pursuer claimed payment of £5, 5s. 8d. for taxes alleged to be due by the defender to him in respect of certain premises let by him to the defender.

HIGH COURT.
Lord Justice-
General.
Lord Kinnear.
Ld. Johnston.

On 21st February 1913 the Sheriff-substitute (Macaulay Smith) assolized the defender from the conclusions of the summons.

The pursuer appealed to the High Court of Justiciary against this judgment, and lodged a note of appeal, in which it was stated:—"On 21st February 1913 a minute of admissions* was lodged, together with the lease and the copy correspondence referred to in said minute. Said minute was lodged for the purpose of obviating the leading of any proof, and bears to be a renunciation of proof by both parties. Said lease was a probative document, and contained the whole terms and conditions of the bargain between the pursuer and the defender in reference to the tack of the premises, in respect whereof the pursuer claimed the sum sued for from the defender, and it provided, *inter alia*, that the said premises were let as an unfurnished residence. Notwithstanding that neither party sought to lead any proof other than that contained in said minute of admissions, the Sheriff-substitute stated that he was entitled to have evidence as to the express purpose for which the house was let, and that as he could not find this from the lease, he was not going to look at it, but he would like to hear the circumstances under which the house was taken. The pursuer objected to the competency of leading evidence as to the purpose for which the premises were let, in respect that the lease was the measure of the agreement between the parties; but the Sheriff-substitute insisted on the defender and Thomas Smart,

* The minute was in the following terms:—"Minute of Admissions in Small-Debt Action *Robson v. Menzies*. To obviate a proof thereon, the parties agree in admitting the following:—(1) The lease between the parties dated 6th and 8th August 1912, produced herewith; (2) The copy correspondence between the parties' agents produced herewith; and (3) That the sums in the claim sued for are the correct taxes on the assessed rental of £55."

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overseer at Kames, defender's own residence, giving evidence as to the purpose for which said premises were let, and on their testifying that the premises were let for the purpose of storing defender's furniture and as a residence while defender's own house was under repair, the Sheriff-substitute held that these facts constituted a special agreement between the parties, relieving the defender of any liability to pay taxes for the period of his occupancy under the lease, and he accordingly assolzied the defender, and found the pursuer liable to defender in £1, 3s. of expenses."

The grounds of appeal were stated as follows :—“(a) Incompetency. The said lease is a probative document, and contains the whole terms of the contract between the appellant and the defender, and no addition to, or modification thereof, could be made by oral evidence. Further, the purpose for which said premises were let was not a competent consideration to take cognisance of in deciding whether or no the defender was liable to relieve the pursuer of the taxes due by defender in respect of his period of occupancy under said lease. (b) Malice and oppression. Parties having renounced probation by minute lodged in Court, it was malicious and oppressive of the Sheriff-substitute, at his own hand, to insist on leading evidence, and although said evidence was irrelevant and incompetent, to decide the case upon and in respect of said evidence.”*

The appeal was heard before the High Court on 27th May 1913.¹

At advising on 10th June 1913,—

LORD JUSTICE-GENERAL.—This is an appeal against a judgment in the Small-Debt Court. The action was a claim for payment of £5, 5s. 8d. of taxes, which the lessor of certain premises claimed from the lessee, and the defender was assolzied. He was assolzied after the Sheriff-substitute had listened to evidence which, in fact, according to the statement of the appellant, the learned Judge himself insisted should be led before him. This evidence, it is said, he had no business to listen to, because the lease, which

* The Small Debt (Scotland) Act, 1837 (7 Will. IV. and 1 Vict. cap. 41), sec. 31, enacts :—“It shall be competent to any person conceiving himself aggrieved by any decree given by any sheriff in any cause . . . raised under the authority of this Act to bring the case by appeal before the next circuit Court of Justiciary, or, where there are no circuit courts, before the High Court of Justiciary . . . Provided always that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the sheriff, or on such deviations in point of form from the statutory enactments as the court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the sheriff; . . .”

¹ *The following authorities were referred to at the hearing:—For the Appellant.*—Moncreiff on Review, pp. 248-251 and 253-257, esp. at p. 256; Gordon v. Mulholland, (1891) 18 R. (J.) 18, 2 White, 576; Renfrew v. Hall, (1901) 4 F. (J.) 27, 3 Adam, 517; Cowe v. M'Dougall, (1908) 5 Adam, 616; Brown v. Edinburgh House Proprietors Co., (1902) 4 Adam, 30; MacLachlan v. Tennant, (1871) 2 Coup. 45; Hair v. Nicol's Trustees, (1871) 2 Coup. 40; Murray v. Mackenzie, (1869) 1 Coup. 247; Gunn v. Taylor, (1873) 2 Coup. 491; Scottish North-Eastern Railway Co. v. Matthews, (1866) 5 Irv. 237. *For the Respondent.*—Sprot v. Portpatrick and Wigtonshire Joint Committee, (1898) 25 R. (J.) 71, 2 Adam, 519; Millar v. Strathmore Auction Co., (1906) 8 F. (J.) 71, 5 Adam, 95; Wilson v. Glasgow Tramways Co., (1878) 5 R. 981.

was produced, was the only document which could show the relationship between the landlord and the tenant, and contained the full terms of the bargain between them. The appellant is the pursuer, and he presents this appeal, and in the note of appeal he sets forth his reasons for the appeal thus—[His Lordship read the grounds of appeal as stated *supra*].

Robson v.

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Lord Justice-General.

A great many cases were quoted to us, and I am afraid it is true that the cases are not altogether reconcilable. For that reason I do not propose to go through them *seriatim*; but I may say that I have, as a matter of fact, read every case in the books that I have discovered which has been decided on this statute. The cases not being reconcilable, I think it puts upon us the duty of going to the statute itself. And I may say also that I think it is all the more necessary to give what will, I hope, be an authoritative judgment upon this matter, because the discrepancies of the cases may, to a certain extent, be explained by the fact that some of them were pronounced at Circuit Courts, where there is obviously not the same opportunity for full citation of authorities and consideration as there is in the High Court here.

The matter naturally depends upon the 31st section of the Small Debt Act, but that must be taken along with the 30th section, and the 30th section provides "No decree given by any Sheriff in any cause . . . decided under the authority of this Act shall be subject to reduction, advocacy, suspension, or appeal, or any other form of review or stay of execution, other than provided by this Act, either on account of any omission or irregularity or informality in the citation or proceedings, or on the merits, or on any ground or reason whatever." I need scarcely say that a more absolute exclusion of appeal could not be imagined; and therefore, in the matter of appeal, we are strictly limited to the grounds subsequently provided in this Act. Those grounds are in section 31, which enacts:—[His Lordship here quoted the terms of the section].

As the first matter that is put forward here is incompetency, I may say at once that I think it is quite impossible to hold that under the head of incompetency you could deal with anything that is wrong in the procedure of the case itself. I think that incompetency means, and can only mean, an inability in the Court to deal with the matter in hand; and I think the reason why the phrase is used—"incompetency including defect of jurisdiction"—is not really to add anything, but is merely to look at the matter from another point of view. In other words, I think incompetency pure and simple would mean any case with which the Court, as a Court, had not power to deal. For instance, if a small-debt decree purported to give a declarator of marriage with a pecuniary result, the Court is obviously incompetent to deal with that matter. Or again, if the Court purported to give a decree for £1000, it would clearly be incompetent to do so.

Where you come to the phrase "want of jurisdiction," that is really the same thing but looked at from the point of view, not of the matter of the complaint but of the person. An illustration of this is a decree in the Small-Debt Court of Midlothian given against a person who lives in Inverness-shire. But in both branches of this incompetency the defect is that the Court itself had no business to go on and pronounce a decree in the matter in hand. That obviously cannot touch something wrong that is done in the proceedings.

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General.

The next ground of appeal here is put as malice and oppression; and there is again, I think, some ground in some of the decided cases for what is argued here—I mean, there is a hint in some of the judgments of there being a sort of oppression which is not oppression in the ordinary sense of the word, but a fancied oppression when anything very far wrong is done in the course of the case. I think that where oppression is joined with malice, as it is here, and is followed by the words “on the part of the Sheriff,” it obviously points to something done by the Judge, and done by the Judge from (what I may call) motives of his own. Although I am not going through the cases, I wish to say that I cannot agree with an expression in one of the judgments in which it was said that what the learned Sheriff had done from caprice was not oppressive.¹ I think that caprice in a Judge, for the purpose of coming to a certain result—for such it clearly was in that case—which has the effect of depriving the litigant of justice, is oppression. But, obviously, that does not apply to this case. There was nothing here oppressive in what the Judge did, and there is not the slightest hint of malice on the Judge’s part.

Now I have taken those two objections first, because those were the points which were put by the pleader in the forefront. But that does not exhaust the whole grounds of appeal; and, in particular, your Lordships will see that, in my opinion at least, these were not the grounds of decision in any of the cases which were cited in which an appeal was allowed, because in none of those cases in which an appeal was allowed was there ever true incompetence or true malice and oppression. And yet I think in all of the cases where an appeal was allowed it was rightly allowed. Now the ground upon which it was rightly allowed was this: “Such deviations in point of form from the statutory enactments as the court shall think took place wilfully, or have prevented substantial justice from having been done.”

Now I think that expression “deviations from the statutory enactments” sends you to the whole proceedings as detailed in the Small Debt Act, and you find in section 13 of the Small Debt Act, “when the parties shall appear, the sheriff shall hear them *viva voce*, and examine witnesses or havers upon oath, and may also examine the parties,” and thereafter decree is pronounced. It appears to me, therefore, that wherever you can show that the Sheriff has denied justice by not allowing the parties a hearing—so to speak, driven them away from the judgment seat—that is a deviation from the statutory forms of a character that has prevented substantial justice from being done.

I think that we have our way made clear to us in this matter by considering an analogous branch of law which has been the subject of more decision, including decisions by the House of Lords, namely, the grounds upon which a decret-arbitral can be set aside. Your Lordships will remember that the grounds upon which a decret-arbitral can be set aside are detailed in the old Articles of Regulation in words which, although not exactly the same, are very like the words used in the Small Debt Act—so like, indeed,

¹ Millar v. Strathmore Auction Co., Limited, 8 F. (J.) 71, *per* Lord M'Laren.

that I cannot help thinking that the draftsman of the Small Debt Act June 10, 1913. must have had in his mind the words of the Articles of Regulation. And in the older decisions there was an inclination on the part of the Court to define "corruption" as used in the Articles, not in the natural sense of the word, but as including a sort of legal corruption, which really included a departure from the justice of the case. That tendency of the Court was corrected by the House of Lords; and I specially refer to the judgment of Lord Watson in the case of *Adams v. Great North of Scotland Railway Company*,¹ and the case which very soon followed after that—the case of *the Holmes Oil Company, Limited, v. Pumphreston Oil Company, Limited*.² But your Lordships will remember that, although the House of Lords and Lord Watson disclaimed any idea of being able to reach injustice through the word "corruption" in the proper sense of the word, yet they said that if there had been an entire desertion of all those forms of process which are meant to do justice between party and party, then you could get at the decree. As an instance of this I refer to the old case of *Mitchell v. Cable*,³ where the arbiter heard the one side and did not hear the other. And I do not think that the matter is really better put, or can be better put, than it is put by a sentence in the judgment of the first Lord Mackenzie in *Mitchell v. Cable*,³ where he says this: "We are not entitled to set aside the award of an arbiter pronounced under an error of judgment, however palpable that error may be; but if any failure in duty has been committed, distinct from an error of judgment, the award cannot stand." Now I think that is not only good law in the case in which it was pronounced, but it is good law also for these small-debt appeals. I ought to say, in order to prevent misunderstanding, that Lord Mackenzie, after the words I have read, added these words: "That failure must be included under the term corruption." That, in view of the House of Lords judgment, is not correct. But that does not vitiate the application of the sentence that has gone before; it merely ascribes it to a wrong category.

Therefore I think what one has got to consider in coming to a concrete case is this: Does what the Sheriff has done in the Small-Debt Court amount to a failure of duty, or has he merely made a mistake in law? If he has made a mistake in law, then the matter is not subject for appeal; if he has failed in duty, then it is appealable. I do not think that this distinction can be brought out better than by comparing two cases which, if I may say so, I think were both quite rightly decided. The one was the case of *Brown v. Edinburgh House Proprietors Company, Limited*.⁴ It was a judgment of Sheriff Maconochie, and the action was a small-debt action for rent. The defence was that there were certain counter claims. Now section 11 of the Small Debt Act provides that, where counter claims are put forward, a certain notice must be given. That notice had not been given; and accordingly Sheriff Maconochie held that he was bound to give decree at once without going into the matter of the counter claim. It was argued, however, that he had, so to speak, driven them from the judgment seat—that he had refused evidence which he ought to have

¹ (1890) 18 R. (H. L.) 1.² (1848) 10 D. 1297, at p. 1307.³ (1891) 18 R. (H. L.) 52.⁴ 4 Adam, 30.

June 10, 1913. heard. But their Lordships held, and I think rightly, that that could not be listened to, because the Sheriff had not refused evidence simply because he would not hear evidence, but because his reading of section 11 was that, if such evidence had been tendered, it was irrelevant in terms of the statute. I think he was clearly right. But even assuming he had been wrong, it did not matter, because it would have been a mere mistake in law.

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Now that case may be compared with the case of *Renfrew v. Hall*,¹ in which a landlord raised a sequestration for rent two days after the Whitsunday term. The tenant offered payment of the rent, but without expenses. Now section 5 of the Small Debt Act provides that a pursuer, in a sequestration for rent where the rent is due, shall get expenses. Now the Sheriff not only did not give expenses but he refused to hear evidence as to the circumstances in which the sequestration was raised. And the Lord Justice-General in that case says this: "It appears to me, however, quite possible that evidence might have been material to the decision of the question. . . . The refusal to hear evidence under the circumstances of the particular case appears to me to be such a deviation in point of form from the statutory enactments governing procedure in the Small-Debt Court as might prevent substantial justice from being done, and I therefore think that the appeal should be sustained."

I think that that decision was quite right also, and the distinction between the two cases is obvious. It was not, in that case, a mistake in law, but it was a failure in duty on the part of the Sheriff in refusing to listen to evidence that might have had a bearing upon the case.

I have nothing more to say upon the general question. I think it is quite clear from the views that I have expressed that, when we come to this particular case, the Sheriff-substitute, if he is wrong, made a mistake in law and nothing else, and accordingly I am of opinion here that the appeal should not be allowed.

LORD KINNEAR.—I agree with your Lordship for the reasons which you have given, in all of which I entirely concur. I do not find myself much embarrassed by the irreconcilability of certain of the cases with others or, if so be, of some of them with the plain construction of the statute. The cases on this matter do not make law. Previous decisions are extremely useful as illustrations of the way in which the law should be applied; and if there were, what I think there is not, a consistent series of judgments on the construction of particular terms, we should find in such judgments a very useful guide in the performance of our own duty in construing the statute. But the decisions in this matter are not law in the sense in which, in other departments, decisions may be binding on the Court, because the purpose of examining them is not to extract from a series of judgments some governing rule or formula which will be found to cover them all, and which therefore may safely be applied to similar or analogous facts upon which the Court has to adjudicate. We do not go to the decisions in this matter for the rule of law at all. The formula is laid down for us in perfectly clear and express terms by the statute, and the decisions of our predecessors can

¹ 4 F. (J.) 27, 3 Adam, 517.

do nothing more than help us in applying that formula by showing how they applied it in particular cases. If some of them are not reconcilable with the great majority—and I must say that I think the great majority are entirely in accordance with the construction of the statute which your Lordship has given—that only shows that in the application of this statute there have been occasional miscarriages which do not bind the Court; and, notwithstanding these particular variations on the ordinary course of decision, we must look at the statute and apply it according to its plain meaning.

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Now in so applying it in the circumstances of the present case I agree with all that your Lordship has said. We have to consider, in the first place, whether there is any relevant allegation of incompetency, because the first ground upon which the appellant says that the judgment is to be set aside is that it was incompetent. I agree with your Lordship that in reading the thirty-first section, which introduces the grounds upon which it is possible to set aside a judgment in the Small-Debt Court, we must take along with this the previous enactment that such judgments are not to be subject to review on account of any omission, or irregularity, or informality, or on the merits, and that the only grounds upon which they may be set aside are those enumerated in the thirty-first section.

As to the first of these grounds, viz., incompetency, I am quite clear that it means the incompetency of the Sheriff and of the Sheriff Court. It is said that the Sheriff-substitute admitted incompetent evidence. But then, if he made a mistake in allowing evidence when it was his business to decide whether evidence should be admissible or not, that is not incompetency in the Court or in the Sheriff. Incompetency, in the sense of the statute, as I read it, means incompetency to decide the matter at all. The Court has no power to determine the particular question one way or another, and such determination is therefore not a matter for it. If it is a question which the Court is called upon, in the ordinary course of procedure, to decide one way or the other, then it is of no consequence whether the Sheriff decides it rightly or wrongly, because, although he may have gone wrong on the merits of the particular question, nevertheless his judgment is unreviewable. I think that that construction, which would have been the only one, in my view, even if the word "incompetency" had not been explained by the statute itself, is confirmed when we see that the statute affords a certain aid to the interpretation of the word "incompetency" by giving a conspicuous instance of its meaning. It says, "Incompetency, including want of jurisdiction." Therefore, want of jurisdiction is an instance of the kind of incompetency which the statute says is to be a sufficient ground of appeal. Want of jurisdiction—as your Lordship has said—is incapacity of the Judge to entertain the matter at all, to decide anything with effect upon the particular question.

The second ground of objection is that the Sheriff-substitute's proceeding was oppressive. Now what is said to be oppressive is this that he, having before him the terms of a lease which it was said was the sole measure of the relations between the landlord and the tenant, nevertheless took evidence as to the purpose for which the tenant had taken the lease and gave effect to that evidence in his decision of the question. He allowed witnesses to

June 10, 1913. speak on a matter which, it was said, was precluded by the written lease.
Robson v. That may have been right or wrong. It may have been an error in judg-
Menzies. ment. I do not express any opinion upon that point, because it is not before
us. But there is nothing in that, taken by itself, approaching to malice and
Lord Kinnear. oppression in the sense of the statute.

I cannot assent to a doctrine which was maintained by the learned counsel—and with some show of support from one of the previous cases—that oppression in this statute does not mean oppression. It was said that it does not mean oppression at all, but that it means something else. I agree that we have the best of all possible guides in rejecting that argument in the judgment of the learned Lords in the case of *Adams v. Great North of Scotland Railway Company*.¹ There is no such thing as “legal oppression,” any more than there is “legal corruption,” as something different from what ordinary educated people, using ordinary language, mean by corruption and oppression. After all, these are ordinary words. The words have a meaning, and when the Legislature uses them in an Act of Parliament it must be understood that it intended that meaning. And it appears to me that the observations of one of the learned Lords who took part in the judgment in the case of *Weir v. Bell*² are directly applicable, when he says, “I do not understand legal fraud, to my mind it has no more meaning than legal heat or legal cold, legal light or legal shade.” Fraud and oppression and corruption mean exactly the same thing when used by lawyers and in legal cases and by ordinary people in the ordinary talk of mankind.

But then, I think, we are relieved of any difficulty in the construction of the word such as might have arisen. There might have been some difficulty in the construction of the word oppression if it had stood alone, because it might well have been said a wrong judgment is oppressive however honest the Judge who delivered it may have been. But then that is quite clearly excluded by the statute which says that the ground of appeal is malice and oppression. Now, malice is *malitia*, which means wickedness. If, therefore, the Judge pronounce an oppressive judgment, not as an honest judgment in the course of his duty, but from some wrong motive or from caprice, I agree with your Lordship that such caprice or wrong motive upon the part of a Judge which leads him to refuse to hear evidence which he was bound to hear, is, in the ordinary sense of the word, malice and oppression; but then, if what the Judge does is to accept evidence which there may be legal grounds for saying ought to be rejected, or to reject evidence which ought to have been admitted, from mere error of judgment, in the exercise of his own honest opinion, there is nothing capricious or oppressive in the sense of the statute.

On the whole matter, therefore, I concur with your Lordship in thinking that what the statute enables us to set aside is a denial of justice from failure of duty on the part of the Judge, and that in this case there is no relevant averment of failure of duty or denial of justice from that cause, but simply that, in deciding a question properly before him, which he was required to decide, the Judge went wrong.

¹ 18 R. (H. L.) 1.

² (1878) 3 Ex. Div. 238, *per* Bramwell, L.J., at p. 243.

LORD JOHNSTON.—I concur with both your Lordships. I consider, how- June 10, 1913.
 ever, that the learned Sheriff-substitute has come to a conclusion which, if
 the circumstances bore the exact complexion put upon them by the appel- Robson v.
 lant, would call for the interference of this Court, and probably result in a Menzies.
 remit to him with instructions, or at least for rehearing.

I cannot subscribe to the doctrine of the Sheriff-substitute, if it be as I understand it, that, where the subject is an unfurnished house, the purpose of the let, where the period of let happens to be a broken period less than a year, has any bearing upon the question of apportionment of taxation. That question falls, in my opinion, to be determined on the terms of the contract of lease, and on these alone. We have here a formal lease of a heritable subject, unfurnished, for occupation as a dwelling-house, with all usual provisions, and some exceptional ones as to repair and sanitary condition. And I cannot see that the question of apportionment of taxation is in any way different, in the case, on the one hand, where the tenant stipulates for the continuance of the lease after the conclusion of the broken period, or where he has not made up his mind to such continuance, but leaves it open to continue on tacit relocation or by express agreement, and in the case, on the other hand, where he has made up his mind *ab initio* that his tenancy is to be limited to the stipulated period, though his mind may change. On the general question of apportionment of taxation in the case of an unfurnished house, which, I think, is the same in all circumstances, I do not think that I should do more than reserve my opinion. I only say that there is, I think, no ground for discrimination according to circumstances.

But when the case came before the Sheriff-substitute parties presented him with a minute of admissions, which admitted the lease and the correspondence between the parties' agents, and obviated any question of accounting. If the correspondence consisted of prior communings, it was incompetent evidence—as incompetent, I think, as that for which the Sheriff-substitute insisted. But this minute is prefaced thus: "Minute of Admissions in Small-Debt Action, *Robson v. Menzies*. To obviate a proof thereon, the parties agree in admitting the following." The expression "to obviate a proof thereon" is ambiguous. Is it to obviate a proof in the action, or to obviate a proof on the points following? The appellant maintains that the minute was lodged for the purpose of obviating the leading of any proof and imported a renunciation of proof. If I thought that this was necessarily the case, I should say that the Sheriff, in insisting *ex proprio motu* for further and incompetent proof, though it may be that malice and oppression in the sense of malicious oppression cannot be attributed to him, was yet guilty of such deviation from his statutory duty as admits of review under section 31 of the statute. I cannot read the statutory provisions (section 13 *et seq.*) regarding procedure, except in the light of recognised rules governing all Court procedure. I think therefore that the Sheriff-substitute would properly have been found to have deviated, in point of form, from the statutory enactments, and the deviation would certainly have been one which prevented substantial justice being done, because it prevented the true question being considered, and enabled the Sheriff-substitute to give effect to peculiar and erroneous views of the considerations on which the question at issue depended.

June 10, 1913. But I cannot say that the terms of the minute of admissions bear unequivocally the meaning which the appellant puts upon them. It is open therefore to conclude that the Sheriff has done no more than order or allow incompetent proof, and against that there is under the statute no redress. I entirely adopt what your Lordship has said on the statute and the case law, to which I should not presume to add anything.

THE COURT dismissed the appeal.

HUGH FRASER, Solicitor—WEBSTER, WILL, & Co., W.S.—Agents.

No. 20. OTTO HALL, Complainer.—*Moncrieff, K.C.—A. A. Fraser.*
 June 19, 1913. CHARLES ANGUS MACPHERSON (Police Court Prosecutor, Edinburgh),
 Respondent.—*Cooper, K.C.—MacRobert.*

Hall v. Macpherson. *Jurisdiction—Statutory Offences—Living on earnings of prostitution—Jurisdiction of Burgh Police Court—Immoral Traffic (Scotland) Act, 1902 (2 Edw. VII. cap. 11), sec. 1 (1).*

Held that a police magistrate sitting in a Burgh Police Court has jurisdiction to try an offence against the Immoral Traffic (Scotland) Act, 1902.

Sentence—Statutory Offence—Increase in penalty by amending Act—Conviction of offence in period extending from before till after date of amending Act—Imposition of increased penalty—Amendment of sentence—Immoral Traffic (Scotland) Act, 1902 (2 Edw. VII. cap. 11), sec. 1 (1)—Criminal Law Amendment Act, 1912 (2 and 3 Geo. V. cap. 20), sec. 7 (2)—Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 75.

The Immoral Traffic (Scotland) Act, 1902, sec. 1 provides that every male person summarily convicted of living upon the earnings of prostitution shall be liable to imprisonment for a term not exceeding three months. By sec. 7 (2) of the Criminal Law Amendment Act, 1912, which came into force on 13th December 1912, the period of imprisonment which may be awarded is increased to six months.

An accused was convicted of an offence against these Acts, which was libelled as having been committed between 1st October 1912 and 15th March 1913, and was sentenced to six months' imprisonment.

Held, in a suspension, that the sentence could not stand in respect that the offence might have been committed in whole or in part prior to 13th December 1912, the date at which the increased penalty came into force; and sentence *reduced*, under the provisions of the Summary Jurisdiction (Scotland) Act, 1908, sec. 75, to one of three months' imprisonment.

HIGH COURT. ON 28th March 1913 Otto Hall was charged in the Police Court of
 Lord Justice-General. Edinburgh on a complaint under the Summary Jurisdiction (Scotland) Act, 1908, at the instance of Charles Angus Macpherson, Public
 Lord Kinnear. Prosecutor, with having "between 1st October 1912 and 15th March 1913, both days inclusive," lived wholly or in part on the earnings of
 Lord Mackenzie. the prostitution of a known prostitute, contrary to the Immoral Traffic Act, 1902, section 1, as amended by the Criminal Law Amendment Act, 1912, section 7, "whereby you are liable to the penalty set forth in said section 7."

The case was tried by one of the Judges of Police, who found the accused "guilty as libelled," and pronounced a sentence of six months' imprisonment.

The accused brought a bill of suspension, in which it was stated:— June 19, 1913.

"(4) On said complaint being called in Court on 27th March 1913 the complainer's solicitor objected to the relevancy of the complaint. The objection to the relevancy stated was that the acts constituting the offence were libelled as having been committed between 1st October 1912 and 15th March 1913, while section 7 of the Criminal Law Amendment Act, 1912, one of the statutes libelled as having been contravened, did not become law until 13th December 1912. The Court having heard the respondent in reply repelled the said objection. The accused pled not guilty to the complaint, and evidence was led and various productions were lodged. The diet was adjourned till 28th March 1913. (5) On 28th March 1913 further evidence was led, and the complainer was found guilty of the charge as libelled and was sentenced by the Judge of Police to six months' imprisonment. (6) The statutes libelled do not *per expressum* confer jurisdiction upon the magistrates or Judges of Police Courts in Scotland, and do not authorise complaints thereunder to be tried by such magistrates or Judges in such Courts, and in consequence, the magistrates or Judges of Police of the city of Edinburgh had no jurisdiction to try the complaint in question."

The accused pleaded, *inter alia*;—The said warrant or sentence ought to be suspended because the procedure was illegal, unwarrantable, and oppressive in the following respects, viz. :—(1) The Criminal Law Amendment Act, 1912, was not law at the date when the offence charged against the complainer is alleged to have commenced, and the Act is not retrospective. (2) The said Judge of Police sitting in said Police Court had no jurisdiction to try said complaint.

The case was heard before the High Court on 30th May 1913.

Argued for the complainer;—(1) The magistrate had not jurisdiction to entertain this complaint. The offence charged was a statutory offence, and, as such, could be tried only by a Court of universal jurisdiction, *i.e.*, the Sheriff Court or High Court, unless jurisdiction were conferred either expressly or by necessary implication on some other Court.¹ The first section of the Immoral Traffic Act, by which the offence was created, did not expressly confer jurisdiction on any Court, and it was not a necessary inference from its terms that a Police Court should have jurisdiction. The statute did not create a jurisdiction; it created an offence, and the words "a Court of summary jurisdiction" used in the first section could therefore only refer to such a Court where it was already empowered to try the offence. (2) The sentence pronounced was incompetent. The charge, which was laid under the Immoral Traffic (Scotland) Act, 1902, and the Criminal Law Amendment Act, 1912, was a general charge of having committed an offence over a period extending from October 1912 to March 1913. The conviction was a general conviction, "guilty as libelled," *i.e.*, a conviction of an offence extending over the whole period. But the Criminal Law Amendment Act, by which the maximum penalty was increased to six months, only came into operation on 13th December 1912, and therefore the offence, in so far as it was committed before that date, was a contravention only of the Immoral Traffic Act, under which the maximum penalty was three months. The magistrate, however, had imposed the penalty which was competent only for an

¹ M'Pherson v. Boyd, 1907 S. C. (J.) 42, 5 Adam, 247; M'Tavish v. Neilson, (1903) 6 F. (J.) 6, 4 Adam, 303.

June 19, 1913. offence committed after 12th December 1912, for the Criminal Law Amendment Act was not retrospective. The provision in section 8 that the Act should not apply to proceedings pending at its date did not imply that the Act was retrospective in other respects.¹

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Argued for the respondent ;—(1) It was unnecessary that jurisdiction should be expressly conferred by the statute ; jurisdiction might be inferred by implication from its terms.² The expression in the statute under consideration, "a Court of summary jurisdiction," necessarily implied that the offence might competently be tried before any such Court, and the City Police Court was such a Court. The case was distinguishable from *M'Pherson v. Boyd*.³ The words used in the Act under consideration in that case were "on summary conviction," and the Court had been unable to find in these words the implication which was plainly to be found in those of the Immoral Traffic Act, viz., "Court of summary jurisdiction."⁴ (2) The offence here libelled was one against the Immoral Traffic Act, and was in no way affected by the Act of 1912 except in the matter of the penalty.⁵ The conviction, therefore, was a good one, and the accused was properly sentenced to the penalty to which he was liable at the time of his conviction. In any case, the Court might amend the sentence by virtue of the provisions of section 75 of the Summary Jurisdiction (Scotland) Act, 1908.*

At advising on 19th June 1913,—

LORD JUSTICE-GENERAL.—[After referring to the complaint and the statutes]—Two points have been taken against the conviction. In the first place, the jurisdiction of the Court is challenged. The Court, as I have mentioned, was the Police Court of the royal burgh of Edinburgh. The terms of the Act, which I have read, are that a person who lives on the earnings of prostitution is to be guilty of a crime or offence, and, if convicted thereof before a Court of summary jurisdiction, shall be liable to certain punishments. It seems to me that, when the Act of Parliament used the expression "Court of summary jurisdiction," it must be held to have done so in the cognisance of what were Courts of summary jurisdiction in Scotland, this being a Scottish Act and one not applying to England ; and that accordingly in this case there was jurisdiction in the Court before which the offence was tried. I conceive that in so holding I am not in any way going against the opinion of the Court, and especially against my own opinion, in the case of *M'Pherson v. Boyd*.⁴ In that case there was no mention of the Court before which the offence was to be tried, and there were indications connected with the provisions for appeal which showed very clearly that the Sheriff Court alone of the inferior Courts was meant. The general proposition, as laid down in that case, I humbly think was per-

¹ Gardner v. Lucas, (1878) 5 R. (H. L.) 105.

² M'Pherson v. Boyd, 1907 S. C. (J.) 42, 5 Adam, 247.

³ Rex v. Austin, [1913] 1 K. B. 551, 8 Crim. App. Cases, 169.

* The Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 75, sets forth the grounds upon which a conviction, sentence, or order of the Court may be quashed, and contains this proviso :—"Provided always that the High Court may amend any conviction, sentence, judgment, order of court, or other proceeding, or may pronounce such other sentence, judgment, or order as they shall judge expedient."

⁴ 1907 S. C. (J.) 42.

fectly sound. But it is quite true that Parliament, being omnipotent in this June 19, 1913. matter, may give jurisdiction to any Court that it pleases, and the only point ^{Hall v. Macpherson.} is one of construction—whether it has been pleased to give jurisdiction to Courts other than the Sheriff Court and the High Court of Justiciary, which ^{Lord Justice-General.} have what we term an inherent jurisdiction for all crimes. I think here it is clearly an implication from the Act that jurisdiction is given to all Courts of summary jurisdiction as they exist in Scotland, and that the Burgh Police Court is one of them.

The other matter that was dealt with is the question of the sentence. As your Lordships have noticed from my recital of the statutes, the penalty under the earlier Act was only three months, and it is only by the second Act that the penalty is increased to six months. Now the second Act only became law on the 13th December 1912, and the complaint is that the accused lived upon the earnings of prostitution between 1st October 1912 and 15th March 1913—that is to say, during a period which embraces time both before and after the passing of the amending Act. The conviction is general, and the punishment allotted is the larger punishment of six months. It seems to me that that cannot stand as it is, because we cannot tell that the actual instance that was proved, and which warranted conviction, may not have been prior to the 13th December 1912; and I cannot think that it was intended that the provision of the Act of 1912, which made the punishment the larger one of six months, was meant to apply to crimes which had already been committed. Accordingly, I do not think that the conviction as it is can stand.

But then I think this is a clear case where, under the provisions of the recent Summary Jurisdiction (Scotland) Act of 1908, section 75, we are enabled to amend the sentence and thereby prevent any injustice being done to the accused without the necessity of quashing the conviction. The proviso of that section, after setting forth that all appeals shall be subject to the provisions of sections 60 and 72, says: "Provided always that the High Court may amend any conviction, sentence, judgment, order of court, or other proceeding, or may pronounce such other sentence, judgment, or order as they shall judge expedient." Accordingly, I think that the proper way of meeting the justice of this case is to reduce the sentence to three months.

LORD KINNEAR.—I agree with your Lordship. I have no doubt that when the statute speaks of a Court of summary jurisdiction it means any Court of summary jurisdiction, because nothing can be more indefinite than the indefinite article, and it is clear that the Police Court of Edinburgh is such a Court. Therefore upon the jurisdiction I have no difficulty.

I have had more difficulty than your Lordship upon the other question, because I think there is some force in the argument that was addressed to us that the statute of 1912 supplies its own point of time for the determination of the question whether it is prospective only or retrospective also, not by reference to the time at which the offence is committed, but to the time at which the proceedings are instituted. But on consideration I have come to the conclusion that that argument depends too much upon a mere construction of words, and that the sound view is that which your Lordship has taken.

June 19, 1913. LORD MACKENZIE.—I agree with your Lordships. Upon the question of jurisdiction I regard the Act of 1902 as conferring *per expressum* jurisdiction to try offences under the statute upon any Court of summary jurisdiction, and therefore no argument can be derived in favour of the suspender from the case of *M'Pherson*,¹ to which your Lordship in the chair has referred. There the language of the Act was "on summary conviction," and the statute also provided that the appeal should be to the Sheriff-depute. That case, therefore, is entirely different from the present.

Hall v.
Macpherson.

In regard to the second question I confess I have no doubt. The complaint libels an offence as having been committed between 1st October 1912 and 15th March 1913. During the whole of this period the offence charged was a punishable offence, but under the Act of 1902 only with three months' imprisonment. A sentence of six months' imprisonment was only warranted by the Act of 1912, which did not come into operation until 13th December 1912. The accused was found guilty as libelled. Therefore the offence may have been committed in whole or in part during the period from 1st October to 13th December, when the maximum penalty was only three months' imprisonment. To hold that upon such a conviction a penalty can be awarded which could not have been inflicted during the period when the offence may have been committed, seems to me to lose sight of the deterrent effect of punishment. It would not, in my opinion, be fair to an offender, whatever the nature of his offence, to inflict a punishment upon him which was not before his eyes when he committed the offence.

As regards the application of the Summary Jurisdiction Act, 1908, section 75, I think this is an appropriate case for amending the sentence and pronouncing the sentence proposed by your Lordship.

THE COURT reduced the sentence to one of three months' imprisonment, and *quoad ultra* refused the bill.

PETER CLARK, Solicitor—SIR THOMAS HUNTER, W.S.—Agents.

No. 21.

June 19, 1913.

Lipsey v.
Mackintosh.

HARRY LIPSEY, Appellant.—*Sandeman, K.C.—Duffes.*
WILLIAM FYFE MACKINTOSH, (Procurator-Fiscal, Dundee),
Respondent.—*Sol.-Gen. Anderson—Gillon.*

Jurisdiction—Statutory Offences—Betting—Sending postcards inviting to bet—Jurisdiction of Sheriff in Sheriffdom where cards received—Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 10 (4).

Held that the Sheriff-substitute at Dundee had jurisdiction to try a Glasgow bookmaker charged with a contravention of the Betting Acts by sending by post to persons in Dundee cards inviting them to bet.

Complaint—Relevancy—Statutory offence—Specification of statutes—Inclusion of statutes creating different offence from offence charged—General conviction—Betting.

Review—Sentence—Amendment of sentence—Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 75.

A bookmaker was tried on a complaint charging him with sending by

¹ 1907 S. C. (J.) 42.

post cards containing invitations to bet, "contrary to" certain specified sections of the Betting Act, 1853, which deal with the offence of owning, occupying, or advertising betting houses, and certain sections of the Betting Act, 1874, which deal with the offence of inviting to bet. He was found "guilty as libelled."

The Court *quashed* the conviction, in respect that the sections of the Betting Act, 1853, libelled were not directed against the offence set forth in the complaint but against entirely different offences.

Held further that this was not a case in which the Court should amend the conviction under section 75 of the Summary Jurisdiction (Scotland) Act, 1908.

On 3rd February 1913 Harry Lipsey, Glasgow, was charged in the Sheriff Court at Forfar on a summary complaint at the instance of William Fyfe Mackintosh, Procurator-fiscal of Forfarshire, at Dundee, which set forth that the accused did, on two specified occasions in January 1912, at some post office in Glasgow unknown to the prosecutor, send by post to certain police-constables in Dundee certain cards, which were received by the constables, and that by the cards so sent the accused invited the recipients to make with him or take a share in or in connection with bets or wagers on the football matches mentioned therein "all contrary to sections 1, 3, and 7 of the Betting Act, 1853, and sections 3 and 4 of the Betting Act, 1874, whereby you are liable in respect of each of the above offences to the penalties provided by section 7 of the Betting Act, 1853, with respect to offences under that section." *

At the diet of compareance on 12th February 1913 the accused appeared and his agent stated the following objections to the competency and relevance of the complaint:—" (First) To the competency; that the Court had no jurisdiction to try the complaint, the contraventions, if any, having been committed outwith the jurisdiction of the Court; (Second) To the relevancy; (1) Complaint irrelevant in respect that the accused is charged with a contravention of sections 1, 3, and 7 of the Betting Act, 1853, whereas on the face of it the contraventions, if proved, must be against section 3, subsection 3, of the Betting Act, 1874; (2) Complaint irrelevant in respect that the cards alleged to have been sent by the accused do not contain any invitation to bet."

The Sheriff-substitute (Neish) repelled these objections, and on 13th March 1913, after hearing evidence, he found the accused guilty as libelled and imposed a fine of £10, being £5 for each offence.

At the request of the accused he stated a case in which the following questions of law were, *inter alia*, put for the opinion of the High Court:—" (1) Had I jurisdiction to try the complaint? (2) Is the complaint relevant?"

The case was heard before the High Court on 31st May 1913.

In his argument for the respondent and in support of the relevancy of the complaint the Solicitor-General referred to *Agnew v. Morley &*

* The Betting Act, 1853 (16 and 17 Vict. cap. 119), provides, sec. 1, that no house, &c., shall be kept for the purposes of betting, and by secs. 3 and 7 imposes penalties on persons owning or occupying and on persons advertising betting-houses respectively.

The Betting Act, 1874 (37 and 38 Vict. cap. 15), sec. 3 imposes a penalty on any person sending a letter, card, or advertisement inviting any person to make or take a share in or in connection with any bet or wager.

June 19, 1913. *Anderson*,¹ in which case a complaint in somewhat similar terms had been held to be relevant.² He further contended that should the Court sustain the objection to the relevancy of the complaint this was a case in which the conviction should be amended in terms of section 75 of the Summary Jurisdiction (Scotland) Act, 1908.³

—
Lipsey v.
Mackintosh.

At advising on 19th June 1913,—

LORD JUSTICE-GENERAL.—[After referring to the charge and stating the objections]—As regards the first objection of no jurisdiction, I think that is quite untenable. I need not go into the matter. I think the matter is perfectly well settled by the series of cases that are generally known as the "Long-firm Cases." In all these cases, where something is going on by the medium of the post, the offence is really committed, if I may use the expression, at both ends of the transmission by the post office. I base my judgment here upon the general law, but I think this objection is probably entirely met by section 10 (4) of the Summary Jurisdiction (Scotland) Act, 1908.

But I think the second objection ought to have been sustained. The Betting Act of 1853 provides, in section 1, that no house, &c., shall be kept for the purpose of the owner or occupier betting with other persons. Section 3 imposes a penalty on the owner or occupier of a betting-house, and section 7 imposes a penalty on persons exhibiting placards or advertising betting-houses. Now, there is not a word in the complaint here about keeping a betting-house or advertising a betting-house. Yet not only was the objection not sustained, but the case went to trial, and there was a general conviction, that is to say, the accused was convicted of offences under sections which there was no attempt to prove had ever been contravened. I think that the conviction is bad upon those grounds. That being so, I do not think it is necessary to go into the somewhat more delicate question of whether, in this case, there was an invitation to bet or whether there was not.

LORD KINNEAR.—I am entirely of the same opinion as your Lordship. As to the objection to jurisdiction, it is to my mind quite untenable. I think the objection to the relevancy, however, is perfectly well founded. The complaint, when read short, really means that inasmuch as you, the accused, wrote certain letters, you are guilty of the offence of keeping a betting-house, and also of the offence of advertising a betting-house, and therefore are within the scope of sections 1, 3, and 7 of the Betting Act of 1853. Now, writing letters giving information as to bets or inviting bets is one thing, and keeping a public betting-house is another and different thing, and I confess I am quite unable to understand why the charge of contravention of these sections of the Act of 1853 was ever brought into the complaint. The complaint specifically alleged, and the complaint which the prosecutor undertook to prove, has nothing whatever to do with these sections. But then the the accused was found guilty as libelled, that is to say, he was found guilty

¹ 1909 S. C. (J.) 41, 6 Adam, 9.

² *Stott & Shaw v. Renton*, 1907 S. C. (J.) 88, 5 Adam, 355, was also cited.

³ Cited *supra*, (J.) p. 102.

of a contravention of each and all of these sections ; and I think that is a June 19, 1913. conviction which cannot stand.

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LORD MACKENZIE.—I agree with your Lordships, and only desire to add that in my opinion this is not a suitable case for applying the provisions of section 75 of the Summary Jurisdiction Act, 1908. In this case it would not only be necessary to reconsider the sentence but to remodel the libel and conviction. I do not in the least mean to suggest a limitation of the powers of the Court under section 75, but I do not consider they should be exercised in the circumstances of the present case.

LORD JUSTICE-GENERAL.—I should like to add that I quite agree with what my learned brother Lord Mackenzie has said. The distinction between this case and the case we have just disposed of (*Hall v. Macpherson*¹) is very obvious. In the last case there was no question that the man had been quite properly convicted of the offence, that is to say, he had been found guilty of living on the earnings of prostitution. All that was wrong was that a bigger penalty was imposed than ought to have been imposed. That was a clear case for amending. But here we have the accused found guilty as libelled, that is to say, he is convicted of all and sundry of the offences, some of which, we find, there was no ground for convicting him of at all. If we amended the sentence here we should be retrying the case for ourselves, because we cannot tell what the views of the Court were when he was convicted of something of which he ought not to have been convicted at all.

THE COURT sustained the appeal and quashed the conviction.

JAMES G. BRYSON, Solicitor—SIR WILLIAM S. HALDANE, W.S., Crown Agent—
Agents.

HIS MAJESTY'S ADVOCATE.—*Sol.-Gen. Anderson—Morton, A.-D.*

No. 22.

HECTOR MACKENZIE, Panel.—*Murray, K.C.—W. T. Watson.*

ANNA MACKENZIE, Panel.—*Moncrieff, K.C.—J. Smith Clark.*

June 20 1913.

Procedure—Indictment—Theft—Relevancy of indictment—Charge of stealing book containing trade secrets and making copies and appropriating secrets—Latitude in time. H. M. Advocate v. Mackenzie.

An indictment against a husband and wife charged the husband (1) with stealing between 3rd July 1907 and 2nd April 1913 a book of recipes of chemical secrets belonging to his employers, and (2) with making during the same period copies of the recipes with intent to dispose of them for profit in breach of an agreement of secrecy with his employers ; and charged the wife with offering to dispose of these or other copies to the employers' trade rivals, in the knowledge that the copies had been fraudulently made by her husband, and with thus appropriating to her own profit trade secrets which were the exclusive property of the employers.

Held, with regard to the charges against the husband, that the first was relevant in respect that the taking of a book in order to copy its contents for an illegitimate purpose was theft, although there might be

¹ *Supra*, (J.) p. 100.

June 20, 1913.

H. M. Advocate v.
Mackenzie.

no intention to retain the book, but that the second was irrelevant as it merely charged the accused with the preparation for, and not with the perpetration of, a crime. *Held* further, that the charge against the wife being dependent on the second charge against the husband fell with it, and in any event was irrelevant in respect that it set forth no overt or accomplished criminal act.

Observations (per the Lord Justice-Clerk) on the duty of a prosecutor to set forth special reasons to justify such an exceptional latitude of time as that taken in the indictment.

HIGH COURT.
Lord Justice-Clerk.
Lord Dundas.
Lord Salvesen.

HECTOR MACKENZIE and Anna Mackenzie, his wife, were charged in the High Court in Edinburgh on an indictment which set forth "that (first) between 3rd July 1907 and 2nd April 1913, at Blandfield Works, Canonmills, Edinburgh, sometime occupied by T. & H. Smith, Limited, manufacturing chemists, or at Blandfield Works, Wheatfield Road, Edinburgh, presently occupied by the said T. & H. Smith, Limited, you, Hector Mackenzie, did steal a book containing recipes of value relative to secret processes for the manufacture of chemical products, the exclusive property of the said T. & H. Smith, Limited, and in particular, recipes for the preparation and manufacture of" (certain specified chemical preparations); "and (second) time and place or places above libelled, you, Hector Mackenzie, being engaged in a confidential capacity as an assistant, first at Blandfield Works, Canonmills, aforesaid, and subsequently at Blandfield Works, Wheatfield Road, aforesaid, in the service of the said T. & H. Smith, Limited, and being bound by your agreement of service with them not to make known, directly or indirectly, to anyone, so long as you remained in said service or at any time after its termination, the secrets of your said employers, or of their manufactures, trade, or business, or of or connected with any of the processes used by them at the date when you entered their service as assistant aforesaid, or at any time thereafter, nevertheless did, in breach of your said agreement and obligation above set forth, and of the trust reposed by your said employers in you as their assistant aforesaid, make copies from the said book, particularly of the recipes for the preparations, manufactures, and processes hereinbefore specifically set forth, and that with intent to dispose of said copies for valuable consideration to trade rivals of the said T. & H. Smith, Limited, and you Anna Mackenzie, knowing the said copies to have been made fraudulently by your said husband, did, between 1st and 21st April 1913, at No. 5a Eyre Place, Edinburgh, or elsewhere in Edinburgh, to the prosecutor unknown, offer to dispose of or furnish said copies or other copies made or to be made therefrom for a valuable consideration to" (certain manufacturing chemists named), "and you Anna Mackenzie did thus attempt to appropriate to your own profit trade secrets which were the exclusive property of the said T. & H. Smith, Limited."

On 16th June 1913 the case was heard before the High Court on objections to the relevancy of the indictment.

Argued for the panel Hector Mackenzie;—The first charge was irrelevant in respect that too great a latitude of time was taken by the prosecutor. A latitude of six years was both unprecedented and unreasonable in a simple charge of stealing a book. This objection also applied to the second charge. The first charge was also irrelevant in respect that there was no such thing as "exclusive property" in processes or recipes for processes, except perhaps where rights of

patent or copyright had been granted, which were not alleged to exist here. At any rate, there could never be an invasion of a right in a process or recipe without publication, and it was not said that there had been any publication by the accused. The second charge was irrelevant because it merely set forth the breach of a civil contract not to disclose the processes, for which the appropriate remedy was an action of damages; it did not set forth anything amounting to criminal fraud. There never could be a crime without an overt act,¹ and here no overt act was alleged to have been committed.

Argued for the panel Anna Mackenzie;—The charge against the wife depended upon and was ancillary to the charge against the husband, and if the charge against the husband was defective it followed *ipso facto* that the charge against the wife could not stand. The charge against the husband was irrelevant for the reasons stated by his counsel, and that was *per se* a sufficient answer for the wife. If, however, the charge of theft against the husband was relevant the charge against the wife was obviously bad. They were both indicted with the crime of theft. If the husband stole the book the crime was complete; the employers were divested of possession, and nothing which the wife subsequently did by way of making copies of the contents of the book could constitute a theft from the employers. It could not even be said that she was "appropriating trade secrets which were the exclusive property" of the employers, because these secrets had already, on the theory of the Crown, been appropriated by the husband. Further, the disclosure of trade secrets was not a common law crime. In the Criminal Procedure (Scotland) Act, 1887,² there was no scheduled form of indictment for such an offence, and the Factory and Workshop Act, 1901,³ and the Post Office (Protection) Act, 1884,⁴ both provided special statutory penalties for the disclosure of secrets. In any event, however, the indictment was further radically bad in that it did not state that any disclosure had actually been made.

Argued for the Crown;—The first charge was clearly relevant; it was a simple charge of stealing a book, and even if the description of the contents of the book were faulty that was immaterial. To constitute theft of the book it was not necessary that the book should have been removed from the employers' premises; if it was temporarily removed from the desk or safe where it was kept that was sufficient *amotio* to satisfy the requirement of the law.⁵ Latitude of time in an indictment was always a question of circumstances, and here the latitude was reasonable and could cause the accused no prejudice.⁶ As to the second charge, the purloining of trade secrets was an offence known to the law.⁷ All the charges really constituted one crime, and accordingly the charge against the wife was good.

¹ Hume on Crimes, vol. i., pp. 26, 27; Austin's Jurisprudence, (5th ed.) p. 461.

² 50 and 51 Vict. cap. 35.

³ 1 Edw. VII. cap. 22, sec. 116, subsec. 3.

⁴ 47 and 48 Vict. cap. 76, sec. 11.

⁵ Macdonald's Criminal Law, (3rd ed.) p. 26.

⁶ H. M. Advocate v. Colquhoun, (1899) 3 Adam, 96.

⁷ Macdonald's Criminal Law, (3rd ed.) p. 23; Dewar, (1777) noted in Burnet's Criminal Law, p. 115, and Hume on Crimes, vol. i. p. 75; Decham, (1834) noted in Bell's Notes to Hume, p. 20.

June 20, 1913. At advising on 20th June 1913,—

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LORD JUSTICE-CLERK.—The first charge in this indictment is a charge of theft against the male prisoner. It sets forth a very great latitude in respect of time, ranging over nearly six years. The justification of the latitude so taken, which is unprecedented so far as I am aware, is made in argument on the ground that the book said to have been stolen was a book of recipes, and that it was taken in order to obtain copies of these recipes, and that the prosecutor does not know when the actual taking occurred. I should myself have expected that a prosecutor proposing to take such a latitude would have set forth facts to indicate his difficulty in being more precise, as, for example, that the accused was in the employment of the owners of the book during the period given, and thus had opportunities of taking possession of it without the fact of his having done so becoming known to the owners. And certainly, if the case were allowed to go to trial, the prosecutor would have to show by his evidence that the latitude taken was not unfairly taken, and if he failed to do so, his failure might lead to his not being able to obtain a verdict. While I refrain from expressing an opinion as to whether the extreme latitude of time taken should not be fatal to the charge for lack of a justifying statement, I may say that, as I understand no trial is to proceed on the present indictment without a new service, the advisers of the Crown may well consider whether, if they are to proceed further with the case, they will not frame an indictment which may be more satisfactory in this respect. I am not prepared to cast the indictment on this point, but it certainly would be more satisfactory, in a case so peculiar, for the prosecutor to express in the indictment the cause justifying a latitude so extreme.

As regards the charge of theft, I cannot see any ground for holding it to be irrelevant. The charge is stealing a book, and that charge the prosecutor will have to prove by sufficient evidence. All defences, such as that there was only a trespass and not a theft, will be open to the accused. The indictment seems to hint at the book having been taken, not to appropriate the actual article itself, but in order to obtain the opportunity of copying part of its contents for an illegitimate purpose. That such a taking, although there is no intention to retain the article, may be theft is, I think, clear. The article is taken from its owner for the serious purpose of obtaining something of value through the possession of it. And that such an action may be a theft is shown by the case of a person who desires to enter premises for a felonious purpose, and takes possession of the key by which the security of the premises is protected. Although he has no desire or intention to appropriate and keep the key, he is held to have stolen the key, he having taken it in order to facilitate the carrying out of his criminal intention. In this case the prosecutor charging the accused with stealing a book described fulfils all the requirements of relevancy, and if he can make out by his evidence that the book was taken, and taken with a nefarious purpose, he may be able to obtain a direction in law from the Judge at the trial that what was done constituted a theft of the book. It is quite evident that a book of no real value in itself may be of great value because of what is written in it. I think, therefore, that the charge of theft against the male prisoner must be held to be relevant.

The second charge against the male prisoner is that he was bound by his agreement with his employers not to make known to others the secrets of their business, and that he did in breach of trust make copies of recipes "with intent to dispose of said copies for valuable consideration to trade rivals."

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I am quite unable to hold that this is a relevant charge of crime, either completed crime or attempted crime. It is a charge covering a preparation for crime only—assuming that the completed act or actual attempt would infer crime—but it is not a charge of anything done that can be called an overt act. The law does not strike at preparation to commit a crime unless by special statutory enactment such preparation is placed in the category of crime. The analogy which comes nearest to the present case is that of forgery. No successful prosecution can take place so as to secure punishment for the preparation of a forgery. The overt act of uttering is essential to a conviction. The forger is not amenable to the law because he has made a forgery or has a forgery in his possession, whatever may be his intent to make use of it to effect a felonious end. Thus in the old indictments, although forgery and uttering were charged, there could be no conviction of the forgery unless the uttering was proved. It must have gone beyond his power to abstain from using by his having used it, by actually presenting it, or posting it, or so putting it out of his own possession that there is no longer any *locus poenitentiae*. Till this is done, however much the making or the possession of the fabricated document may indicate moral delinquency, his act does not bring him within the grasp of the law. He has not proceeded to put his nefarious intention into operation. He is like a man who has prepared false keys in order to enter the premises of another for a felonious purpose, but has never used them. This well-established and most just rule of law, which does not allow of punishment for unfulfilled intents and preparations which have not culminated in an irrevocable act of commission or attempt, is only, as I have said, set aside in certain cases by statutory enactments for special reasons. Thus the manufacture of spurious banknotes is constituted a criminal offence without there being any proof of uttering. The statute strikes at the manufacture of false banknotes as being a thing highly dangerous to the general community, and calling for special State intervention. That a statute should be necessary to check such wholesale manufacture illustrates the rule that the preparation of a fraudulent document, or a document intended to be fraudulently used, is not in itself a punishable crime, and that it requires an overt act of use to constitute an indictable offence. In this indictment the statement that he made the copies with an intent to dispose of them to trade rivals, is not an averment of any act done, but only of a state of mind, which might be gone back upon, and nothing done to carry out the intent. I have therefore no hesitation in holding the second charge against the male prisoner to be irrelevant.

Lord Justice-Clerk.

There remains the charge against the female prisoner, and this, in view of the irrelevancy of the second charge against the male prisoner, must fall with it. The charge is expressed in a very extraordinary way. It states that the female prisoner knew that her husband had fraudulently made copies of recipes. But if, as I hold, the allegation made against the husband does not constitute a relevant charge of fraud, how can she be said to

June 20, 1913. have known that he had acted fraudulently? For the word "fraudulently" must here be held to be meant to express a crime committed. But if no crime is relevantly averred to have been committed, it follows that she cannot be charged in the sequence of this indictment with knowing a fraud had been committed. And that being so, the whole basis of what follows necessarily falls away.

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Lord Justice-Clerk.

Even were it otherwise, I feel that I must say that my strong impression is that, apart from the ground of objection above dealt with, what is charged here against the female prisoner does not amount to an overt act of crime. It is alleged only that she "offered to dispose" of recipes to certain people. That is that in words, whether written or spoken, she made an offer to give them certain things for a consideration. Even if it would have been criminal had she carried out the offer and handed over the recipes and got the consideration, I cannot see that her mere expression of a willingness to do so would constitute a crime or an attempt to commit crime. To me it appears reasonable to say that, as long as she was in the position of being able to draw back and repent of her proposal, she could not be held to have committed an offence for which she could be dealt with as a criminal. Her conduct in intending to sell the recipes might be morally reprehensible, but she had only spoken or written of an intention to do an act; she had not done any act which falls within the category either of accomplished or attempted crime. All as regards action was still in her own power either to do or not to do. If she did not do, can it be said that crime was committed? She had done nothing; she had only evinced an intention to do something. It was still open to her not to proceed to do it, should she so resolve. I have thought it right to express my view on the charge as stated, although from the fact that it must fall along with the second charge against the male prisoner with which it is structurally connected, it is unnecessary to decide the question of relevancy as regards the female prisoner on the special grounds to which I have last referred.

LORD DUNDAS.—I concur with the Lord Justice-Clerk.

LORD SALVESSEN.—This is an unusual case; and I am not surprised that the Crown have found difficulty in framing the indictment. There are three charges—two against the male accused and one against his wife. There is no suggestion that the two acted in concert; and, indeed, the indictment excludes this view.

As regards the first charge I am of opinion that the objection to relevancy fails. The charge is simply one of theft of a book, which is described as containing certain recipes. It is not said to whom the book belonged, although the recipes which it contained are described as being the exclusive property of T. & H. Smith, Limited. It was, however, conceded that it is not necessary, to make a charge of theft relevant, that the indictment should contain a statement that the article stolen was the property or in the lawful possession of any given person. Here the book is sufficiently described, and the place from which it was stolen is also set forth. The most serious objection was that the latitude of time was too great, and, at

first sight, a charge of theft of a single article as having been committed June 20, 1913. between 3rd July 1907 and 2nd April 1913 is unusual, but the circumstances are also unusual. The male accused is said to have been in the service of the firm from whose premises the book was stolen during the whole of that period; and the Crown say that they cannot condescend on a particular date when the theft was committed. One can figure many parallel instances. Thus a dismissed servant is found in possession of a piece of plate belonging to his master. He has been in the master's service for some years; and there is no definite evidence as to when the piece of plate was last seen. Nevertheless it may be reasonably certain that it was abstracted at some time during the period of service. A criminal might well escape punishment for such a theft if it were necessary to specify the date at which it was committed. I am therefore of opinion that this objection fails.

It may be gathered from the second charge that the book itself was not appropriated; but if it was removed by the accused, for the purpose of making copies of its contents, and if he had no right to have it in his possession at all, the charge of theft may be substantiated. It is no defence that the property has been restored by the thief, especially if he has done so only after the theft has served its purpose. If this is the true nature of the first charge, then the fact of copies having been made from the book may be the main evidence of the alleged theft, which will be more or less serious according to the purpose which the accused had in view in making the copies.

As regards the second charge, I think it is irrelevant. It sets forth a breach of the accused's contract of service with his employers, but this is primarily a civil wrong. The indictment narrates that the accused, being bound not to make known the secrets of his employers, did, in breach of his obligation, make copies of certain secret recipes. It does not, however, go on to state that he disclosed them to others or made any use of them himself. Assuming that he intended to do so, no overt act on his part is alleged. This charge seems to assume that the accused had access to the book with his employers' authority; for if he stole the book, in order to make the copies, such an offence is already covered by the first charge. I cannot affirm that it is a crime for a clerk to make copies from an employer's book, which copies he neither discloses nor makes use of in any way. He has, of course, no legal right to make such copies, and they would fall to be given up by him to his employer or destroyed. It may even be that the accused was demonstrably preparing himself to do his employer a wrong; but it is not a crime to make preparations with a view to committing some crime in the future. A man may purchase a pistol with the avowed object of shooting an enemy; but if the pistol remains in his possession unused, he has committed no crime.

The third charge is confined to the wife of the male accused, and it is bound up with the second charge against him—which we are all agreed is irrelevant. It, accordingly, starts badly. Its substance is that she, knowing that certain copies of recipes which were in her husband's possession had been made fraudulently by him, offered to dispose of these copies, or other copies to be made therefrom, to certain rivals in trade of the Messrs Smith. Now while the word "fraudulently" is used in this charge, it must be interpreted by what is said as to how the male accused got possession of the copies.

June 20, 1913. So interpreted, it simply means that Mrs Mackenzie knew that these copies had been made by her husband in breach of his contract of service. It is not said that she actually disclosed the contents to any person; merely that she offered to do so for a valuable consideration. It is not even alleged that she ever had possession of them. Now, however reprehensible such conduct may have been, and assuming a criminal intention to be proveable, there is still no overt act alleged such as to exclude *locus poenitentiae* on her part. It is very much the same thing as if she had offered to steal the book, and make copies of its contents, if she were well paid for doing so. The person who made such an offer would be potentially a criminal; but, if the offer was not accepted and nothing followed, he would not have actually committed a crime. I am accordingly of opinion with your Lordships that this charge also fails upon relevancy.

THE COURT repelled the objections to the first charge against the male panel, and *quoad ultra* held the indictment irrelevant.

SIR WILLIAM S. HALDANE, W.S., Crown Agent—P. GARDINER GILLESPIE & GILLESPIE, S.S.C.—HUME M'GREGOR & Co., S.S.C.—Agents.

No. 23. JOHN MORRISON, Complainer (Appellant).—*D.-F. Dickson—Paton.*
DUNCAN ANDERSON, Respondent.—*MacRobert.*

July 16, 1913.

Morrison v.
Anderson.

Statutory Offences—Game—Trespassing in pursuit of game or rabbits—Complaint—Relevancy—Alternative charge—Game (Scotland) Act, 1832 (2 and 3 Will. IV. cap. 68), sec. 1—Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 18, and Schedule C.

Held that a complaint brought under the Summary Jurisdiction (Scotland) Act, 1908, charging an accused with trespassing in pursuit of "game or rabbits," contrary to the Game (Scotland) Act, 1832, sec. 1, was relevant, and not open to the objection that it libelled alternative charges.

Procedure—Trial—Administration of Justice—Prosecution under Game (Scotland) Act, 1832—Emergence of question of civil right—Lease—Game—Ground game—Right of joint tenant in common pasturage to give authority to kill rabbits—Ground Game Act, 1880 (43 and 44 Vict. cap. 47).

In a prosecution in the Sheriff Court for trespassing in pursuit of game or rabbits contrary to the Game (Scotland) Act, 1832, sec. 1, the question arose whether one of five joint tenants of a common pasturage had the right to authorise a third party to kill rabbits upon the land.

Held that a question of civil right had emerged, and accordingly that the complaint fell to be dismissed.

Question whether the common law right of the tenant of a farm verbally to authorise another to kill rabbits for the preservation of his crops was available to a tenant of pasture ground common to several tenants; and *opinion reserved* upon the applicability of the Ground Game Act, 1880, to such a tenancy.

HIGH COURT.
Lord Justice-
Clerk.
Lord Dewar.
Lord Hunter.

DUNCAN ANDERSON was charged in the Sheriff Court of Argyllshire at Oban on a complaint at the instance of John Morrison, with the concurrence of Donald Mackenzie, Procurator-fiscal, Oban, which set forth that "on 22nd August Nineteen hundred and twelve, upon the common pasture lying between the farm of Brolas, Airds Bay, Taynuilt, and the land of Airds Park, Muckairn, Taynuilt, which common

pasture lying as aforesaid is upon and part of the estate of Airds Bay, belonging to the complainer, in the united parish of Ardochattan and Muckairn and county of Argyll, you did in the daytime trespass on said land forming said common pasture in search or pursuit of game or rabbits, contrary to the Game (Scotland) Act, 1832, section 1, whereby you are liable to a penalty not exceeding £2, together with the costs of conviction, and, in default of payment of said penalty, to imprisonment in terms of the Summary Jurisdiction (Scotland) Act, 1908, sections 47 and 48."*

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At the trial the accused's agent stated the following objections to relevancy of the complaint:—“(1) The complaint is irrelevant in respect that trespassing in pursuit of ‘game or rabbits,’ as libelled, is an alternative charge. (2) Complaint irrelevant in respect that a civil right is involved.”

The Sheriff-substitute (Wallace) sustained the first objection and allowed the complaint to be amended by the deletion of the words “game or.” With regard to the second objection he repelled it *hoc statu*, being of opinion that at that stage of the case there was nothing before him to enable him to dispose of the objection. Thereafter the accused pleaded not guilty and the case proceeded to trial.

After hearing evidence the Sheriff-substitute dismissed the complaint on the ground that it raised a question of civil right.

The complainer, John Morrison, obtained a stated case on appeal to the High Court of Justiciary.

In the stated case the Sheriff stated that the following facts, *inter alia*, had been admitted or proved to his satisfaction:—“(1) The accused was the brother of Peter Anderson, the agricultural tenant of Sandbank Croft, Airds Bay, Taynuilt. (2) Peter Anderson was one of five tenants of the common pasture referred to in the complaint, the tenancy being held under a lease for a number of years. (3) The locus was not unenclosed lands, nor moorlands, nor a detached portion of moorland. Peter Anderson was sole tenant of Sandbank Croft, which is arable land, with right of pasture on said common pasture, and enclosed. (4) The five tenants of the common pasture had agreed that any one of their number might shoot ground game thereon. (5) The accused had written authority from his brother (Peter Anderson) to shoot ground game on the common pasture, previous to and on the date libelled. (6) At the time no demand was made by the complainer's gamekeeper on the accused to produce any written authority by his brother to shoot on said common pasture, nor was there ever any demand made in the sense of section 1 (1) (c) of the Ground Game Act, 1880. (7) The complainer was proprietor of the locus.”

* The Game (Scotland) Act, 1832 (2 and 3 Will. IV. cap. 68) enacts:—Sec. 1. “. . . That if any Person whatsoever shall commit any Trespass by entering, or being, in the Daytime, upon any Land, without Leave of the Proprietor, in search or pursuit of Game, or of Deer, Roe . . . or Conies, such Person shall” on conviction be liable to a penalty.

The Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), enacts:—Sec. 18. “All proceedings under this Act for the trial of offences or recovery of penalties shall be instituted by complaint in the form contained in Schedule C to this Act. . . .”

Schedule C contains the following form:—“You did in the daytime trespass on said land in search or pursuit of game (or rabbits), contrary to the Game (Scotland) Act, 1832, sec. 1; whereby,” &c.

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He also set forth at length a number of other facts which showed that the accused had been on the common pasture on the occasion in question in suspicious circumstances. He then stated that he had dismissed the complaint on the ground that a question of civil right had arisen which had been expressed by the agent of the accused in the following terms:—"A civil right is involved, in respect that the accused is a brother of the agricultural tenant of Sandbank Croft, and is authorised by his brother in writing to shoot both on the arable land and on the common pasture referred to in the complaint, the five tenants of said pasture having decided that any one of their number might shoot on said pasture; and further that the proprietor is endeavouring to have the question as to these five tenants' right to shoot tried in this Court."

The questions of law for the opinion of the Court were, *inter alia*, the following:—" (1) Was I right in sustaining the first objection to the relevancy, and allowing the complaint to be amended?" " (3) On the facts admitted and found proved, was I right, following on the motion of accused's agent, in finding that the question of civil right referred to had arisen? (4) If so, and on the authorities submitted,* was I right in dismissing the complaint with £2, 2s. of expenses to accused?"

The case was heard before the High Court on 6th March 1913. †

Argued for the appellant;—(1) There was no necessity to strike out the words "game or" to make the complaint relevant, as the complaint did not libel alternative charges¹ and was in the usual form.² Under section 1 of the Game (Scotland) Act, 1832, there was only one offence, viz., trespassing in pursuit of either game or rabbits. These were not two offences, one trespassing in pursuit of game, the other trespassing in pursuit of rabbits; and the section merely referred to two modes of committing the same offence, the essence of which was trespassing with intent to poach. The Summary Jurisdiction (Scotland) Act 1908³ did not affect the question. It was a statute dealing purely with procedure, and could not make alternative offences out of what was a single offence before its date. Moreover, the forms contained in Schedule C were merely illustrations of the specification required to make a valid complaint.⁴ It was unnecessary to insert the words "without leave of the proprietor," as these words were implied.⁵

* All the authorities referred to by the Sheriff-substitute were cited before the High Court, except Small Landholders (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 49), secs. 24 and 26 (5); Crofters Common Grazings Regulation Act, 1891 (55 and 56 Vict. cap. 41); and Johnston on Small Landholders Act, 1911, p. 49.

† At the same time an appeal was heard from a decision of the same Sheriff-substitute at the instance of Charles Neil Macdonald, the complainer in a complaint which charged the same accused with trespassing on certain lands (of which the complainer was the sporting tenant), "in search or pursuit of game or rabbits" contrary to the Game (Scotland) Act, 1832, section 1. The complainer refused in the Sheriff Court to amend the complaint by deleting the words "game or," and the Sheriff-substitute dismissed the complaint.

¹ Maxwell v. Marsland, (1889) 16 R. (J.) 48, 2 White, 176; Stenhouse v. Dykes, 1908 S. C. (J.) 61, 5 Adam, 553; Connell v. Mitchell, *supra*, (J.) p. 13, 7 Adam, 23.

² Nicol v. Strachan, *supra*, (J.) p. 18, 7 Adam, 31.

³ 8 Edw. VII. cap. 65.

⁴ Sec. 19.

⁵ Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. cap. 35), sec. 8.

(2) The facts stated did not raise a question of civil right, and no such question had arisen at the stage of the proceedings at which the Sheriff-substitute had dismissed the complaint. It might be that the general question whether one of several joint tenants could authorise an outsider to kill rabbits on the joint holding was a question of civil right, but that question had not arisen in the present case, because the accused had failed to prove what was a necessary preliminary to that question, viz., that, on the assumption that the joint tenant was in the same position as a sole tenant, the accused was a person to whom such authority could have, and had in fact, been given. In the present case it was only under the Ground Game Act, 1880,¹ that the tenant could have granted the authority in question, because any common law right of destroying rabbits which a tenant possessed apart from that Act was limited to the case where rabbits were destroying crops, when the tenant could kill them in order to protect the crops² and was founded upon the view that rabbits were vermin,³ a view discountenanced in *Lord Advocate v. Young*.⁴ Here, however, there was no crop, for hill pasture was not crop, and there was no averment even that the pasture was being destroyed. But under the Ground Game Act the authority had to be in writing, and here no written authority had actually been produced; and further, it was only to a limited class of persons that that authority could be given,⁵ and it had not been proved that the accused fell within that class.⁶ It followed accordingly that the accused's position was hopelessly bad whatever were the rights and powers of the person who granted the authority, and accordingly the question of the rights and powers of the granter was one which did not come into the case, and did not at any rate fall to be settled at this stage of the proceedings.⁷ Being, however, only the tenant of a common grazing, it was clear that he was without the scope of the Ground Game Act and enjoyed none of the privileges conferred thereby.⁸ In any event the case should not have been stopped until the question of civil right, if there was one, had been fully ascertained and developed, which had not been done here.⁹

Argued for the respondent;—(1) A complaint charging a trespass in pursuit of "game or rabbits" was irrelevant, in respect that it libelled alternative offences,¹⁰ viz., trespassing in pursuit of game, or trespassing in pursuit of rabbits. Being brought under the Summary Jurisdiction (Scotland) Act, 1908, it fell to be brought in the precise form given in the Schedule appended to that Act,¹¹ and the presence there of the brackets round the words "*or rabbits*" indicated alter-

¹ 43 and 44 Vict. cap. 47.

² Bell's Principles, sec. 1224; *Fraser v. Lawson*, (1882) 10 R. 396, Lord Rutherford Clark, at p. 406.

³ *Goaling v. Brown*, (1878) 5 R. 755.

⁴ (1898) 25 R. 778.

⁵ Ground Game Act, 1880, sec. 1, subsec. 1 (b).

⁶ *Bruce v. Prosser*, (1898) 25 R. (J.) 54, 2 Adam, 487.

⁷ *H. M. Advocate v. Bell*, (1892) 3 White, 313.

⁸ Ground Game Act, 1880, sec. 1 (2).

⁹ *Macdonald's Criminal Law*, 3rd ed., p. 526; *Barlas v. Chalmers*, (1876)

3 R. (J.) 26, 3 Couper, 279; *Higgins v. Earl of Moray*, (1884) 12 R. (J.) 1,

5 Couper, 479; *Dalrymple v. Chalmers*, (1886) 13 R. (J.) 34, 1 White, 37.

¹⁰ *Connell v. Mitchell*, *supra*, (J.) p. 13.

¹¹ *Johnston v. Pettigrew, &c.*, (1865) 3 Macph. 954.

July 16, 1913. native offences. The accused was accordingly entitled to know with which offence he was charged. The complaint was further irrelevant in respect that it did not state that the act had been done without the leave of the proprietor, and section 8 of the Criminal Procedure (Scotland) Act, 1887, had no application to such an omission. (2) The Sheriff had rightly dismissed the complaint because the disclosed facts raised a question of civil right,¹ viz., whether the tenant, being one of five tenants, had a right to authorise the accused to kill rabbits. That was the only question in the case, because no objection could be taken to the form of the authority given. The Sheriff had found it proved that the authority was written, and no objection had been taken in the Court below to the fact that the writing had not been produced. The authority accordingly complied with the requirements of the Ground Game Act, 1880, which applied to the land here in question in respect that it did not fall under the exception provided for in section 1 (2), viz., common or moorland land. But in any event authority in writing was unnecessary, seeing that at common law a tenant had a right to kill rabbits for the protection of his holding, and could delegate that right without writing.² Reference was also made to the undernoted cases.³

At advising on 16th July 1913,—

LORD HUNTER.—The first question which arises in this stated case is as to the form of complaint. The complainer charged the respondent in the complaint, which was brought under the Summary Jurisdiction (Scotland) Act, 1908, with trespassing upon lands of which the complainer is proprietor in search or pursuit of game or rabbits, contrary to the Game (Scotland) Act, 1832, section 1. Objection was taken to the complaint as irrelevant, in respect that trespassing "in pursuit of game or rabbits" as libelled, is an alternative charge. The Sheriff-substitute sustained this objection. The complainer's agent then moved for leave to amend by deleting the words "game or." Leave was granted and, the amendment having been made, the case went to trial. The necessity for our considering the point arises from the circumstance that in a second case against the same respondent the complainer refused to amend, and the Sheriff-substitute thereupon dismissed the complaint.

It is not disputed that under the Game Act the complaint is relevant, as the offence struck at is trespassing in pursuit of either game or rabbits. The introduction of the word "or" does not introduce two offences, but refers to two modes of committing the offence, the essence of which consists in trespassing. By the Summary Jurisdiction Act, 1908, Schedule C, the form of complaint given for day trespass in pursuit of game or rabbits is: "You did in the daytime trespass on said land in search or pursuit of

¹ *Barlas v. Chalmers*, 3 R. (J.) 26; 3 Coup. 279; *Higgins v. Earl of Moray*, 12 R. (J.) 1, 5 Coup. 479.

² *Calder v. Robertson*, (1878) 6 R. (J.) 3, 4 Coup. 131; *Stuart v. Murray*, (1884) 12 R. (J.) 9, 5 Coup. 526; *M'Adam v. Laurie*, (1876) 3 R. (J.) 20, 3 Coup. 223; *Jack v. Nairne*, (1887) 14 R. (J.) 20, 1 White, 350.

³ *Smellie v. Lockhart*, (1844) 2 Broun, 194; *Smith v. Young*, (1856) 2 Irvine, 402.

game (or rabbits) contrary to the Game (Scotland) Act 1832, section 1." July 16, 1913. The respondent says that the complaint if brought under the 1908 Act must be in the precise form given, and that the presence of the brackets round the words "or rabbits" indicates an alternative offence to trespassing in pursuit of game. For this contention I find no support in the provisions of the Act 1908. On the other hand, as I read section 19 of that Act, the forms contained in Schedule C, in terms of which complaints are to be stated, are given merely as illustrative of the specification which is sufficient to make a valid complaint. It is expressly provided that the description of any offence in the words of the statute contravened shall be sufficient. I find nothing to suggest that what was one offence under the Game Act, 1832, became two offences under the Summary Jurisdiction Act. The case of *Connell*,¹ to which the Sheriff-substitute refers, does not appear to me to support any such contention. I think, therefore, that the Sheriff-substitute took a wrong view as to the form of complaint, which, in my opinion, was valid and did not require amendment.

The second question arises in this way. The complainer led evidence, the result of which is set forth in the facts which the Sheriff-substitute found proved. The ground over which the respondent was alleged to have trespassed in pursuit of rabbits was pasture ground, over which the respondent's brother had a right of pasturage—his lease as I understand giving him right to sole occupation of a certain amount of arable ground and a right of pasturage over the ground in question along with five other tenants. The respondent adduced his brother as a witness, and he testified, and the Sheriff believed him, that he had given authority to his brother to shoot rabbits. The giving of such a licence involved a claim by the tenant of a right for himself to shoot rabbits or to authorise another to do so for him. Accordingly the Sheriff-substitute held that a question of civil right had arisen, and he dismissed the complaint.

In taking the course which he did the Sheriff-substitute appears to have proceeded mainly, if not entirely, upon the provisions of the Ground Game Act, 1880. Assuming that Act to apply in the circumstances of this case—and I express no opinion upon that matter—I think that the person founding upon a right to shoot over land of which he is not occupier must produce written authority from the tenant. The Sheriff has found that the respondent had such authority; but there is no record of the production of any writing, and the complainer says that no writing was produced. This would probably lead to our having to remit the case to the Sheriff to hear further evidence, unless the course taken by him is justified upon other grounds. In my opinion, however, it was so justified.

At common law the tenant of a farm is entitled in the absence of restriction in his lease to kill rabbits, at all events for the preservation of his crops. He is also entitled to authorise anyone to kill rabbits on his farm—see *Calder*,² *Stewart*³; and a person prosecuted under the Day Trespass Act may establish such authority without producing any written mandate from the tenant—*Jack*.⁴ I think it may be a question whether this right

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Lord Hunter.

¹ *Supra*, (J.) p. 13.² 12 R. (J.) 9, 5 Coup. 526.³ 6 R. (J.) 3, 4 Coup. 131.⁴ 14 R. (J.) 20, 1 White, 350.

July 16, 1913. on the part of a tenant gives him a right to authorise shooting of rabbits over pasture ground common to several tenants. But, on the respondent's establishing to the Sheriff's satisfaction, as he apparently did, that he had authority from a tenant of the ground to kill rabbits, I think the case assumed a new aspect. It then became no longer a question of trespassing in pursuit of rabbits, but a question whether the tenant had a right to give such authority as he claimed to have given. I therefore think that the third and fourth questions fall to be answered in the affirmative.

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Lord Hunter.

The LORD JUSTICE-CLERK and LORD DEWAR concurred.

THE COURT answered the first question of law in the negative and the third and fourth questions in the affirmative, and dismissed the appeal.

MAXWELL, GILL, & PRINGLE, W.S.—DUNCAN SMITH & MACLAREN, S.S.C.—Agents.

No. 24.

July 17, 1913.

Rintoul v.
Scottish
Insurance
Commis-
sioners.

WILLIAM RINTOUL, Appellant.—*Macmillan, K.C.—Masonochie.*
THE SCOTTISH INSURANCE COMMISSIONERS, Respondents.—
Sol.-Gen. Anderson—T. G. Robertson.

Procedure—Instance—Public or private prosecution—Statutory offence—National Insurance Act, 1911 (1 and 2 Geo. V. cap. 55), sec. 69 (2)—Failure to pay contributions—Title of Commissioners to prosecute.

Held (in a case before the National Insurance Act, 1913, sec. 41 (5), had come into operation) that the Scottish Insurance Commissioners, established under the National Insurance Act, 1911, had no title under that Act or otherwise to prosecute a complaint under section 69 (2) in respect of failure to pay contributions under the Act; and that the prosecution should have been at the instance of the public prosecutor.

Observations on the various qualifications which in Scotland confer a right to prosecute, and in particular on the law regarding the implied grant by statute of such a right to private persons.

Dicta in previous cases dealing with the latter question, and in particular those of the Lord President in *Caledonian Railway Company v. M'Gregor*, 1909 S. C. 1010, *doubted*.

HIGH COURT.
(Full Bench.)
Lord Justice-
General.
Lord Justice-
Clerk.
Lord Dundas.
Ld. Johnston.
Lord Guthrie.

IN December 1912 William Rintoul, farmer, Kembach, Cupar, Fife, was charged in the Sheriff Court at Cupar on a summary complaint at the instance of "the Scottish Insurance Commissioners, established under the National Insurance Act, 1911, with the concurrence of George Brander, Procurator-fiscal of the Sheriff Court of Fife and Kinross at Cupar, for the public interest," setting forth that the accused had failed to pay (1) on or before 13th October 1912, and (2) on or before 28th November 1912, the contributions payable by him in terms of the National Insurance Act, 1911, section 4, part 1 of the second schedule of the Act, the third schedule of the Act, and section 6 of the National Health Insurance (Collection of Contributions) Regulations, dated 4th and 10th July 1912, in respect of three farm servants, David Allison, Andrew Jack, and Matthew Wilson, employed by him for the period from 15th July 1912 to 28th November 1912, "whereby you are liable in respect of each such default to a fine not exceeding £10, in terms of section 69 (2) of the National Insurance Act, 1911, and in default in payment to imprisonment, in terms of sections

47 and 48 of the Summary Jurisdiction (Scotland) Act, 1908, and July 17, 1913. you are further liable in terms of section 69 (2) of the National Insurance Act, 1911, to pay to the Scottish Insurance Commissioners the sum of" £1, 15s., "being a sum equal to the amount of the contributions which you have failed to pay, as aforesaid, in respect of the said" employees.*

Rintoul v. Scottish Insurance Commissioners.

The accused objected to the competency of the complaint on the ground, *inter alia*, that the complainers had no title to prosecute. He also stated objections to the relevancy of the complaint.

The Sheriff-substitute (Armour-Hannay) repelled all the objections. The accused then pleaded not guilty, and after evidence led, was found guilty as libelled. He was fined £3 as a *cumulo* penalty, and sentenced, in default of payment, to fifteen days' imprisonment, and was also decerned to pay £1, 15s. to the Commissioners, being the amount of the contributions which he had failed to pay.

He asked for and obtained a case for appeal, in which the question of law for the opinion of the Court was, "Was I right in repelling the objections to the competency and relevancy of the complaint?"

The appellant ultimately abandoned all objections except the objection to the instance of the complaint.

The case was heard before the High Court on 19th and 20th March 1913, and was remitted to a full bench, before which it was heard on 28th and 29th May 1913.

The arguments of parties sufficiently appear from the opinions of the Judges. The undernoted authorities were referred to.¹

* The National Insurance Act, 1911 (1 and 2 Geo. V. cap. 55), enacts:—Sec. 69. "(2) If any employer has failed to pay any contributions which under this part of this Act he is liable to pay in respect of an employed contributor, or if any such employer, any insured person, or any other person, is guilty of any other contravention of, or non-compliance with, any of the requirements of this part of this Act, or the regulations made thereunder, in respect of which no special penalty is provided, he shall for each offence be liable on summary conviction to a fine not exceeding £10, and where the offence is failure or neglect on the part of the employer to make any such contributions, to pay to the Insurance Commissioners a sum equal to the amount of the contributions which he has so failed or neglected to pay, which sum when paid shall be treated as a payment in satisfaction of such contributions."

¹ For the Appellant.—National Insurance Act, 1911 (1 Geo. V. cap. 55), secs. 54, 55, 56, 57 (1) (2), 69 (2), 80, 83; Crown Suits (Scotland) Act, 1857 (20 and 21 Vict. cap. 44), sec. 4; Macdonald's Criminal Law, 3rd ed., p. 282; Hume on Crimes, 3rd ed., vol. ii., p. 118 *et seq.*; Alison's Criminal Law, vol. ii., p. 99; Rennie's Trustees and Others v. Rennie, Dec. 11, 1810, F. C.; Simpson v. Board of Trade, (1892) 19 R. (J.) 66, 3 White, 167; Caledonian Railway Co. v. McGregor, 1909 S. C. 1010; Rex v. Baggallay, [1913] 1 K. B. 290; Kennedy v. Cadenhead, (1867) 5 Irv. 539; Jamieson v. Wilson and Another, (1901) 3 F. (J.) 90, 3 Adam, 395; Reid v. Lang, (1859) 21 D. 1298. For the Respondents.—Great North of Scotland Railway Co. v. Anderson, (1897) 25 R. (J.) 14, 2 Adam, 381; Simpson v. Corporation of Glasgow, (1902) 4 F. 611; Burns v. Turner, (1897) 25 R. (J.) 38, 2 Adam, 450; Bremridge v. Smith, (1902) 4 F. (J.) 50, 3 Adam 565; Lockwood v. Chartered Institute of Patent Agents, *supra*, (J.) p. 8, 7 Adam, 14; Glasgow City and District Railway Co. v. Hutchinson's Trustees, (1884) 11 R. (J.) 43, 5 Coup. 420; Craig v. Great North of Scotland Railway Co., (1865) 5 Irv. 206; Thom v. Caledonian Railway Co., (1886) 14 R. (J.) 5, 1 White, 248.

July 17, 1913. At advising on 17th July 1913:—

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sioners.

LORD JUSTICE-CLERK.—The main question in this appeal is whether the Commissioners appointed by the Treasury under the Insurance Act of 1911 have a title to prosecute for penalties to which persons are liable in certain circumstances in terms of that Act. It is important at the outset to consider what are the recognised qualifications which in Scotland confer the right to prosecute. These are, I think, four in number. First, there is the universal qualification of the Lord Advocate to prosecute by himself or by the officers under him. Second, there is the qualification of a person injured or aggrieved by the criminal act of another, either by an injury caused to himself, or it may be to someone in close relationship to himself, *e.g.* as where a parent is killed, or a child is injured. Third, where the person has an interest to prosecute from being by law entitled to the whole or part of the penalty, or being a direct sufferer by the offence committed, as in the case of tramcars being driven at a prohibited speed past the complainer's house. (Before leaving this head, which relates to implied authority to prosecute, I would ask leave to say that on looking back at the decisions in cases where there has been held to be power to prosecute by implication, I am inclined to think that some of the *dicta* in the opinions of some of the Judges, and I do not except myself, have been expressed in terms which might call for some reconsideration and modification. I do not suggest that I have doubt as to the soundness of the decisions given, but I only desire to express my own feeling, that I do not wish to be understood as being perfectly satisfied with some of what may be called the *obiter dicta* in the opinions given. I think they might well be reconsidered in any case arising where they might be founded on. But I do not think they present any difficulty that can hamper us in the disposal of this case.) Fourth, where by statute power to prosecute is given to someone in a certain position, it being, in the view of the Legislature, expedient to confer the power to prosecute, which would not exist at common law.

The question here is whether the Commissioners under the Insurance Act have a right to prosecute under any of these three last categories. They have, of course, no position as public prosecutors, and cannot claim such merely because they perform duties of a public character.

Are they in any sense in the category of being injured or aggrieved by the delinquency which forms the subject of the complaint? I think it very plain that this cannot be held to be so. They have in their own interest nothing to complain of; no wrong has been done to them. The subject of the complaint is one for which no penalty or punishment could be inflicted at common law. It is only by special statutory enactment that authority is given for presenting a complaint and demanding the infliction of a penalty. Again, it seems to me to be plain that these Commissioners cannot found on any interest in them to prosecute for the penalty. They can have no right to any sum of penalty that may be inflicted by the magistrate. The disposal of such a penalty, unless otherwise ordered by statute, as where it is ordered to be paid in whole or in part to an informer, is a matter by which the Commissioners can take nothing. Penalties go to the Exchequer, unless otherwise ordered. Mr Robertson in the debate stated that the "body of

Commissioners had suffered by not getting the contribution money," and July 17, 1913. that they were thus wronged. When the contention is put in that form, it bears its own refutation on the face of it. The idea of a wrong done to the Commissioners is, I think, out of the question.

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The final question comes, therefore, to be under the fourth head. Does the statute under which these Commissioners are appointed confer on them the power to prosecute for the penalties enumerated in it? It is not disputed that no such power is directly conferred. It is significant that the Act expressly confers upon them the power to sue, and subjects them to liability to be sued, but it is absolutely silent as to any power to institute proceedings in the Courts of criminal jurisdiction. One would certainly expect that, if the Legislature intended to confer such a power, it would be done in express terms, seeing that, as has been shown, there is no interest from which a right to prosecute could be inferred. But although this would be the natural and sensible course, and would prevent difficulties, it is said, and, I think, with justification, that the fact that no direct authority to institute prosecutions is given is not conclusive against the existence of such a power. It is not to be doubted that such a power may be inferred without express words conferring it, if there be words in the statute from which the implication that it was the intention of the Legislature to confer it can be clearly established. But it will not be sufficient that an intention may be conjectured from the general language of the Act, or from the idea of expediency or convenience. Such a conclusion can only be legitimately drawn from the words of the Act, if they, when construed fairly and reasonably, demonstrate the intention and clearly imply that power is given. It is therefore necessary to see whether anywhere in the statute the intention that the Commissioners should have power to prosecute in those cases where prosecutions are authorised is so plainly indicated that it must be held as a necessary inference that the right to prosecute exists. I have accordingly gone over the statute from end to end, and I find that the following are the clauses relating to the matter in question. Section 19 declares that when maternity benefit is paid to a husband and he neglects to provide for his wife at the time of confinement he is liable on summary conviction to imprisonment, with or without hard labour, for a period not exceeding one month. Section 68, which relates to stay of execution of an ejectment upon medical certificate, contains in subsection (3) an enactment that a person attempting to enforce a judgment of ejectment in contravention of the section "shall be liable on summary conviction to a fine not exceeding fifty pounds." I pass over in the meantime section 69, to which I shall refer later. Section 101 enacts that if a person "knowingly makes any false statement, or false representation," in certain proceedings he shall be "liable on summary conviction to imprisonment for any term not exceeding three months, with or without hard labour." Lastly, by section 112, subsection (3), any person delaying or obstructing an inspector in the exercise of any power under the section, or failing to produce documents, or concealing or preventing or attempting to conceal or prevent any person from appearing before an inspector, shall be liable on summary conviction to a fine not exceeding £5.

Lord Justice-
Clerk.

It is plain that nowhere in these clauses, and it is the same in section 69,

July 17, 1913. is there any word or phrase indicating that prosecution is committed to the Commissioners. The phrasing is in all cases the same, and it is to be noted that in some of the cases it is not a question of money penalties but of serious crime that is being dealt with, for which imprisonment is prescribed as the punishment to be inflicted. There is nothing whatever to indicate that the duties of these Commissioners extend to prosecuting offences calling for punishment by imprisonment without the option of a fine, the offence being a direct *malum in se*, as in the case of making false statements or representations under section 101. But, if the contention made for these Commissioners is good for anything, it would entitle them to prosecute in such a case, just as much as in a case relating to mere failure to make payments by stamping cards.

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It remains only to notice the 69th section, which is peculiar, and which is strongly founded on by the respondents. The first subsection is similar to that in section 101 relating to false statements or false representations. The second subsection is as follows:—"If any employer has failed to pay any contributions which under this part of this Act he is liable to pay in respect of an employed contributor, or if any such employer, any insured person, or any other person is guilty of any other contravention of or non-compliance with any of the requirements of this part of this Act or the regulations made thereunder in respect of which no special penalty is provided, he shall for each offence be liable on summary conviction to a fine not exceeding ten pounds, and where the offence is failure or neglect on the part of the employer to make any such contributions, to pay to the Insurance Commissioners a sum equal to the amount of the contributions which he has so failed or neglected to pay, which sum when paid shall be treated as a payment in satisfaction of such contributions." The latter part of this subsection is certainly peculiar, as it tacks on to the penalty the liability to pay the sum the failure to pay which timeously has given ground for the prosecution, and directs that the accused be found liable to pay the sum to the Commissioners. In short, it authorizes a civil decree for the arrears. It is said that this implies that the Commissioners can prosecute under the complaint. I do not think that this is at all implied. It is a special provision to save separate litigations, enabling the magistrate to order payment into the hands of the Commissioners (whose duty it is to receive them) of the arrears which have been the ground for the prosecution for a penalty. It provides a shorthand way for recovering the arrears. But I cannot hold, if the Commissioners cannot competently prosecute under the Act according to all its other provisions, that this convenient way of enabling arrears to be recovered after conviction presents a case of necessary implication that the power to prosecute in all cases under the different clauses of the Act where penalty or imprisonment is sought to be inflicted is conferred upon the Commissioners. The liability to pay the arrears may be held to follow the conviction of the offence, but it is not a penalty or a punishment which is the purpose of prosecution. It is at best an order to pay the arrears, tacked on by authority of the Act to the conviction, but it could not, I think, be held to be part of the conviction of the offence or its punishment. If on a prosecution for penalty being about to be entered on, the sum in arrear was handed to the representative of the Commissioners or

proof was brought that the arrears had been paid, then this latter part of July 17, 1913. clause 69 could not be given effect to, while the penalty might still be awarded. *Rintoul v. Scottish Insurance Commissioners.* If the arrears are not paid, the Sheriff has power to give a judgment ordering the party to pay. But this is a civil proceeding following upon the criminal prosecution, by an exceptional power conferred by the statute. It is not a matter falling within the prosecution at all. The conviction and infliction of the penalty is one thing, and is a criminal matter. The order to pay the arrears which have been proved in the prosecution is an order of a civil nature, and its sanction on failure to obtemper it is a civil sanction. This is clear from the very words used in this case, the judgment of the Sheriff bearing "as regards said sum of £1, 15s., decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale after a charge of ten free days." All this is civil in the form of expression and in the effects which are prescribed on failure to pay. I think it would have been quite competent for the Sheriff to have made the two judgments separate and to have signed each separately, the one as an authority for warrant of execution by the officials of the criminal department, the other as a decree under which on non-payment diligence might be done by the officers having power to act in civil process. Lord Justice-Clerk.

I am unable to see that this addendum for civil proceedings to enforce payment of a debt to the Commissioners can be held by implication to constitute the setting up of the Commissioners as competent prosecutors in proceedings which are in their nature essentially criminal. So far from thinking that it affords sufficient ground for such general inference, I feel myself unable to hold that it gives any ground at all for such an inference. If then there is no power conferred to prosecute, it is scarcely necessary to say that the concurrence of the Lord Advocate cannot confer any title on those who have it not.

I therefore hold that the Sheriff should have sustained the objection to the title of the Commissioners to prosecute, and that the first question should be answered in the negative. If this should be the opinion of the Court, there is no need to consider any of the other questions, as the conviction must be set aside on this preliminary ground.

LORD DUNDAS.—A question was mooted at the debate whether or not the Insurance Commissioners ought to be regarded as a Government Department. In *Rex v. Baggallay*¹ the Solicitor-General for England maintained that they were a Government Department within the meaning of the Rules Publication Act, 1893,² and founded, *inter alia*, upon the words, "some other Government Department," contained in section 112 (4) of the National Insurance Act, 1911. The English Court found it unnecessary to decide the question. At our bar the Solicitor-General and his learned junior argued that the Commissioners are not a Government Department, but I do not think the point arises here for decision. The complaint is not laid as a public prosecution at all; but upon the footing of a private prosecution at the instance of the Scottish Commissioners, with the concurrence of the procurator-fiscal.

¹ [1913] 1 K. B. 290.

² 56 and 57 Vict. cap. 66.

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Lord Dundas.

It seems clear that the Commissioners are not in the position of private prosecutors entitled to complain on the ground of any personal injury or personal interest. When regard is had to the provisions of the statute it is plain that they are not persons aggrieved, or having a substantial and peculiar interest in the issue of the proceedings. I do not mean to indicate that a private prosecution may not competently be brought in regard to a statutory offence—*malum prohibitum*, not *malum in se*. On the contrary, such a complaint seems to be quite competent, under given circumstances, if the prosecutor has a sufficient interest. Illustrations of the competency of such proceedings may be found, for example, in the *Glasgow City and District Railway* cases,¹ where the prosecutors were entitled to a portion of the penalties; in *Simpson v. Corporation of Glasgow*,² where the prosecutor had a clear personal interest, not only because he might receive part of the penalty, as informer, but also because the Corporation's trams, which were alleged to run at excessive speed, passed close to the house where he and his young family resided; and in *Lockwood v. The Chartered Institute of Patent Agents*,³ where the Institute had a pecuniary interest because it was entitled to charge registration fees which the appellant declined to pay. In the case before us it seems clear that the Commissioners have no such interest as to give them a title to prosecute.

The question comes to be whether or not the statute of 1911 gives the Commissioners a title to raise and follow forth this complaint. If it does, they do not require the concurrence of the procurator-fiscal. If it does not, his concurrence cannot avail them. The statute does not expressly confer any such title. It could very easily have done so if that had been the intention of the Legislature. But while section 57 (2) provides that the Commissioners may sue and be sued by that name, section 80, which is concerned with the application of the Act to Scotland, is silent as to any right or title on their part to bring complaints or prosecutions. I think one must infer that the Legislature deliberately refrained from giving the Commissioners such right or title in Scotland. I do not say that a statutory title to prosecute must be conferred in express words. It might be held to be given by necessary implication; or even, short of that, by way of clear and definite inference from a reasonable and natural construction of words used in the statute. The Solicitor-General maintained that their title to prosecute this complaint could be so inferred; and he made reference, in support of this view, to a number of scattered sections and subsections occurring in the course of this lengthy and intricate Act. In my opinion his process of inference was much too remote and complicated to be successful. I do not think we are entitled, or that we ought, to infer a title to prosecute from what is, to my mind, at best matter of conjecture, based upon the terms of the statute as a whole, or upon its general scope and purpose, or upon grounds of alleged expediency. I venture to think that in some of the cases in this Court, judicial dicta, if not actual decisions, have gone too far in the direction of inferring a statutory title in private persons to prosecute for penalties; and where, as in this case, a penalty has

¹ 11 R. (J.) 43 and 59, 5 Couper, 420 and 463.

² 4 F. 611.

³ *Supra*, (J.) p. 8, 7 Adam, 14.

been created by a public statute, purely in the public interest, it seems to me that we should lend no countenance to the view that any person other than the public prosecutor is entitled to prosecute, unless the statute so provides, either expressly, or as a matter of reasonably clear implication from a natural construction of words used. The mere fact that the public prosecutor is not named in a statute as the party entitled to complain or prosecute is not sufficient to confer, by way of inference, a title upon someone else to do so; the presumption is that, if the statute is silent, penalties are to be recovered by the public prosecutor—(Summary Jurisdiction (Scotland) Act, 1908,¹ sec. 27).

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I am therefore of opinion that the instance in this complaint is bad; and that we should answer the question put to us in that sense.

LORD JOHNSTON.—In the National Insurance Act, 1911, provision is made (section 57 (1)) for the appointment of Commissioners for the purposes of the Act. And wherever in the Act the term “The Insurance Commissioners” is used, in Scotland we are directed (section 80) to read “The Scottish Insurance Commissioners.”

Nowhere in the Act are the Scottish Insurance Commissioners incorporated, nor are they anywhere treated as a public department in the wider and general sense of the term. In fact they are appointed by the Treasury, salaried by the Treasury, and their ramification of branch officers is under control of the Treasury. They have no single official head accountable in his place in Parliament. They are properly Commissioners appointed to conduct a certain limited and statutorily defined class of business for the nation. But the nature of that business renders it necessary that they should be able readily to sue and be sued. And, accordingly, instead of leaving them to depend on the Crown Suits Act, 1857, the applicability of which might be doubtful, section 57 (2) of the Act provides that they may sue and be sued by their statutory name. But the whole expression of this subsection indicates that it has reference to civil actions only, just as has the Crown Suits Act, 1857. Though reliance was placed upon its terms by the Commissioners I do not think that it has any bearing upon the instance in criminal matters.

Where statutory penalties for statutory offences are concerned, we are out of the ambit of civil proceedings. There is no special provision for the Commissioners being statutorily empowered to prosecute for penalties. And that being the case, I see no reason why the common principle which, in the criminal law of Scotland, applies to all prosecutions in the public interest should not apply to the Scottish Insurance Commissioners as well as to Government Departments in the higher or narrower sense. For reasons which I need not repeat, it has been considered right that all such prosecutions should proceed at the instance and therefore on the responsibility of the Lord Advocate or his representatives in the Supreme Courts. And, to be consistent, that principle must be applied in the case of the Scottish Insurance Commissioners. The matter is not I think affected by the fact that, ancillary to the infliction of a penalty, the Court may under section 69

¹ 8 Edw. VII. cap. 65.

July 17, 1918. (2) order payment of delinquent contributions. The proceeding is primarily and essentially a criminal prosecution for penalties.

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sioners.

I need hardly add that, if the instance is bad, the concurrence of the procurator-fiscal does not mend it.

LORD GUTHRIE.—I concur.

In the absence of express statutory authority, private prosecution in Scotland is only allowed where there is either sufficient private, that is to say personal interest, or where, although the statute in question does not confer express authority, such authority must be inferred. Here there is admittedly no express statutory authority. It is in my opinion clear there is no sufficient personal interest in the Commissioners. The only question is whether such authority must not be inferred. But for decisions already pronounced I should have doubted whether a case could be conceived where such inference would be unavoidable. If, for instance, while no express authority was given, the statute contained directions regulating the conduct of prosecutions by the body claiming the right. The decisions have gone even further than such a case; but it appears to me that the claim of the Commissioners would go beyond any of the cases hitherto decided, and I am not disposed to go further than the cases have already gone.

It will be no public loss if the result of this decision is to lead those responsible for framing and adjusting statutes, if power to prosecute is desired, to see that it is expressly given.

LORD JUSTICE-GENERAL.—As your Lordships are aware, I have only a vote in the case of a division among your Lordships, and your Lordships are unanimous. But it is expedient that I should express an opinion upon the matters which have been argued before us, all the more because, having had the opportunity of maturely considering all the cases upon this point, I wish to say that I am satisfied that some of the views I expressed in *Caledonian Railway Company v. M'Gregor*¹ are unsound. I refer to that part of the opinion which draws a distinction between common law crimes and statutory crimes in the matter of interest. I am satisfied that the law is exactly as expressed by my brother Lord Dundas in his review of the cases upon that matter. With that correction, the other remarks in that case by myself, and I think the decision, were right. And I apprehend that, upon the general principles, there is no difference in opinion between myself and your Lordships.

Put shortly it comes to this, that there are four ways in which a title to prosecute exists. There is the title of the Lord Advocate, and there is the title of the private individual with the concurrence of the Lord Advocate, where that private individual can show that he has been personally wronged by the crime or offence complained of. Neither of these cases applies to this case. It is not a prosecution by the Lord Advocate; and I am entirely with your Lordships in holding that it is quite impossible for the Commissioners to qualify a private interest in the sense in which a private interest was declared to exist in the decided cases.

¹ 1909 S. C. 1010.

Then, thirdly, there is a title conveyed expressly. Parliament in this July 17, 1913. matter is omnipotent; and if Parliament gives a title, there the title is. Rintoul v. And then, lastly, and here also I understand that your Lordships agree with Scottish Insurance Commissioners. me, there is no impossibility in holding that there may be a title to some one, not the Lord Advocate, conferred by implication. The only question, therefore, that remains is—Is there such an implication in this statute as will give the Commissioners a title to prosecute this prosecution? I say “this prosecution,” because I do not think it necessarily follows that if they had a good title for this prosecution, they would have a good title to prosecute all the offences in the statute. Here I confess I personally have a different opinion from your Lordships. If I had had to decide this case by myself, I should have found myself able to take what your Lordships may consider the leap of holding that there was an implied title conferred under the terms of section 69, and that for the simple reason that the right of the Commissioners to get back the arrears in what I agree may be practically a civil process is only given them under a condition precedent, namely, that there has been a conviction under a prosecution; and I think that the two are so narrowly linked together that I myself should have held that that was sufficient implication to give them a title to institute the criminal prosecution which is the condition precedent to the recovery of arrears. Lord Justice-General.

But although that is my opinion, and your Lordships are of a different opinion, I wish most emphatically to say this, that I do not think this matter ought to have been left thus. This statute contains, among other things, a Scottish application clause, and it is surely not too much to expect that the Scottish law officers should be able to tell what was necessary in Scotland, and to put in a simple addition to the application clause which, by dealing with the right to recover the unpaid instalments, would make the matter *lucē clarius*.

THE COURT answered the question in the case in the negative, sustained the appeal, and quashed the conviction, sentence, and decerniture or order appealed against.

J. DUNBAR POLLOCK, Solicitor—JAMES WATT, W.S.—Agents.



CASES

DECIDED IN

THE COURT OF SESSION, &c., 1912-1913.

EDWARD GORMAN, Pursuer.—*J. A. Christie.*
MOSS' EMPIRES, LIMITED, Defenders.—*J. Macdonald.*

No. 1.

Oct. 15, 1912.

*Reparation—Slander—Privilege—Sufficiency of averments of malice—
Master and Servant—Master's liability for servant's slander.*

Gorman v.
Moss'
Empires,
Limited.

In an action of damages for slander, brought against a limited company owning a music hall, the pursuer averred that, while he was present at a performance in the hall, he was falsely accused by an attendant of indecent conduct towards a member of the audience, and that he was taken to a private room where the slander was repeated by the attendant of the hall and by the manager. He averred that these slanderous statements "were made and persisted in most recklessly, pertinaciously, and maliciously."

Held that the occasion was privileged, and that, as there was no sufficient averment of facts inferring malice, the action was irrelevant.

Finburgh v. Moss' Empires, Limited, 1908 S. C. 928, *distinguished*.

EDWARD GORMAN brought an action in the Sheriff Court at Glasgow 2D DIVISION. against Moss' Empires, Limited, in which he sought damages for (1) Sheriff of an assault committed on him by one of the defenders' servants, and Lanarkshire. (2) a slander uttered by the defenders' servants.

The pursuer averred that on 9th September 1911 he visited one of the defenders' music halls in Glasgow, along with his wife and two friends, and took seats in the gallery. (Cond. 3) "Some time after the entertainment started the pursuer left his friends and went to the back of the gallery to proceed to the lavatory. On his return, the pursuer, as a 'turn' was on the stage at the time, waited for a second or two at the back of the gallery until said 'turn' was finished. Whilst waiting there an attendant in the employment of the defenders, whose duty it was to keep order in said gallery, came up to the pursuer and accused him of having indecently conducted himself towards a young lady who happened to have been at the back of the gallery at the same time as the pursuer, and that he had attempted to persuade her to accompany him into the gentlemen's lavatory. The pursuer indignantly denied the accusation and an altercation ensued, in the course of which he was violently assaulted by said attendant. As a result of said assault, the pursuer sustained a severe contused injury to his eye and general bruising." (Cond. 4) "Thereafter the pursuer was hustled to a private room in said music hall, belonging to the manager or under-manager (the pursuer does not know which), and there said slander was repeated by said

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attendant. It was also repeated by said under-manager. The pursuer indignantly denied said suggestion and insisted on the police being sent for. On the police arriving inquiries were made, and they refused to take any proceedings against the pursuer." (Cond. 5) "The assault committed on the pursuer was committed by the defenders' said servant in the course of his service with the defenders, and for the defenders' benefit. It was part of said attendant's duty to keep order in said gallery and to put out any person who was creating a disturbance in same. The pursuer believes and avers that the attendants in said gallery were in the habit of assaulting patrons who visited the music hall who interfered with them in the slightest way. This was known or ought to have been known to the defenders and their manager, and for the injuries pursuer sustained defenders are liable in damages as craved in the first conclusion of the initial writ." (Cond. 6) "The defenders are also liable in damages to the pursuer as craved in the second conclusion of the initial writ for the slander uttered by their servants on the occasion in question. The defenders are a limited company, and the whole management and conduct of said music hall is entirely left to their manager, under-manager, and attendants, who are charged by the defenders with the whole conduct of the business. The said false and calumnious statements were of and concerning the pursuer and were made by the defenders' said servants in the course of their service with the defenders for the defenders' benefit, and were made and persisted in most recklessly, pertinaciously, and maliciously."

The defenders pleaded, *inter alia*;—(1) The action is irrelevant. They also stated a plea of privilege.

The Sheriff-substitute (Boyd), on 2nd February 1912, pronounced an interlocutor sustaining the defenders' first plea in law, and dismissing the action.

The pursuer appealed to the Sheriff (Millar), who, on 20th May 1912, adhered in regard to the conclusion for damages for assault, and dismissed the action as laid under this head; *quoad ultra* recalled the Sheriff-substitute's interlocutor, found that the pursuer had stated a relevant case in support of the conclusion for damages for slander, and with regard to it repelled the defenders' first plea in law, and before answer allowed both parties a proof of their averments.*

* "NOTE.— . . . The defenders' agent maintained, in the first place, that it was not averred that the statement was made by the defenders' servants within the scope of their employment; but the averments of the pursuer are that the false and calumnious statements of and concerning the pursuer were made by the defenders' servants 'in the course of their service with the defenders for the defenders' benefit.' Now, these were the exact words used in the case of *Finburgh v. Moss' Empires, Limited*, 1908 S. C. 928, which was held relevant by the Court of Session. The pursuer says that the words were used by an attendant in the employment of the defenders whose duty it was to keep order in the gallery where the pursuer was. It was while he was performing that duty that he used the words to the pursuer. If it were competent to look at the defenders' answers, answer 5 makes it perfectly clear that according to the bye-laws and regulations of the Magistrates of the city of Glasgow there was the duty on the defenders' representatives to keep order and decorum in the theatre and to put out any person who was creating a disturbance therein, or who was acting in an offensive manner. Accordingly, I think this contention of the defenders must be repelled.—[The Sheriff then dealt with certain contentions for the

The pursuer required the case to be remitted to the Court of Session for jury trial. The case was heard before the Second Division on 15th October 1912 on a motion for the allowance of issues, when the defenders maintained that the summons was irrelevant.

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Argued for the defenders;—(1) The Sheriff was right in dismissing the action *quoad* the first conclusion, but he should also have dismissed it as laid on slander. The summons was not relevant unless it appeared that the servant in uttering the slander was acting within the scope of his employment and for the benefit of his master,¹ and this could not be affirmed of the servant's conduct in this case. *Finburgh v. Moss' Empires, Limited*,² was distinguishable in respect that there (a) the servant uttered the slander in presence of members of the audience, and (b) the servant simply made a reckless statement, while here the servant did no more than explain to his superior the reason for his action in regard to the pursuer. (2) *Esto* that the action was otherwise relevant, it failed because the occasion was privileged, and there was no averment of facts and circumstances inferring malice, or, at all events, of independent or extrinsic facts and circumstances inferring malice.³

Argued for the pursuer;—(1) It was not maintained that the summons was relevant on the case of assault. But so far as it was laid on slander it was plainly relevant. *Finburgh v. Moss' Empires, Limited*,² (which was indistinguishable from the present case) and *Citizens Life Assurance Co. v. Brown*⁴ settled this point in favour of the pursuer. (2) The pursuer did not dispute that malice must be put in issue. The necessary facts and circumstances sufficient to infer malice were set forth in condescendences 3 and 4. There was no general rule that the facts and circumstances must be independent of the words and action complained of⁵; this was insisted on only in cases of judicial slander or in similar cases, such as *Chalmers v. Barclay, Perkins, & Company, Limited*.⁶ [Lord Dundas referred to *M'Adam v. City and Suburban Dairies, Limited*.⁷] No question of privilege arose in that case. In regard to the form of issue *Webster v. Paterson & Sons*⁷ was referred to.

LORD DUNDAS.—In this case a proof before answer was allowed in the Court below; the pursuer appealed for jury trial; and the defenders have taken the opportunity of arguing that there is no relevant case.

Mr Macdonald maintained that view upon two grounds. On the first ground I am against him, and I need say no more than that I agree substantially with the way in which that matter has been put by the learned

defenders which were not maintained at the hearing in the Inner House.] On the whole matter I think this case comes within the scope of the case of *Finburgh* already quoted, and that the pursuer is entitled to an inquiry. As the case may raise a question of privilege on the evidence, I think the proof should be before answer."

¹ Riddell v. Glasgow Corporation, 1911 S. C. (H. L.) 35.

² 1908 S. C. 928.

³ *Chalmers v. Barclay, Perkins, & Co., Limited*, 1912 S. C. 521, at p. 530; *Macdonald v. M'Coll*, (1901) 3 F. 1082.

⁴ [1904] A. C. 423.

⁵ *Brown v. Fraser*, (1906) 8 F. 1000, at p. 1006.

⁶ 1911 S. C. 430.

⁷ 1910 S. C. 459.

Oct. 15, 1912. Sheriff. It is said that the pursuer does not aver that the statement complained of was made by the defenders' servants within the scope of their employment; but, as the Sheriff points out, it is averred that "the statements were made by the defenders' said servants in the course of their service with the defenders for the defenders' benefit"; these were the exact words which were used and held sufficient in the case of *Finburgh*¹; and, further, the pursuer's case is that the words were used by an attendant in the employment of the defenders, whose duty it was to keep order in the gallery where the pursuer was; and it was while he was performing that duty that he used the words. Upon that point, therefore, I need say no more.

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Limited.

Lord Dundas.

On the second point I think Mr Macdonald is on much firmer ground, and that his contention must be given effect to. This point does not appear to have been argued in the Court below, no doubt because that Court had not the advantage of having the proposed issue before it; but the learned Sheriff does seem to have had in his mind that a question such as that which has here been argued might be raised, for at the conclusion of his note he says:—"As the case may raise a question of privilege on the evidence, I think the proof should be before answer." The point has been sharply raised before us by Mr Macdonald. He maintained that the occasion was privileged, and as to that I do not understand that any doubt exists or that any objection is taken. This being so, Mr Macdonald proceeded to maintain that malice must go into the issue; and there, again, Mr Christie, quite rightly I think, agreed that this was so. But then Mr Macdonald carried his argument further, and urged that there is no averment on record of facts and circumstances from which malice could be inferred, and if that is correct, as I have come to think it is, then the record is irrelevant, and the action must be dismissed upon that ground. When one searches the record one really finds nothing supporting a case of malice except the general averment in cond. 6, that the statements were not only false and calumnious, but "were made and persisted in most recklessly, pertinaciously, and maliciously." I can find nothing in the condescendence in the nature of a statement of any specific fact or circumstance importing malice. But what Mr Christie says we are to infer—because it is nowhere stated—is that there was such recklessness of conduct on the part of the attendant as to amount in law to malice inferring liability against the defenders. I do not doubt that there might be averments of recklessness which the Court might hold to amount to such malice. *Finburgh*¹ was a case of that kind. But I find nothing of that sort here. It seems to me upon the pursuer's own statements that this was the case of an attendant acting within the scope of his duties and acting *in bona fide* and reasonably, however erroneous he may have been in some of his conceptions. I am of opinion, therefore, that we must recall the interlocutor of the Sheriff; find that the pursuer has set forth no relevant case; and dismiss the action.

LORD SALVESEN.—I am of the same opinion. The case of *Finburgh*,¹ I think, disposes of the first plea that was maintained by Mr Macdonald for the defenders. But it is in marked contrast to the present on the other

¹ 1908 S. C. 928.

matter to which your Lordship has referred—namely, the question of malice. Oct. 15, 1912.
 I observe that in the case of *Finburgh*¹ Lord Ardwall in holding that there was a relevant case of malice, said,—“There are averments charging the defenders’ servants with recklessness sufficient, if proved, to entitle a jury to infer malice, and that because it is a rule of law that where statements are made recklessly without sufficient inquiry, and without ordinary and reasonable regard to the character of others, such words may be held to have been uttered maliciously.” Now, there are no averments here which suggest recklessness on the part of the attendant, or any undue disregard of the character of the pursuer.

Gorman v.
 Moss’
 Empires,
 Limited.
 Lord Salvesen.

On the pursuer’s own averments the slanderous statement was made only to himself, and he says nothing to exclude the case of the defenders that the attendant in making it proceeded on the information of a young lady who had made a complaint to him as to the conduct of the pursuer. It is perfectly obvious that if a complaint of that sort is made and is believed by the attendant, it is his duty to remonstrate with the person against whom the charge is made. It is no doubt said that the statement was repeated, but the circumstances in which it was repeated, as disclosed by the pursuer’s own record, indicate to my mind conclusively that the attendant was not going beyond his proper duty. The pursuer says that he was taken to a private room, and that there the charge was repeated to the under-manager. That is exactly what one would expect where, as here, the charge had been denied by the pursuer in order that it might be investigated, and the proper course to follow determined by a superior authority. Beyond that there is absolutely no averment against this attendant. So far as one can gather from the pursuer’s averments he acted with perfect propriety, assuming that he was in the *bona fide* execution of his duty, which is the only assumption upon which the pursuer has a case at all against the defenders.

Accordingly, it being now conceded, as was decided in *Finburgh’s* case,¹ that the attendant was privileged, there are no averments in this record to deprive him of his privilege; there is nothing from which one would be entitled to infer that he acted recklessly, or that would justify the insertion of the word maliciously in the issue. I agree, therefore, that we must dismiss the action.

LORD GUTHRIE.—I am of the same opinion. The pursuer’s pleadings not only disclose a case of apparent privilege on the part of the defenders, but they show that the pursuer is not in a position to meet that defence with the necessary answer, namely, an averment which if proved will destroy the defenders’ apparent privilege.

In the case of a limited company it has not yet been held that antecedent and independent malice on the part of one of their servants will infer liability on them; and in this case it is not necessary to consider that question, for nothing of the kind is suggested. All that is put forward is that there was recklessness in the way of word and conduct which would make the limited company liable. The recklessness in the way of word is

¹ 1908 S. C. 928.

Oct. 15, 1912. in the shape of an alleged repetition of the slander. But that repetition was to the under-manager, who is said by the pursuer himself to have been one of those who were in charge of the establishment. Recklessness in the way of conduct might conceivably infer liability on the part of a limited company. But it does not appear to me that the averment of an altercation, as the pursuer narrates the circumstances, would suggest anything to throw a light back on what the servant had previously said in the way of inferring malice, but rather the reverse.

Gorman v.
Moss'
Empires,
Limited.
—
Lord Guthrie.

LORD JUSTICE-CLERK.—I entirely concur in the opinions which your Lordships have expressed.

THE COURT recalled the interlocutor of the Sheriff, sustained the first plea in law for the defenders, and dismissed the action.

ST CLAIR SWANSON & MANSON, W.S.—MENZIES, BRUCE-LOW, & THOMSON, W.S.—
Agents.

No. 2. THE PROVOST, MAGISTRATES, AND COUNCIL OF THE BURGH OF ALLOA,
Appellants.—*Constable, K.C.—D. Anderson.*

Oct. 18, 1912.

JAMES DUNLOP OCTAVUS WILSON AND OTHERS, Respondents.—
Sandeman, K.C.—Burn Murdoch.

Magistrates
of Alloa v.
Wilson.

Burgh—Street—Public or private street—Removal of barricade on private street by town-council—Duty of adjoining proprietors to pave the street—Personal objection—Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), secs. 103 (5) and 104 (2) (d).

A barricade, which had been erected across an unpaved private street in a burgh by the adjoining proprietors to prevent it being used as a thoroughfare, was removed by the town-council without the consent of these proprietors, who had refused their consent except on condition that they should not be called upon to pave the street. Some years after the removal of the barricade the proprietors, on being called upon by the town-council to level and pave the street under sec. 104 of the Burgh Police (Scotland) Act, 1903, maintained that the street had become a public street and so was maintainable by the town-council, or in any event that the town-council were barred from calling on them to pave it.

Held (1) that the street had not become a public street by reason of the removal of the barricade; and (2) that the town-council were not barred by their actings from now calling on the proprietors to pave it, in respect that these actings had not prejudiced the proprietors in their obligation to pave the street.

1st DIVISION. THIS was a case stated by the Sheriff of Stirling, Dumbarton, and Clackmannan (Lees), under the provisions of the Burgh Police (Scotland) Acts, 1892 and 1903, on appeal between the Magistrates of Alloa and James Dunlop Octavus Wilson and others, the proprietors of properties fronting West Kellie Place, Alloa, a street alleged by the Magistrates to be a private street and by the respondents to be a public street.

The case set forth:—

"On 12th June 1911 the appellants passed a resolution that this street should be 'made,' and that the statutory notices for the formation of the street should be issued. On 8th August following a notice was accordingly issued to the respondents, . . . proceed-

ing on the Burgh Police (Scotland) Acts, 1892 to 1903, and in particular on section 133 of the said Burgh Police (Scotland) Act, 1892, as amended by the said Burgh Police (Scotland) Act, 1903, calling upon them to cause the carriageway in West Kellie Place, extending from Ludgate to Ochil Street, in the burgh of Alloa, to be freed from obstructions, and to be properly levelled, paved, causewayed, or macadamised, &c., all in terms of certain plans, sections, and specifications specified in the said notice, and deposited in the chambers of the burgh surveyor of Alloa. Oct. 18, 1912.
Magistrates
of Alloa v.
Wilson.

"The respondents appealed to the Sheriff-substitute against this resolution, upon the ground that West Kellie Place is a public street within the meaning of the Burgh Police (Scotland) Acts, 1892 and 1903, and not a private street within the meaning of these Acts, and that the respondents are therefore not liable to pay any part of the costs, charges, or expenses incurred by the appellants in respect of the said works. The Sheriff-substitute took evidence upon the statements and answers made by the parties, and, on 9th February 1912, issued an interlocutor finding that West Kellie Place was a public street, and quashing the resolution appealed against. The appellants thereafter appealed to the Sheriff, but I, on 16th March 1912, refused the appeal, holding that the said road had become a public street of the burgh of Alloa in terms of the Burgh Police (Scotland) Act, 1903, section 103 (5), and that accordingly the resolution of the appellants complained of was illegal and incompetent.

"West Kellie Place extends between Ludgate and Ochil Street, which are and have for many years been public streets within the burgh of Alloa. Both sides of West Kellie Place have been completely feued under feu-charters, commencing in 1871 and ending in 1886, and have been completely built with dwelling-houses for more than twenty years. . . .

"There is only one feu on the south side of the street, and it runs the full length of the street. It was the first of the feus to be given off, and it was subsequently divided, and is now owned by two proprietors. It is described in the feu-charter as bounded on the north-west and north by a piece of ground laid off to form a street, which is the street now in question. The feus on the north side of the street are described as bounded on the south by the road or street called West Kellie Place. The ground on the north side is feued upon, *inter alia*, the condition that the feuar and his foresaids 'shall be bound forthwith to construct in a substantial and workmanlike manner at his or their own expense a road or street on the south of said piece of ground to the extent of one-half of the width thereof, with a suitable footpath, kerb, and runchannel, all to the satisfaction of the superior.' The road or street formed has never been bottomed, causewayed, or macadamised. The charters applicable to the south side do not contain such a clause.

"The said road was made and intended only for the owners' use, and accordingly, subsequent to the laying off of the street, a barricade was erected by the authors of the respondents across the roadway, extending between the footpaths on either side, at a place about equidistant from either end of the street, with the view of preventing its being used by the public for through heavy vehicular traffic. Said barricade remained in that position for several years until it was removed as aftermentioned in 1892.

"The road has never been formally taken over by the appellants

Oct. 18, 1912. as a public street under the provisions of the Burgh Police (Scotland) Act, 1892, section 134, or of the Burgh Police (Scotland) Act, 1903, section 104, subsection (2) (e).

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"In 1890 the question of removing the barricade and taking over the street by the burgh was considered by the appellants, who resolved that as 'the street was apparently sufficiently made for any traffic likely in the meantime to pass over it,' they would simply ask Mr Melvin (one of the feuars) to remove the barricade, and 'would not at this time ask it' (the street) 'to be made, and as a matter of course, the adjoining proprietors would be looked to to keep it in order until such time as it was properly made by them and taken over by the Commissioners.' The correspondence was resumed in 1892. On 15th March 1892 the Town-clerk, by direction of the appellants, wrote to Mr Melvin requesting him to remove the barricade. On 11th April Mr Melvin replied, 'I beg to say on behalf of the other proprietors and myself that we are quite willing to take down this barricade at once, on the understanding that we are not called on to form the street in any other way than at present, so long as we keep it in proper repair.' The appellants decided that they could not give any such undertaking, and directed the Clerk to request the removal of the barricade. He accordingly did so, saying 'the Commissioners consider that the removal of the barricade will be for the public advantage.' No agreement, however, was come to, and as the feuars did not remove the barricade, though again called on to do so on 21st September 1892, and would not consent to its removal unconditionally, the appellants, in the month of December 1892, *brevi manu*, and without the consent of the respondents or their authors, removed the said barricade for the purpose of throwing the road open for through vehicular traffic by the general public of the burgh, and have kept it open for such purpose ever since without opposition being made by the respondents, and without protest except when the barricade was being removed.

"On 3rd August 1904 the Town-clerk, upon the instructions of the Town-Council, wrote to each of the respondents as owners of their respective subjects in West Kellie Place, asking them then to lay the foot-pavement in front of their property, and stating that the Council desired that the foot-pavement should be laid with runchannel, kerb, drains, and gully gratings. All the respondents, upon receipt of the said request, complied therewith, and laid the foot-pavements in the manner desired by the Town-Council.

"On a few occasions between 1892 and the date of the foresaid notice of 8th August 1911, the feuars, or some of them, and on one occasion the appellants, have voluntarily laid ashes on the roadway so as to provide passage dryshod for the former. The surface of the road is still in fairly good condition in dry weather, but becomes soft and muddy in wet or frosty weather.

"In these circumstances I held in law (1) That in consequence of this removal of the barricade and the assumption of the control of the traffic, and of the use of the road for the public general vehicular traffic of the burgh, the Town-Council became responsible for the maintenance of the said road; (2) That on the Burgh Police (Scotland) Act of 1903 coming into force on 15th May following, the said road became, in terms of section 103, subsection (5) thereof, a public street of the said burgh of Alloa; and (3) That accordingly the resolution of the Town-Council of 8th August 1911 complained of,

requiring the present respondents and others to causeway said road, Oct. 18, 1912. was illegal and incompetent.*

The questions of law for the opinion of the Court were:—“(1) ^{Magistrates of Alloa v. Wilson.} Whether the appellants acted legally in removing, without the consent of the respondents, the barricade erected by them to preserve West Kellie Place from public through traffic, unless they intended to be responsible thereafter for the upkeep of the street? (2) Whether, if such action on the part of the appellants was illegal, they can now, after exposing the street to deterioration by public general use for nearly nineteen years, call on the respondents to make good the deterioration due to this illegal act? (3) Whether, in consequence of this action of the appellants, West Kellie Place became a public street in virtue of the provisions of the Burgh Police (Scotland) Act,

* The Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), enacts:—

Sec. 103. “(5) ‘Public street’ shall, in the principal Act [Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55)] and this Act, mean (1) any street which has been or shall at any time hereafter be taken over as a public street under any general or local Police Act by the town-council or commissioners; (2) any highway within the meaning of the Roads and Bridges (Scotland) Act, 1878, vested in the town-council; (3) any road or street which has in any other way become or shall at any time hereafter become vested in or maintainable by the town-council; and (4) any street entered as a public street in the register of streets made up under this Act:

“(6) ‘Private street’ shall in the principal Act and in this Act mean any street other than a public street: . . .”

Sec. 104. “(2) In addition to the scheduled amendments, the principal Act shall be amended or extended in the following particulars:—

“(d) For section one hundred and thirty-three shall be substituted the following section:—

“Where any private street or part of such street has not, together with the footways thereof, been sufficiently levelled, paved, causewayed, or macadamised and flagged to the satisfaction of the council, it shall be lawful for the council to cause any such street or part thereof, and the footways, to be freed from obstructions, and to be properly levelled, paved, causewayed, or macadamised, and flagged, and channelled in such way and with such materials as to them shall seem most expedient, and completed with fences, posts, crossings, kerbstones, and gutters, and street gratings or gullies and drains for carrying off the surface water, and thereafter to be maintained, all to the satisfaction of the council.

“(e) For section one hundred and thirty-four shall be substituted the following section:—

“If any private street or part thereof, together with the footways thereof, shall at any time be made, paved, causewayed, or macadamised and flagged, and otherwise completed as aforesaid and put in good order and condition, to the satisfaction of the council, then, and on application of any one or more of the owners of premises fronting or abutting upon such street or part thereof, or of the superior or owner of the ground on which such street or part thereof has been formed, it shall be lawful for the council to declare, and if such street or part thereof has been paved and put in good order and condition as hereinbefore mentioned, and if the owners of one-half or more of the frontage of such street or part concur in the application, the council shall declare the same to be vested in the council, and it shall be thenceforward vested in and maintained by the council.”

Oct. 18, 1912. 1903; and (4) Whether the resolution of the appellants of 12th June 1911 complained of was legal and competent?"

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The case was heard before the First Division on 18th October 1912.

Argued for the appellants;—In 1892 when the Town-Council removed the barricade from the street in question it was unquestionably a private street, and nothing had occurred at that time, or subsequently, to make it a public street. In removing the barricade the Town-Council had not acted illegally, but had acted for the public good in exercise of their powers under the General Police and Improvement (Scotland) Act, 1862, the statute then in force; and, indeed, in virtue of that Act the street might at the same time have been formed at the expense of the respondents.¹ If the Town-Council's action were illegal, the respondents should have taken steps by interdict or otherwise to resist the removal; but in any event, an illegal act by the Town-Council could not have the effect of excusing the respondents from the performance of their statutory obligations. The respondents had suffered no prejudice with regard to these statutory obligations; on the contrary, they had had the benefit of not being called upon to pave the street for nineteen years. Nor could the removal of the barricade be construed into an acceptance of the proprietors' condition that they should not be called upon to pave the street. Such a condition could not have been accepted, for it was liable to repudiation by any future Town-Council who chose to put in force their statutory powers. In the register of streets prepared in terms of section 5 of the 1903 Act, this street was entered as a private street, and the onus was on the respondents to show that it was in fact a public street. This they had failed to do. The street had never been taken over formally by the Town-Council in terms of section 104 (e) of the 1903 Act, and when the definition clause, section 103 (5), was looked at it was clear that this was still a private street, for the mere removal of the barricade could not have the effect of vesting it in the Town-Council, or of making it maintainable by them.²

Argued for the respondents;—While the street in question was a private street, the feuars on either side of it were entitled to exclude public traffic, which was done by means of the barricade. When the appellants removed the barricade the street became a public thoroughfare, and passed out of the control of the feuars and ceased to be a private street.³ If it was maintained that the barricade was removed with the consent of the feuars, then its removal implied acceptance on the part of the Town-Council of the conditions on which the feuars were willing to consent to the removal. Thus either by acceptance of the conditions, or by their own arbitrary act, the appellants had taken over the duty of maintenance, and the street had become a public street, "vested in," and "maintainable by the Town-Council" in the sense of section 103 (5) of the Act of 1903. The

¹ 25 and 26 Vict. cap. 101, secs. 3, 149, 150.

² *Campbell v. Leith Police Commissioners*, (1866) 4 Macph. 853; *Kinning Park Police Commissioners v. Thomson & Co.*, (1877) 4 R. 528; *Neilson v. Borland, King, & Shaw*, (1902) 4 F. 599; *Corporation of Glasgow v. Caledonian Railway Co.*, 1908 S. C. 244; *Glasgow and South-Western Railway Co. v. Magistrates of Ayr*, 1911 S. C. 298.

³ *Kinning Park Police Commissioners v. Thomson & Co.*, 4 R. 528, Lord Justice-Clerk Moncreiff, at p. 530.

language of the Act made it unnecessary to inquire as to the way in which the street was taken over by the Town-Council, and the appellants were barred from calling upon the respondents to form this street, because their own actings were sufficient evidence of dedication to make it a public street.¹

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LORD PRESIDENT.—[After narrating the circumstances and referring to the fact that the Sheriff had quashed the resolution of the Town-Council]—The view upon which the learned Sheriff quashed the resolution is stated by him thus. He details the circumstances which I have detailed, and then he says: "In these circumstances I held in law (1) that in consequence of this removal of the barricade and the assumption of the control of the traffic, and of the use of the road for the public general vehicular traffic of the burgh, the Town-Council became responsible for the maintenance of the said road." There is no question that inasmuch as this street by genesis was a private street the requisition of the Town-Council is in terms of the Act and within their powers, provided that it is still a private street. Now, it must be still a private street unless in the meantime it has been turned into a public street. The definition of a public street is to be found in the 5th subsection of the 103rd section of the Burgh Police Act, 1903, and that gives four criteria by which a public street may be recognised. The first is a street which has been or shall be taken over as a public street. That means formally taken over in any way provided for in the Act. In this case that has not been done. The second is a highway within the meaning of the Roads and Bridges (Scotland) Act, 1878, vested in the Town-Council. That does not apply to this street. The fourth is any street "entered as a public street in the register of streets" under the Act, and that also, we are told, does not apply to this street, which is entered on the register as a private street and not a public street. There is only one criterion left, the third, which is any road or street which has in any other way become vested in or maintainable by the Town-Council. Now, "vested in" points to one of two things, either vested in terms of some statutory provision or vested in terms of conveyance. Neither of these will do in this case, and therefore we are brought to the last question of all, whether it is maintainable by the Town-Council. If I were of opinion with the learned Sheriff that in consequence of the removal of the barricade the Town-Council had become responsible for the maintenance of the road, I should hold that it had become a public street; but I suppose the test of maintainability is a simple one, and it is this. After these events which happened in 1892 and after the correspondence, supposing there had been excessive rainfall, or some accident, and the street had got into shocking disrepair, could the feuars have called upon the Town-Council to repair and maintain it? I am unable to come to any such conclusion. *Ex hypothesi* it was a private street to begin with, and there is no obligation on the Town-Council to maintain a private street.

Accordingly, I have no difficulty in holding that, if there is any obligation on the Town-Council, it must either rest upon direct contract, or the Town-Council must be barred from saying they are not liable.

¹ Dixon's Trustees v. Whyte, (1897) 24 R. 639, Lord M'Laren, at p. 647.

Oct. 18, 1912. There was a proposition on the one side and on the other, but neither party accepted the other party's terms, so that direct contract seems to be out of the question, for there was obviously no consensus at all. Then when you come to the question of bar, the essence of that is that owing to the action of one party the other party has been put in a worse position than he otherwise would have been in. All that happened was that the Town-Council knocked down the barricade, and the feuars took no steps to put it up again. Is their position any worse so far as the statute is concerned? As a matter of fact, instead of being the worse they have had their money in their pockets all these years, when they might have been called upon there and then to causeway the street. They were allowed in these years to go on with the street as it was. They seem to be in no worse position through the barricade having been knocked down; and accordingly I cannot agree with the decision that the learned Sheriff has come to. I do not think it is necessary to answer all the questions put, but if the third question is answered in the negative and the fourth in the affirmative, that disposes of the case.

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of Alloa v.
Wilson.

Ld. President

LORD KINNEAR.—I agree in all respects with the opinion which your Lordship has just delivered.

LORD JOHNSTON.—I concur.

LORD MACKENZIE.—I concur with your Lordship. I think that the question which arises in this case is whether upon the facts stated it can be inferred that there was a contract between the feuars and the Town-Council in which the Town-Council came under an obligation to maintain the street in question. If they did, by force of it, it has become a public street, but I agree with your Lordship that upon the facts as stated such contract did not exist here. As regards the question of bar, I am bound to say that the arguments pressed by Mr Constable appear to me of great weight, that so far from being prejudiced by the delay the feuars are in a better position; because, as your Lordship has put it, they have had their money, which they might have been called upon to expend nineteen years ago, in their pockets all the time, and the fact that they are called upon now to causeway the street puts them in no worse position, because the expense for doing it now has not been made greater by anything that has happened during the past nineteen years.

THE COURT answered the third question in the negative and the fourth in the affirmative, found it unnecessary to answer the other questions, and recalled the judgment appealed against.

MORTON, SMART, MACDONALD, & PROSSER, W.S.—FRASER, STODART, & BALLINGALL, W.S.—Agents.

THE PARISH COUNCIL OF AYR, Pursuers (Respondents).—*Horne, K.C.* No. 3.
—*Valentine.*

THE PARISH COUNCIL OF WIGTOWN, Defenders (Appellants).— Oct. 25, 1912.
Johnston, K.C.—Hon. W. Watson.

Poor—Settlement.—Residential settlement—Continuity of residence—Poor Law (Scotland) Act, 1898 (61 and 62 Vict. cap. 21), sec. 1. Ayr Parish Council v. Wigtown Parish Council.

In September 1906 a workman obtained employment as a coal-heaver in the parish of A, which was not the parish of his birth settlement. In the summer of 1907, when his employment became slack, he left the parish and went into training with the militia and thereafter worked as an agricultural labourer. After an absence of nearly three months he returned to the parish of A and resumed his former employment. In the summer of 1908 he again absented himself for militia training and agricultural employment, his absence on this occasion lasting for over three months. He then returned to work in the parish of A, and remained there till June 1910, when he became chargeable as a pauper.

Held that he had not “resided for three years continuously” in the parish of A in the sense of sec. 1 of the Poor Law (Scotland) Act, 1898, and accordingly had not acquired a residential settlement in that parish.

Mackenzie v. Cameron, (1858) 21 D. 93, distinguished.

On 9th September 1911 the Parish Council of Ayr brought an action in the Sheriff Court at Wigtown against the Parish Council of Wigtown for recovery of sums disbursed by the pursuers for the maintenance of James Kelly, as a pauper, in the poorhouse at Ayr. 1st DIVISION. Sheriff of Dumfries and Galloway.

The pursuers pleaded, *inter alia*;—(1) The said James Kelly having been born in the parish of Wigtown, and having no residential settlement in the parish of Ayr or elsewhere, the parish of Wigtown, as the parish of his birth settlement, is liable for his maintenance.

The defenders pleaded;—The said James Kelly having acquired a residential settlement in the parish of Ayr, that parish is liable for his maintenance without any right of relief against defenders, and the present action should therefore be dismissed with expenses.

A proof was allowed and led, the facts ascertained at which were thus narrated by the Sheriff-substitute in his note:—“The question now at issue is whether James Kelly can be said to have resided continuously at Ayr from 27th June 1907 to 27th June 1910.

“There is no conflict of evidence in the case. On returning to Ayr from harvest work in September 1906 Kelly found employment as a coal-heaver with Mr William Allan, coal merchant, Ayr. The employment lasted during the winter and spring, but failed him during the summer months, when the coal trade was slack. Kelly therefore left Ayr in July 1907, went into training with the militia for three or four weeks in Dumfriesshire, and thereafter worked at the harvest in Kirkcudbrightshire for six or seven weeks. He returned, however, to Ayr early in October, as he ‘knew where he had a job to go to,’ and continued in Mr Allan’s employment during the following winter and spring. In the summer of 1908 Kelly again joined the militia for three weeks in Dumfriesshire, and thereafter found work in Kirkcudbrightshire, first in thinning turnips, and latterly at the harvest. About the beginning of October, after an absence from Ayr of over three months, he resumed his employment with Mr Allan. In the summer of 1909 Kelly’s absence from Ayr

Oct. 25, 1912. does not appear to have extended beyond two or three days. He went to Dumfries for the militia training; but, having been discharged as medically unfit, he returned to Ayr, and continued to work in Mr Allan's employment until 27th June 1910, when, owing to illness, he had to apply for parochial relief. While in Ayr during the period in question Kelly resided mostly in a model lodging-house, called the 'Trades Hotel.' When he left in summer for harvest or other work he seems to have taken all his possessions with him; but after commencing work with Mr Allan in September 1906, though he was always only a casual labourer, yet he does not appear to have wavered in his purpose of regularly returning to Ayr as the place where he reckoned on earning his living."

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Parish
Council.

On 19th December 1911 the Sheriff-substitute (Watson) pronounced an interlocutor in the following terms:—"Finds in fact (1) that James Kelly was born in the parish of Wigtown; (2) that he acquired a residential settlement in the parish of Ayr, which was subsisting at 27th June 1910, when he became an object of parochial relief: Finds in law that the defenders are not bound to relieve the pursuers of their disbursements on behalf of the said James Kelly: Therefore sustains the plea in law stated for the defenders, and assoilzies them from the crave of the writ."

The pursuers appealed to the Sheriff (Fleming), who, on 24th February 1912, pronounced an interlocutor sustaining the appeal, and finding, *inter alia*, that the pauper had not acquired a residential settlement in the parish of Ayr, and that the defenders were bound to relieve the pursuers of their disbursements on his behalf.*

* "NOTE.—The doctrine of constructive residence in poor-law cases has been carried very far, but no case was quoted to me, nor have I found any, where there was held to be constructive residence in which there was not some connecting link between the individual and the parish from which he was physically absent. A wife, a family, a parent, and even furniture and other belongings left in the parish have been held to be such a connecting link.

"Here the pauper was unmarried, and a casual labourer paid by the job as he could get one. He was under no obligation to turn out to work, and when he did turn out he took his chance of getting something to do. He lived in a model lodging-house, paying each night for his bed. He had no property or possessions except what he stood up in or carried in his pockets.

"Had his absence from Ayr been merely for the purpose of militia training the result might have been different, but as he continued his absence to undertake work elsewhere I have to consider whether his actual residence elsewhere can be treated as constructive residence in Ayr.

"I think it cannot. When the pauper left Ayr as he did in each year of his residence there he took his whole possessions with him. He had no engagement for work on his return, or even a definite promise. When he had finished his militia training he looked out for a harvesting job and worked at that till the end of harvest. Then he returned to Ayr because, as he says, 'I knew where I had a job to go to in Ayr.' But when he is asked, 'Had you any fixed intention of returning to Ayr if you got a job elsewhere?' his reply is, 'If I had got a job I would have taken it. It all depended on the pay. I went to Ayr because I could make more money in Ayr.'

"If the question to be answered in such cases is, 'Where is the person's home,' I think it is impossible to say of this pauper that when he was harvesting or looking for work elsewhere his home was still in Ayr. And equally would it be impossible if after the harvest was over he had got work

The defenders appealed to the Court of Session, and the case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Cullen) on 25th October 1912.

Oct. 25, 1912.

Argued for the appellants;—Although the pauper had been absent from Ayr for militia training and for harvesting work during periods of slackness in his employment there, he had none the less been continuously resident in Ayr, and had there acquired a residential settlement.¹ It was not maintained that during his absence from Ayr there had been constructive residence there, but the intervals of absence had not been sufficient to break the pauper's continuity of residence, and from the brief duration of his last interval of absence there was clear indication that, during all such intervals, his intention was to return to Ayr.²

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Counsel for the respondents were not called upon.

LORD PRESIDENT.—I have no hesitation in saying that I think the learned Sheriff is right. It is a question of fact and a question of degree. I do not think the doctrine of constructive residence arises. In order to lose a birth settlement, a man must acquire a settlement by continuous residence. The question is whether this man ever had such a residence in Ayr as can be said to be continuous residence. I think he had not. Mr Watson quite properly has quoted the case of *Mackenzie*.¹ That case went a very long way—much further than I should have been prepared to go. But we cannot take that case as a standard and then see whether this one comes so near it that the same result must follow. Each case must be determined by its own circumstances; and what I think distinguishes this case from *Mackenzie*,¹ if it is necessary to distinguish it, is that the period which *in toto* was dealt with in *Mackenzie*¹ was very much longer than the period in the present case. In *Mackenzie's* case,¹ for nearly twenty years of his life the man had shown that the one place where he had got subsistence from his labour was the parish of Blair Atholl, and the only period of the year when he was not there was when he went home to his own parents' house, when employment was slack at Blair Atholl. Here you have not got the same continuity of time. After Mr Allan had once begun to employ him Kelly not unnaturally went back to Ayr, where he thought a job was waiting for him, but he would have been equally happy to go anywhere else if he could have got a better job. You have not got that long period of year after year which would enable you to say that Ayr was the only place where the pauper went for his livelihood, as it was possible to say of Blair Atholl in *Mackenzie's* case.¹ I am therefore for adhering to the learned Sheriff's interlocutor.

in the same parish and remained at it for the necessary period to say that he was not, during the harvest and his subsequent residence in that other parish, qualifying for a residential settlement there. But no one can retain a residential settlement by constructive residence and, at the same time, by physical residence begin to qualify for such a settlement in another parish.

"I think the defenders have failed to prove that the pauper was continuously resident within the parish of Ayr for three years prior to chargeability."

¹ *Mackenzie v. Cameron*, (1858) 21 D. 93.

² *Beattie v. Smith and Paterson*, (1876) 4 R. 19.

Oct. 25, 1912. LORD JOHNSTON and LORD CULLEN concurred.

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THE COURT affirmed the interlocutor of the Sheriff, and dismissed the appeal.

M. J. BROWN, SON, & CO., S.S.C.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

No. 4.

Oct. 30, 1912.

Wylie v.
Inland
Revenue.

MISS CHARLOTTE ETHEL WYLIE, Appellant.—*Mailand*.
WALTER JAMES ECCOTT, Surveyor of Taxes, Respondent.—
Sol.-Gen. Anderson—J. A. T. Robertson.

Revenue—Income-tax—Profits—Deduction of expense incurred in earning profits—Profits earned by letting furnished house—Expense of renting house elsewhere—Property and Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D—Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), sec. 2, Schedule D.

A lady made a profit by letting her furnished house for two months, and, when assessed for income-tax thereon, claimed to deduct the rent of another house which she had taken to reside in during that period.

Held that this rent was not an expense necessarily incurred in earning the profit, and accordingly that the deduction should be disallowed.

1st DIVISION.
Exchequer
Cause.

THIS was a case for appeal under the Taxes Management Act, 1880, and set forth that at a meeting of the Commissioners for Income-Tax for the county of Haddington, held at Haddington on 10th May 1912, Miss Charlotte Ethel Wylie, residing at Eastfield, North Berwick, appealed against an assessment on the sum of £60 made upon her under the Property and Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, Sixth Case; the Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), sec. 2, Schedule D; and the Finance Act, 1911 (1 and 2 Geo. V. cap. 48), sec. 14.

The case further set forth:—

“The following facts were admitted or proved:—

“(1) The assessment was made on Miss Charlotte Ethel Wylie in respect of rent received by her for letting her house, Eastfield, North Berwick, furnished for the months of August and September 1911.

“The rent received for said two months was . . . £90 and the following deductions were allowed:—

Valued rent for two months, ...	£14
Proportion of rates, ...	3
Wear and tear of furniture, ...	9
Cleaning, ...	2
Agency, ...	2
	30
	£60

“(2) For the appellant it was contended (while the fairness of the above deductions was not disputed) that the rent paid by Miss Wylie for a furnished house at Aberfeldy during the period for which she let and endeavoured to let her house at North Berwick is a proper deduction and the Assessor had not allowed anything for it. The house at North Berwick was the appellant's only house, and she had no other house to which to remove in order to vacate the North Berwick house and so render it a lettable subject. The address of

the house so rented by her was Cuilaluinn, Aberfeldy, and the amount paid by her for the use of it for four months was £70 (seventy pounds). Oct. 30, 1912.
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"(3) The Surveyor of Taxes (Mr W. J. Eccott) maintained that the rent paid by Miss Wylie for the house she occupied during the time her house at North Berwick was let is not a proper deduction for the following reasons:—

"The Income-Tax Acts contemplate the assessment of profit, and are not concerned with the application or destination of the profit when it is made.

"This principle has been repeatedly laid down, and particularly in the following cases:—*Paddington Burial Board v. Commissioners of Inland Revenue*, (1884) 2 T. C. 46, *per* Day, J., at p. 50; *Californian Copper Syndicate v. Harris*, (1904) 6 F. 894, *per* Lord Trayner, at p. 899, 5 T. C. 159, at p. 168.

"The Surveyor further argued that if the appellant contended that no profit could be said to be realised until she had actually returned to her house and had set over her expenditure upon lodging against her receipts from letting her house, she was confusing two totally distinct things. What was sought to be ascertained were the expenses necessarily incurred in the process of letting the house at North Berwick furnished. Now the expense incurred by Miss Wylie in taking another house elsewhere was not such an expense. She might have gone to stay with friends. Or again, supposing she had not let it, but wished to take a holiday abroad or at Aberfeldy, she could not claim to set the expense so incurred against any other portion of her income.

"(4) The Commissioners, having considered the facts and arguments submitted to them, refused the appeal and confirmed the assessment."

The case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Cullen) on 30th October 1912.

Argued for the appellant;—This was not a question of destination of profits, but of expenditure in earning profits. The appellant did not make a business of letting houses, but in this instance had made a profit by letting her only home, and the expense of meanwhile finding a home elsewhere was a necessary expense to the earning of that profit.¹ The statutory prohibition in Schedule D of the Act of 1842, First and Second Cases, against deduction of living expenses did not apply to the present circumstances, which fell under the Sixth Case.

Argued for the respondent;—It was in the appellant's discretion whether she took another house or not, and the proposed deduction was therefore not in any sense a necessary expenditure. It was in fact a destination of the profits, not a preliminary to the earning of them.² The ground on which the appellant sought to make this deduction came to be that it was a necessary living expense, and therefore the prohibition against the deduction of living expenses directly applied.

¹ *Gresham Life Assurance Society v. Styles*, [1892] A. C. 309, Lord Herschell at p. 321, 3 T. C. 185, at p. 193; *Dowell's Income-Tax Laws*, 6th ed. pp. 185, 212; *Fry on Income-Tax*, p. 20.

² *Strong & Co., Limited, v. Woodfield*, [1906] A. C. 448; *Dowell's Income-Tax Laws*, 6th ed. p. 197.

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LORD PRESIDENT.—I think there is no doubt about this case. A lady lets her house furnished, and by that means gets a very much larger return for it than the relative amount of the annual value which is in the valuation-roll, and upon which she pays income-tax under Schedule A. Accordingly, the Crown make a claim under Schedule D, and they begin with a statement of the rent which she gets from her tenant. Then they deduct the proportion of the rent in the Valuation-roll upon which she has already paid income-tax under Schedule A, corresponding to the period for which the house is let. Then they take off certain other deductions in respect of rates, wear and tear of furniture, cleaning, and agency, and they bring out the sum which represents clear profit to the lady and on which they propose to charge. She says—and it is contended in this case—that she is entitled further to make a deduction of the rent which she had to pay for a house elsewhere when she turned out of her own house in order to allow it to be let.

If it was the law that you were entitled before reckoning the profits of your business to have a deduction for the necessary cost of your living somewhere (because you must always live somewhere in order to conduct business), the argument would be a good one, but as it is distinctly specified in one of the cases under the Income-Tax Acts that no such charge is permissible, I am afraid that this charge cannot be allowed. This particular expenditure on a house elsewhere has nothing necessarily to do with the letting of her own house. It only represents the necessity of her living somewhere. So far as letting her house is concerned it is a necessity that she should go out, but it is not a necessity of the situation that she should take a house elsewhere. She might stay with friends—she might go to an hotel.

Accordingly, I am of opinion here that the determination of the Commissioners was quite right and should be affirmed.

LORD JOHNSTON.—The claim in question is made under the Sixth Case of Schedule D, and therefore I do not think it necessary to refer to the rules applicable to both the First and the Second Cases upon which argument was addressed to us. There can be no doubt that this lady *ex facie* made a profit by letting her house, because she received as rent a good deal more than the proportion of the year's assessed rental after making all proper allowances. If then, under the sixth case, the Commissioners have got to ascertain the full amount of profits and gains which she made out of this letting, I cannot see that it is possible to make a deduction in respect of the rent which she paid for another house, the renting of which enabled her to let her own; and for this very simple reason, that what she does when she leaves her own house and provides for her residence during the interval is entirely a personal matter, which it is impossible to reduce to any rule. She may take a smaller house. She may take a larger house. She may take no house at all, but live with friends, or travel. The whole thing is so entirely dependent upon her own personal wishes and circumstances, that it is impossible to found upon the course which she actually took any claim for deduction from the net rent which she received for the house which she let.

LORD CULLEN concurred.

Oct. 30, 1912.

THE COURT affirmed the determination of the Commissioners.

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HAMILTON, KINNEAR, & BEATSON, W.S.—SIR PHILIP J. HAMILTON GRIERSON,
Solicitor of Inland Revenue—Agents.

TYZACK & BRANFOOT STEAMSHIP COMPANY, LIMITED, Pursuers
(Appellants).—*Horne, K.C.—Hon. W. Watson.*

No. 5.

FRANK STEWART SANDEMAN & SONS, Defenders (Respondents).—
D.-F. Dickson—A. R. Brown.

Oct. 30, 1912.

Tyzack &
Branfoot
Steamship
Co., Limited,
v. Sandeman
& Sons.

Ship—Affreightment—Bill of Lading—Exemptions—Condition exempting ship from responsibility for marking on goods—Liability for unmarked goods—Apportionment among consignees of unmarked goods not identifiable as part of any particular consignment—Commixtio.

Bales of jute, consigned to various consignees and specifically marked, were shipped under bills of lading bearing that the bales were received "marked and numbered as per margin," but that "the weight, measure, quality, contents, and value" were unknown, and that the ship was not to be liable for "inaccuracies, obliteration or absence of marks."

On the discharge of the ship 14 bales were amissing. 11 bales also were found to be through some unknown cause without marks, and could not be identified as belonging to any particular consignment. It was not disputed that these 11 bales formed part of the jute shipped at the port of loading; but the consignees—four in number—who did not receive their full consignments refused to accept any of these bales.

In an action for freight brought by the shipowners against one of the four consignees, *held* (1) that on the terms of the bills of lading the shipowners were exonerated from responsibility for the absence of markings on the bales; (2) that the four consignees were bound to accept the 11 bales, and that these fell to be allocated among them in proportion to the respective shortages on their consignments; but that each of them was entitled to deduct from the freight due by him the value of his proportion, thus ascertained, of the 14 missing bales.

Spence v. Union Marine Insurance Co., (1868) L. R., 3 C. P. 427, *followed*.

On 9th June 1910 Tyzack & Branfoot Steamship Company, Limited, brought an action in the Sheriff Court at Dundee against Frank Stewart Sandeman & Sons, spinners and manufacturers, Dundee, concluding for payment of £175, 1s. 6d., this sum being the balance of freight due for the carriage on the pursuers' steamship 'Fulwell' of bales of jute, for which the defenders held bills of lading.

The pursuers averred that in August 1909 the "Fulwell" loaded at Calcutta a cargo of 28,002 bales of jute for conveyance to Dundee. The jute was consigned to thirty-seven different consignees; and the defenders were onerous indorsees and holders of bills of lading for eleven parcels of jute, consisting of 2476 of these bales.

The bills of lading were in these terms:—

"Shipped in good order and condition . . . bales of jute at . . . lbs., being marked and numbered as per margin; and to be delivered subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition, from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of Dundee. . . .

"(4) The number of packages signed for in this bill of lading to be binding on steamer and owners, unless errors or fraud be proved, and

2D DIVISION.
Sheriff of
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any excess of shippers' marks to be delivered. Any shortage to be paid for at the spot market value on the day of arrival of the vessel.

"(5) The following are the exceptions and conditions above referred to:—Weight, measure, quality, contents, and value unknown. . . .

"(7) The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration or absence of marks, numbers, or description of goods shipped, leakage, breakage, loss or damage by dust from coaling on the voyage, sweat, rust, or decay, except through improper stowage. Fines and expenses and losses by detention of ship or cargo, caused by incorrect marking or by incomplete or incorrect description of contents or weight, or of any other particulars required by the authorities at the port of discharge upon either the packages or bills of lading, shall be borne by the owners of the goods.

"(11) On arrival at port of destination, delivery to be made on payment of freight as above and production of the bills of lading in accordance with the endorsements thereon, or against the consignees' suborders for any portion of such bills of lading duly lodged. The cargo to be discharged without delay, and according to the custom of the port for steamers, at any safe dock, wharf, quay, or basin which may be appointed on arrival"

The pursuers further averred that the discharge of the vessel began on or about 14th October on its arrival at Dundee. The bales, as they were discharged, were taken possession of by harbour porters, who wheeled them into sheds on the quay. Of the cargo, 14 bales were unaccounted for, and after the consignees had been engaged in removing bales, it was found that there remained in the harbour sheds 11 unclaimed bales. The defenders had received 2470 bales, and claimed for a short delivery of 6 bales. Three other consignees also claimed for short deliveries, the total shortage claimed for by these parties and the defenders being 25 bales. "The defenders and the other consignees claiming for short delivery decline to regard any of these 11 bales as part of their consignments, alleging that the 11 bales thus remaining unclaimed either bear different marks from theirs or no marks at all; and in the claims for shortage referred to the delivery of the said 11 bales to the consignees has not been allowed for. The pursuers have repudiated the said claims for shortage to the extent of 11 bales, on the ground that the 11 bales left in the shed were bales which the defenders and the claiming consignees were bound to attribute to their bill of lading quantities—the pursuers, by the terms of the bills of lading, not being liable for inaccuracies, obliteration or absence of marks, numbers, address or description of goods shipped." The pursuers offered "to pay to the defenders, and the other consignees, in such proportions as they may be found to be respectively entitled to the same, the price" of the 14 bales, but explained that "owing to the failure of the defenders and the other consignees to allocate among themselves the 11 bales left in the harbour shed, the pursuers are unable to ascertain what part, if any, of the price of the 14 bales tendered" would fall to the defenders. The sum sued for was the balance of the freight unpaid and still due by the defenders, subject to any deduction to which the defenders might be entitled in respect of the pursuers' tender.

The defenders averred that they had not received six of the bales consigned under their bills of lading; that the 11 bales were not

shipped under these bills; and that they declined to take them in Oct. 30, 1912. implement of the bills. They also averred:—"The cargo in question was discharged on to a covered quay or shed in the dock. There is no custom of the Port of Dundee regulating the delivery of jute cargoes. The pursuers' right to freight depends on the right delivery of the cargo, and their lien therefore depends on their retaining possession or control thereof, and the defenders have a right to set off against it any claim for damage they may sustain through short delivery of or damage to their jute, so that delivery cannot be given or taken until the pursuers have assorted and set out the jute in separate parcels according to the marks and quality marks in the respective bills of lading, and afforded the defenders an opportunity of examining the condition of the bales and checking the marks thereof and settling the freight. The pursuers, however, did not do this, or tender to the defenders delivery of the bales referred to in the said bills of lading. On the contrary, they discharged the jute from their vessel promiscuously on to the quay with exceptional rapidity, and very much faster than the bales could be loaded by the defenders on their carts and lorries and removed from the quay. The pursuers never assorted the bales and never tendered them to the defenders in implement of their respective bills of lading, but left the defenders to search out their bales as they best could."

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A proof was led in the action. The facts proved are stated in the following passage from the opinion of Lord Salvesen:—

"The facts in this case lie within a short compass, and are not seriously in controversy. The pursuers' steamer 'Fulwell' loaded in Calcutta between 11th August and 1st September 1909 a cargo of jute in bales for conveyance to Dundee. The cargo was brought alongside in barges, and the bales of jute were hoisted in slings of five or six at a time direct from the barge into the hold of the steamer. Native tallymen were employed by the ship to tally the cargo at each hold, and to see that the number of bales stated in the boat-note handed by the bargee to the tallymen corresponded with the number unloaded from the barge. The boat-note, besides stating the number of bales on board, also described the marks on the bales. It was part of the tallymen's duty not to receive burst or wet bales; and where any such were returned, a note of the number and the reason for rejecting them was put upon the boat-note, as well as a jotting in pencil of the number of slings and the number of bales which each sling contained, with a summation of the total number received from each barge. The principal boat-note was retained by the ship, a copy being delivered by the bargee. A mate's receipt, made out in accordance with the particulars in the boat-note, was signed by the chief officer, and from this document a bill of lading applicable to the particular parcel was made out by the shippers, containing the same particulars and signed by the ship's agent on behalf of the master.

"The first of the two bills of lading with which we are concerned in this case was for a parcel of 254 bales of jute bearing to be shipped by Ralli Brothers, and having the marks 'Registered, 400 lbs. J.P.S. Naraingunge, 1909-10.' On end, 'R.B.' Of this parcel 127 bales had the quality mark 2 in red, and 127 bales the quality mark 3 in green. The other parcel had precisely similar marks, but consisted of 246 bales of jute, one-half having the quality mark 2 in red and the other half the quality mark 3 in green.

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"The evidence shows, and indeed this was not disputed, that the loading was carried on in the customary way and so that it was impossible for the tallyman to check the marks on each bale, although he had an opportunity of seeing, with regard to the top layer of bales in the barge, that the marks, generally speaking, corresponded with those indicated in the boat-note. If, however, occasional bales were unmarked or had different marks, this would almost inevitably escape detection. In order to enable the tallyman effectively to check the marks, every sling would have had to be laid on deck and the bales turned over with the marked side uppermost, the markings being on a piece of gunny or sacking which is on one side of the bale only, and is held in position by a continuous rope wound round it. Such a method of conducting loading is unknown at Calcutta, and would greatly prolong the operation. The practice, therefore, is for the tallyman not to pay special attention to the marks on each bale, but to accept the description in the boat-note as generally confirmed by his own observation before commencing to unload the barge.

"The cargo as described in the bills of lading consisted of 28,002 bales of jute consigned to thirty-seven different consignees, and included bales of many different marks. The 'Fulwell' had a prosperous voyage, and arrived in Dundee about the 14th of October, when the discharge was commenced and extended over rather more than a fortnight. The method of discharge was the one customary at Dundee. The ship's stevedores hoisted the bales in slings by five or six at a time on to a raised platform, from which they were slid singly down an inclined plane which extended to the nearest shed, where the bales were received by harbour porters employed by the consignees as a body and paid by them. These porters assorted the bales according to their marks, and they were then removed by the consignee to whom each lot belonged. The removal was checked by a shipping clerk employed by the ship, by a merchant's clerk employed by the consignees, and by a shore-dues clerk on behalf of the harbour authorities. Of the thirty-seven consignees, thirty-three received their full consignments bearing the marks specified in their respective bills of lading. The defenders received 2470 bales out of a total specified in their bills of lading of 2476. Of the number received there were ten which bore the quality mark of 2 instead of the quality mark of 3, which is an inferior quality; but the defenders naturally made no demur to taking the superior quality instead. On the whole cargo there was a shortage of fourteen bales; and in addition there were eleven bales which on 30th October were discovered to have no marks except certain marks on the ends in individual cases. None of these bales can be identified as forming part of the parcels consigned to the consignees who did not obtain their full bill of lading quantity; and each of them refused to accept any of these bales as forming part of their consignments. The pursuers, while not admitting that there was any shortage in the quantity delivered as compared with the quantity actually shipped, have offered to account for the value of the fourteen bales. The question in the case is whether they are also bound to account for the value of the eleven bales which they actually carried and delivered over the vessel's side, but which do not bear the marks described in the various bills of lading whose holders have not received their full quantities.

"The matter is somewhat complicated by the circumstance that there is a shortage, and that this falls to be distributed over four

different consignees; as also that the same consignees must, according to the pursuers' contention, take the eleven bales among them in proportion to the shortage of their several consignments. I shall, however, for the sake of simplicity, treat the case as if there had been one consignment only, and as if of that consignment the whole number of bales had been delivered except the eleven which were found to be unmarked. How the absence of marks occurred is not made the subject of direct evidence, as indeed it could scarcely have been. The marks might conceivably have been torn off in the course of stowing the cargo or of unloading it, but no suggestion of this kind was made at the time when the question first arose; and it was only long afterwards that an examination was made of the bales in the shed, when some of the defenders' experts say that the ropes had in some cases got slack in the middle, pointing to the possibility of the pieces of gunny on which the markings were stencilled having come off. How little importance is to be attached to this examination after the goods had been exposed to the risk of much handling in the sheds may be judged from the fact that two of these bales, each weighing 400 lb., had bodily disappeared, having apparently been stolen in the interval. I entertain no doubt that, as the quality of the jute did not correspond with any of the consignments on which there had been a shortage, the marks were not on the bales when they were shipped at Calcutta, and that this fact escaped the notice of the tally-clerks owing to the manner in which the goods were loaded on board, and the obvious interest that the bargees, acting either for themselves or on behalf of the shippers, would have to conceal the absence of marks on a bale by placing it in the centre of the sling. I should further add that it was admitted by counsel for the defenders that the eleven bales in question had been received by the ship at Calcutta, and that there had been no exchange of bales either at Calcutta or at any of the ports at which the vessel called, a supposition which would, in any case, have been entirely excluded by the evidence."

On 29th August 1911 the Sheriff-substitute (Campbell Smith) pronounced the following interlocutor:—"Finds that the defenders, Frank Stewart Sandeman & Sons, are, under bills of lading held by them, entitled to delivery from the pursuers of 2476 bales of jute, and that they have obtained delivery of no more than 2470 bales: Finds that the pursuers are bound either to deliver the six bales still undelivered, or to establish a 'valid excuse' for their failure to deliver them: Finds that the pursuers have failed to establish any valid excuse for non-delivery of said six bales, and that, therefore, the defenders are entitled to deduct the value thereof from the sum sued for: Assesses the value of said bales at £15, 5s. 4d.: Decerns against the defenders for payment to the pursuers of £159, 16s. 2d. (being the sum sued for, £175, 1s. 6d., under deduction of the said sum of £15, 5s. 4d.), with interest thereon as craved."

The pursuers appealed to the Court of Session, and the case was heard before the Second Division on 25th, 26th, and 27th June 1912.

Argued for the appellants;—The appellants were only bound to deliver the goods received for carriage. This was the extent of the duty of a shipowner as carrier at common law; and his position was in no way affected by section 3 of the Bills of Lading Act, 1855,¹ for that section applied to the person who signed the bill of lading

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only and not to the shipowner. Thus, although the bill of lading stated that 246 bales were received, it was open to the shipowner to prove as against the shipper and the consignee—whose right was no higher than the shipper's¹—that a smaller number of bales were actually shipped, the onus of this proof being on the shipowner; and similarly, while the shipowner would be *prima facie* bound if the master had, by custom or otherwise, a mandate to sign, and did sign, a bill containing a representation as to the marks on the bales, in this case also the shipowner might by proof discharge his *prima facie* liability. In the present case the appellants had proved that they had delivered all the bales which they had received except fourteen, for which they accepted responsibility; and as regards the quality marks on the bales, the master had no authority to bind the owners as to these, for that was no part of his duty as master.² The appellants, therefore, were not bound by the representation in the bills as to the marking of the goods. But, in any case, they were protected by the terms of the bills of lading.³ Clause 5 of the bills exempted them from all liability regarding the contents of the bales, and clause 7 from liability regarding the external marks on the bales. In *Parsons*⁴ it was held that the person who signed the bill of lading would not be liable for the obliteration of a mark from goods shipped, as the presence or absence of that mark did not affect the identity of the goods but merely their identification. The respondents' contention that there had been no delivery of the bales to the consignees was negatived by the decisions,⁵ and also by the provision in the bills of lading that the cargo was to be discharged "according to the custom of the port." That custom had been followed here. The bales having been delivered, it was the duty of the consignees to apportion the eleven unmarked bales among themselves; and the rule for the method of apportionment was established by the case of *Spence v. Union Marine Insurance Company*.⁶ Each consignee was liable in freight for his bales as delivered over the side of the ship, subject to deduction of the value of his proportion of the fourteen bales which had been lost.

Argued for the respondents;—The appellants were bound to deliver goods of the same quantity and description as were stated in the bills of lading to have been shipped. Here they had professed to tally the marks, and had acknowledged receipt of the bales "marked and numbered as per margin." These marks were leading marks; and the master had authority to insert the leading marks in the bills.

¹ *Craig & Rose v. Delargy*, (1879) 6 R. 1269.

² *Cox v. Bruce*, (1886) 18 Q. B. D. 147, *per* Lindley, L.J., at p. 153, Lord Esher, M.R., at p. 152, Lopes, L.J., at p. 154; *Craig & Rose v. Delargy*, 6 R. 1269, *per* Lord President Inglis, at p. 1275, Lord Shand, at p. 1284; *The "Ida,"* (1875) 32 L. T. 541.

³ *Jessel v. Bath*, (1867) L. R., 2 Ex. 267; *Lebeau v. General Steam Navigation Co.*, (1872) L. R., 8 C. P. 88, *per* Bovill, C.J., at p. 93; *Parsons v. New Zealand Shipping Co.*, [1901] 1 K. B. 548; *Moes, Moliere, & Tromp v. Leith and Amsterdam Shipping Co.*, (1867) 5 Macph. 988, *per* Lord President Inglis, at p. 991; *Horsley v. Baxter Brothers & Co.*, (1893) 20 R. 333.

⁴ [1901] 1 K. B. 548.

⁵ *British Shipowners' Co., Limited, v. Grimond*, (1876) 3 R. 968; *Knight Steamship Co., Limited, v. Fleming, Douglas, & Co.*, (1898) 25 R. 1070.

⁶ (1868) L. R., 3 C. P. 427, referred to by Lord Russell of Killowen in *Smurthwaite v. Hannay*, [1894] A. C. 494, at p. 505.

This was recognised in *Cox v. Bruce*.¹ In the case of *Parsons*² the identity of the delivered goods with the goods received by the ship-owner was not questioned: here the whole question was as to the identity of the goods delivered with the goods shipped. On the terms of the receipt in the bill of lading the onus of proving that the goods were not marked rested on the appellants just as the onus of proving a shortage in the shipment would.³ This onus the appellants had not discharged. On the voyage fourteen bales were lost, and for aught that appeared in the evidence all the respondents' missing bales might have been included in these lost bales. It could not, therefore, be said that the appellants had shown that the bales of the respondents were not marked, when they had given no account of the lost bales. As for the special conditions in the bills of lading on which the appellants relied, the fifth condition did not affect the present question. The seventh had no application. That clause could only apply if it were proved that the goods tendered by the appellants were those that were shipped under the bills of lading. Fourteen bales, possibly all correctly marked, had disappeared; and of the eleven unclaimed bales it was not proved that any of these actually were part of the respondents' consignment. Hence the appellants could not invoke the protection of the seventh condition.⁴ Again, the bills of lading acknowledged that the bales were "shipped in good order and condition," and as the bales were not delivered in good condition the appellants could not recover the freight.⁵ Further, there had been no delivery to the respondents of their bales. The porters were acting for all the consignees indiscriminately; and it was impossible to maintain that this was a tender of goods when it was uncertain to which of the consignees the goods belonged. The two decisions as to delivery⁶ on which the appellants relied were not in point, for in these cases there was no question as to delivery to a number of consignees, nor was there any dispute except as to the time of delivery. Here there was no question as to the time of delivery; the only question was as to what had been delivered. In *Spence*⁷ also the goods were all of the same quality, and the decision proceeded on a principle which was inapplicable here, viz., *commixtio*.⁸ *Smurthwaite*⁹ was really adverse to the appellants' contention. It was held there that a number of consignees could not join as plaintiffs in an action as each had a separate claim under a separate contract. The contracts with the various consignees must therefore stand by themselves; and the appellants could not require the respondents to resort to allocation of the bales with the other consignees under separate contracts.

At advising on 12th July 1912,—

LORD SALVESSEN.—[After stating the facts of the case in the passage

¹ 18 Q. B. D. 147.

² [1901] 1 K. B. 548.

³ *M'Lean & Hope v. Fleming*, (1871) 9 Macph. (H. L.) 38, L. R., 2 H. L. (Sc.) 128; *Smith & Co. v. Bedouin Steam Navigation Co., Limited*, (1895) 23 R. (H. L.) 1, [1896] A. C. 70.

⁴ *Moss, Moliere, & Tromp v. Leith and Amsterdam Shipping Co.*, 5 Macph. 988.

⁵ *Compania Naviera Vasconzada v. Churchill & Sim*, [1906] 1 K. B. 237.

⁶ *British Shipowners' Co., Limited, v. Grimond*, 3 R. 968; *Knight Steamship Co., Limited, v. Fleming, Douglas, & Co.*, 25 R. 1070.

⁷ L. R., 3 C. P. 427. ⁸ *Bell's Prin. sec. 1298.* ⁹ [1894] A. C. 494.

Oct. 30, 1912. printed *supra*].—Each bill of lading contains certain exceptions and conditions qualifying the ship's responsibility for delivering the goods specified therein. There is also an express provision with regard to the number of packages in these terms: "The number of packages signed for in this bill of lading to be binding on steamer and owners, unless errors or fraud be proved, and any excess of shipper's marks to be delivered. Any shortage to be paid for at the spot market value on the day of arrival of the vessel." This provision, which is unusual, serves to explain the attitude of the pursuers with regard to the fourteen bales short delivered. Presumably they are unable to point to any particular error or fraud which resulted in the bills of lading being for a larger quantity of bales than was actually delivered at Dundee; although on the evidence there can be little moral doubt that the ship in fact delivered all the bales received.

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The only exceptions and conditions which have any bearing on the question relating to the eleven bales are as follows:—" (5) Weight, measure, quality, contents, and value unknown "; and " (7) The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration or absence of marks, numbers, or descriptions of goods shipped."

It is unnecessary to consider what would have been the liability of the pursuers had these conditions not been embodied in the bill of lading. The primary duty of a shipowner is to carry in safety the goods received by him from the shipper and, if he does so, it is pretty plain that the shipper can have no claim against him because he has induced the ship's agent to sign his name to an inaccurate representation of the marks on the goods so received. There is high authority for the proposition that a consignee is in this respect in no better position than the shipper—*Craig & Rose v. Delargy*.¹ It is not necessary, however, to enter upon this somewhat vexed question, as it is quite certain that the shipowner may qualify the obligation that he might otherwise be held as undertaking as in a question with the consignees. Thus if the bill of lading bears on the face of it that so many tons of goods have been received, and the obligation is qualified by the words "weight unknown," the owner will not be responsible if a less quantity is delivered to the consignees, although the latter may have paid on the faith of the bill of lading, provided the shipowner, in fact, delivered the quantity of goods put on board his vessel. This was expressly decided in the case of *Jessel v. Bath*.² The statement as to the weight of the goods contained in the bill of lading, qualified by the words "weight unknown," was construed as being a representation by the shipper of which the master who signed the bill of lading had no knowledge. Baron Bramwell said: "This document, though apparently contradictory, means this—a certain quantity of manganese has been brought on board, which is said by the shipper for the purpose of freight to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct. On a bill of lading so made out I think no one could be liable in such an action as the present."

I am unable to distinguish that case in principle from the present. Reading the bill of lading as a whole, I think it means that the shipper has represented to the signatory that the bales are marked and numbered as on

¹ 6 R. 1269.

² L. R., 2 Ex. 267.

the margin of the document, but that the latter expressly signs on the Oct. 30, 1912. footing that the ship will not be responsible if the marks as so described do not prove to be accurate, or if there is an entire absence of marks, or if the description of the goods turns out not to correspond with that given in the bill of lading. This is made all the more manifest by the subsequent clause that, if expenses and losses by detention of the ship and cargo be "caused by incorrect marking or incorrect description of contents or weight," such losses shall be borne by the owner of the goods. Now, I think it impossible to suggest, in the face of such clauses, that the agent who signed the bill of lading was guaranteeing the correctness of the markings as stated therein. In these circumstances, had there been only one consignee of this cargo, I entertain no doubt that he would have been bound to take delivery of the eleven unmarked bales as well as those that bore the correct markings, and that he would have had no defence to an action for freight.

It is curious that on a matter of this kind, which must be of frequent occurrence, there should be no precise authority in point as to the responsibility of the ship. Two cases were, however, referred to, in both of which the decision was in favour of the shipowner although there was no express exemption in the bill of lading. The first is the case of *Cox v. Bruce*,¹ where the master had signed a bill of lading for 192 bales described as marked R.C. 2 and 286 marked R.C. 3. The 2 and 3 were quality marks. On delivery it turned out that there were fifty-nine bales short of No. 2 quality and fifty-nine in excess of No. 3. The consignee, who had acquired the bill of lading for value without notice of any incorrectness in the description of the goods, claimed the difference in value between fifty-nine bales of No. 2 quality and the same number of bales of No. 3. It was held that the shipowners were not liable either for breach of contract or on the ground that they were estopped by the representation in the bill of lading. There was a special clause in that bill of lading with which we are not concerned here, which was construed as meaning that the responsibility for correct delivery did not attach unless the quality marks had been correctly inserted in the bill of lading. The ground of the decision appears to have been that the master had no power to bind his owners by an incorrect description of the goods any more than he could bind them by an incorrect statement of the number or weight, and the case is also important as showing that Lord Esher took the same view as Lord President Inglis, in *Craig & Rose v. Delargy*,² that an indorsee of a bill of lading has no higher rights than the shipper.

The other case is that of *Parsons v. New Zealand Shipping Company*,³ where certain carcasses had been shipped under a bill of lading which contained a marginal description of them as marked 622 X, whereas a corresponding number of carcasses marked 522 X was tendered. The action was directed against the agents who signed the bill of lading, and not against the shipowners; and yet it was held that the defendants were not liable. A. L. Smith, M.R., put his judgment on a special clause in the bill of lading which ran as follows: "The ship shall not be responsible for correct delivery or loss unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark and number or

¹ 18 Q. B. D. 147.² 6 R. 1269.³ [1901] 1 K. B. 548.

Oct. 30, 1912. address." He construed this as meaning correctly marked with the mark and number according to the bill of lading, and held that the clause was inserted to meet a case where the goods were not correctly marked according to the bill of lading. In my opinion the clause in the bill of lading we are considering is much more clear and unambiguous, and if so, it follows that the pursuers cannot be answerable for the misdescription.

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LordSalvesen. A difficulty arises in the present case from the circumstance that there was a shortage of fourteen bales; and the defenders say that it may be that the whole of the bales in respect of which they claim were amongst those for which the ship admits liability. It appears, however, that exactly the same position is taken up by the other three consignees against whom actions for freight have also been raised (these actions to await the decision in the present case), and I think it is perfectly plain that none of the eleven unmarked bales can be identified with any of their shipments. These eleven bales must, however, have formed part of one or more of the four parcels in question. How, then, are they to be distributed? It appears to me that the answer is furnished by the decision in *Spence*.¹ In that case the marks on a large number of bales of cotton had become so obliterated by sea water that none of them could be identified as belonging to any particular consignee. It was held that these bales must be attributed to the consignees in the proportion that the quantity to which each was entitled bore to the whole quantity shipped. That was a case against underwriters, the ground of action being that as it was impossible to identify any of the bales as being the plaintiff's he was not bound to receive them, and that, as in a question with the underwriters, there was a total loss of the bales. It was pointed out by Bovill, C.J., that this argument would equally apply if not a single bale had been lost, and if the marks only had been obliterated; and would lead to the strange anomaly that although all the goods which had been put on board arrived safely at their destination there would be a total loss on the whole of them for the purpose of insurance law. In another part of his opinion he says: "There is no authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, and become *bona vacantia*." Applying this principle to the present case, and on the assumption of the facts above referred to, the just way of distributing the unmarked bales to each consignee is in proportion to the total shortage. Parties are agreed as to the way in which this works out in the case of the present defenders, and the sum to which they are entitled in respect of the six bales of which they have not meanwhile taken possession. If the ship had to make good the value of these bales, the sum would work out, as the Sheriff-substitute has fixed it, at £15, 5s. 4d.; but, on the assumption that the defenders are bound to take their proportion of the eleven bales, this sum is reduced to £8, 11s., which will form a deduction from the admitted freight. I propose, therefore, that we should recall the Sheriff-substitute's interlocutor, and make appropriate findings in fact consistent with the views above expressed; and should grant decree for the sum of £175, 1s. 6d., under deduction of £8, 11s., with interest, as con-

¹ L. R., 3 C. P. 427.

cluded for. As the whole controversy has turned on the obligation of the Oct. 30, 1912. defenders to take their proportion of the eleven unmarked bales, they must be found liable in expenses both here and in the Court below.

An argument based upon the decisions in the two cases of the *British Shipowners' Company v. Grimond*¹ and the *Knight Steamship Company*² I have no doubt these two cases were well decided, and, in any event, they are binding upon us; but, except in so far as it appears from them that the customary method of discharging jute cargoes at Dundee was followed in the present case, they appear to me to have no application. The mere fact that the harbour porters took delivery of certain bales from the ship's side on the instruction of the general body of consignees has, in my opinion, no bearing on the question whether any particular consignee is bound to pay freight on these bales if they turned out not to form part of the parcel for which he held a bill of lading. The question would still be open whether the tender of these bales by the shipowners to any particular consignee or consignees was a tender which they were bound to accept. If, for instance, it had been established that the bales in question had been substituted by the shipowners for other bales which were in fact consigned under one or more of the bills of lading, the provisional delivery to the harbour porters would not affect the right of the consignees in question to reject the bales. According to the recognised method of discharge at Dundee it would be quite impracticable to ascertain, during the course of unloading and before the bales were delivered across the ship's rail, whether they formed part of the consignment which the harbour porters were authorised by their constituents to receive. The decisions quoted are merely to the effect that where bales so received do form part of the cargo belonging to consignees who have instructed the harbour porters to attend to their interests, the risk of damage from exposure on the quay or otherwise falls to be borne by the receivers whose property they *ex hypothesi* were, but delivery *per se* could not in the circumstances effect a transfer of property of goods which were not in fact shipped by any of the merchants from whom the holders of the bill of lading derived their right.

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The LORD JUSTICE-CLERK, LORD DUNDAS, and LORD GUTHRIE concurred.

ON 30th October 1912 the Court pronounced the following interlocutor:—"Recall the interlocutor of the Sheriff-substitute, dated 27th August 1911: Find in fact (1) that between 13th and 31st August 1909 the s.s. 'Fulwell' loaded at Calcutta a cargo consisting mainly of jute in bales; (2) that bills of lading for 28,002 bales of jute were granted on behalf of the master of said vessel, and that said bills of lading were endorsed to thirty-seven consignees, and included bales of many different marks; (3) that the s.s. 'Fulwell' arrived in Dundee on 14th October, on which day the discharge of the vessel commenced in the customary manner and was completed on or about 31st October; (4) that the customary manner of delivery followed upon this occasion is for porters employed by the whole body

¹ 3 R. 968.

² 25 R. 1070.

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of consignees to take delivery of the whole cargo from the ship's tackles and carry it into sheds, and there assort the parcels of the various receivers; (5) that all the consignees except four, viz., Messrs Sandeman & Sons, who are the present defenders, William Nairn, C. Robertson & Company, and Fleming, Douglas, & Company obtained delivery of the whole consignments specified in their bills of lading marked as therein described; (6) that there were 14 bales short of the quantities contained in the bills of lading presented by the four consignees named above, and that the pursuers admit liability, for the purposes of this case, for the value of said 14 bales; (7) that there were 11 bales which were not marked as described in the bills of lading presented by the four consignees above mentioned; that it is impossible to identify said bales as forming part of any parcel or parcels marked in the manner set forth in the bills of lading presented by said consignees, but that there were marks on the ends of said bales which showed that some of them could not have been marked 'on end in red "R.B.,"' and that said consignees refused to treat said bales as forming any part of their consignments; (8) that the defenders in this action were endorsees of 11 bills of lading, representing 11 separate parcels of jute amounting to 2476 bales, of which 246 bales were shipped under bill of lading No. 21 of process, and 254 bales under bills of lading No. 22 of process; (9) that in the out-turn of the ship there were 6 bales less, bearing the marks described in Nos. 21 and 22 of process, than the quantities enumerated in said bills of lading, and that the defenders refused to treat any part of the 11 bales above mentioned as belonging to their parcel, and sought to deduct the value of 6 bales from the amount of freight due by them; (10) that the said 11 bales were shipped in the condition in which they were delivered by one or more of the shippers of said consignments; and (11) that the said bills of lading contained, *inter alia*, the following conditions:— 'Weight, measure, quality, contents, and value unknown,' and 'the ship is not liable for inaccuracies, obliteration or absence of marks, numbers, or description of goods shipped': Find in law that the defenders, as in a question with the pursuers, are bound to attribute to the parcels of which they have not received the full quantities or qualities specified in the bills of lading corresponding proportions of the said 11 bales and of the 14 bales not accounted for by the ship, and that they are entitled to receive credit for the value of their said proportion of the 14 bales not accounted for: Find that the balance of freight due by the defenders to the pursuers is admitted to be £175, 1s. 6d., and that their proportion of the value of the said 14 bales amounts to £8, 11s., which they are entitled to deduct from the amount sued for: Therefore decern against the defenders for the sum of £166, 10s. 6d., with interest thereon at the rate of five per centum per annum from the date of citation till payment: Find the defenders liable in expenses both in this Court and in the Court below . . . "

ALEX. MORISON & Co., W.S.—ELDER & AIKMAN, W.S.—Agents.

IAN KEITH MACKINTOSH, Petitioner (Respondent).—*D. Anderson.*

No. 6.

THOMAS MACKINTOSH AND ANOTHER, Reclaimers.—*C. H. Brown.*

Oct. 29, 1912.

Entail—Provisions to younger children—Free rent—Deductions—Interest on debt—Interest on Estate-duty—Finance Act, 1894 (57 and 58 Vict. cap. 130), secs. 6 (8) and 9 (1).

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By a deed of entail power was conferred upon the successive heirs of entail in possession to make provisions for widows by way of annuities, not exceeding a certain proportion of the free rents of the estate to be computed "after deduction of all annual public and parochial burdens and interests of debts and provisions affecting the same at the time"; also to make provisions for younger children, not exceeding a certain number of years' free rent of the estate, the rent "to be computed and taken as at the date of the deed granting the provisions, after deduction of all annual public and parochial burdens affecting the same at the time," no mention being made of interest of debts as a deduction.

An heir of entail, on succeeding to the estate, made provisions for younger children, the deed of provision being executed before the date arrived when, under the Finance Act, 1894, payment of certain estate-duties due in respect of the estate could actually be demanded.

Hold that in estimating the "free rent" for the purposes of the provisions to younger children there fell to be deducted:—

(1) Interest on debts affecting the estate, in respect that "free rent" meant rent free from such interest, and that this was not affected by the fact that in the deed of entail interest on debt was not specifically mentioned as a deduction with regard to such provisions.

(2) Interest on estate-duty, in respect that, although the estate-duty was not actually payable till after the date of the deed creating the provision, it was already an existing statutory burden on the estate.

On 5th March 1912 Ian Keith Mackintosh, with consent and concurrence of his mother, Mrs Alice Mary Mackintosh, widow of Lord Hunter. William Alexander Mackintosh, as his curator and administrator-at-law, presented a petition under the Entail Acts, 1824 to 1882, and relative Acts of Sederunt, and the Finance Act, 1894,* for authority to charge the entailed estate of Usan with estate-duty, settlement estate-duty, and children's provisions.

The petition set forth:—"That the petitioner succeeded to the said lands and estate on 17th July 1911 on the death of his grandmother, the deceased Mrs Helen Keith or Keith Mackintosh of Usan

"That the said deceased Mrs Helen Keith or Keith Mackintosh, the former heir in possession, succeeded to the said lands and estate on 1st February 1909, upon the death of her brother the deceased George Keith, Esq. *Secundus* of Usan, and she was at the date of her death duly infeft in the said lands and estate

* The Finance Act, 1894 (57 and 58 Vict. cap. 30), sec. 6, which deals with the collection and recovery of estate-duty, enacts:—Subsection (8).

"Provided that the duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments . . . with interest at the rate of 3 per cent per annum from the date at which the first instalment is due, . . . and the first instalment shall be due at the expiration of twelve months from the death. . . ."

Sec. 9 enacts:—Subsection (1). "A rateable part of the estate-duty on an estate . . . shall be a first charge on the property in respect of which duty is leviable. . . ."

Oct. 29, 1912. "That in respect of the passing of the said lands and estate to the said Mrs Helen Keith or Keith Mackintosh on the death of the said Mackintosh v. George Keith, *Secundus*, estate-duty and settlement estate-duty Mackintosh. became exigible in terms of the Finance Act, 1894, upon the value of the said lands and estate. The estate-duty (at the rate of $4\frac{1}{2}$ per cent) amounted to £1481, 12s. 6d., and the settlement estate-duty (at the rate of 1 per cent) amounted to £276, 4s. 8d. These duties together amounted to £1757, 17s. 2d.

"That at the date of the said Mrs Helen Keith or Keith Mackintosh's death the said duties were unpaid, and that by her trust-disposition and settlement, dated 23rd December 1907, and with three holograph codicils thereto, dated respectively 24th February 1909, 29th June 1910, and 2nd February 1911," she, *inter alia*, bequeathed to her executors her right to charge the entailed estate of Usan with the duties.

By the deed of entail under which the estate was held the successive heirs or heiresses of entail were empowered to make provisions for wives or husbands by way of annuity equal to one-fourth part of the free rents of the estate, "to be computed and taken as at the date of the deed granting the annuity, after deduction of all annual public and parochial burdens and interests of debts and provisions affecting the same at the time."

Power was also given to the successive heirs in possession to grant bonds in favour of younger children, and to burden succeeding heirs of entail therewith, for provisions not exceeding two years' free rent of the estate, in case there should be one child other than the heir succeeding to the estate, and up to five years' free rent in case there should be three or more such children, "the rent in all such cases to be computed and taken as at the date of the deed granting the provisions, after deduction of all annual public and parochial burdens affecting the same at the time, but not of the existing liferents to wives or husbands."

The petition further set forth:—"That by bond of provision, dated 16th March 1909, the said Mrs Helen Keith or Keith Mackintosh, on the narrative that she was heiress of entail in possession of the said lands and estate . . . that the free rental of the said lands and others at the date of the said bond of provision amounted to the sum of £1628, 6s. 5d., and that she was desirous of exercising the powers conferred on her by the said disposition and deed of entail by securing the sum of £8140 sterling to the said Thomas Mackintosh, Archibald Mackintosh, and Mrs Jane Christina Mackintosh or Tod, wife of William Leonard Tod, residing at Glenesk, Polton, being her whole children then in existence other than and besides the said William Alexander Mackintosh, her eldest son and then apparent heir in the said lands and estate (who thereafter died predeceasing her),—*inter alia*, bound and obliged herself and the heirs of entail succeeding to her in the said lands and estate, on the day after her death, to content and pay to the said Thomas Mackintosh, Archibald Mackintosh, and Mrs Jane Christina Mackintosh or Tod, the said sum of £8140, being under five years' free rent of the said lands and estates as at the date of the said bond of provision, after deduction of all legal and public burdens, in terms of the said disposition and deed of entail."

On 16th March 1912 a remit was made to Mr W. S. Haldane, W.S., to enquire into the facts, and to report, and he reported, *inter*

al'ia, as follows:—"A point which has arisen in connection with the ascertainment of the precise amount of the younger children's provisions is whether interest on the estate-duties now proposed to be charged on the estate in respect of the late Mrs Mackintosh's succession, and which, by section 9, subsection 1, of the Finance Act of 1894, became first charges on the estate, falls to be taken into computation. The reporter is of opinion that in the circumstances of the present case it does *not*, the duties not having become exigible until one year after her succession, in terms of section 6, subsection 8, of the Finance Act, 1894, which in this case would mean that the first instalment of duty became due on 1st February 1910—the year following the creation of the provisions. Moreover they have not in point of fact been yet created charges on the estate. . . .

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"In computing the free rental, as stated in the said bond of provision, on which the said Mrs Keith or Keith Mackintosh fixed the amount of her younger children's provisions, no deduction apparently was made in respect of interest on debt affecting the estate, which the reporter understands amounted to £5575, created subsequent to the date of the entail. The deed of entail itself only expressly excludes from computation 'existing liferents to wives or husbands,' but having regard to the terms of section 4 of the Aberdeen Act (5 Geo. IV. cap. 87), and to the reasoning of the Judges in the case of *Lord Lovat v. Fraser, &c.*, June 30, 1885, 12 R., p. 1179, it appears to the reporter that interest on debt affecting the estate falls to be deducted in ascertaining the 'free rent.'"

On 22nd May 1912 the Lord Ordinary (Hunter) pronounced an interlocutor in the following terms:—"Finds (1) that the interest on debts charged upon the entailed estate falls to be deducted in calculating the free rent on which the amount of the provision to younger children is to be based; (2) that interest on the amount of the estate-duty (including settlement estate-duty) payable in respect of Mrs Keith Mackintosh's succession also falls to be deducted in calculating the said free rent; and (3) that the expenses of the bond or bonds and dispositions in security for the amounts of the said younger children's provisions, and the said estate-duty, cannot form a charge upon the entailed estate."*

* "OPINION.—This is an application by an heir of entail in possession to charge the entailed estate with estate-duty, settlement estate-duty, and provisions to children. Mr Haldane, to whom a remit was made, has raised certain questions which were argued before me. They arise in this way.

"Mrs Keith or Keith Mackintosh, the former heir in possession, succeeded to the estate on 1st February 1909. On 16th March 1909 she executed a deed of provision in favour of her younger children for the sum of £8140, a sum said to be under five years' free rent of the estate, and therefore competent under the deed of entail. In calculating free rent no deduction was made in respect of interest on debts charged upon the estate. The reporter is of opinion that this was wrong. I agree with him.

"Under the deed of entail it is provided that the heir of entail in possession may, in the event of there being three children other than the heir—the case in point—grant a bond to his said younger children burdening the succeeding heirs for payment of provisions not exceeding 'the sum of five years' free rent of the whole lands and others'—'the rent to be computed and taken after deduction of all annual, public, and parochial burdens affecting the same at the time, but not of the existing liferents to wives or husbands.' If these words stood alone, I do not think it could be success-

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Thomas Mackintosh and Archibald Mackintosh, two of Mrs Keith Mackintosh's younger children for whom provision had been made, reclaimed, and the case was heard before the First Division (without Lord Mackenzie) on 26th June 1912.

Argued for the reclaimers;—(1) In considering the effect of an exercise of powers to grant provisions by an heir of entail, it was important to distinguish between powers conferred by the Aberdeen Act,¹ and those conferred by the deed of entail.² In computing free rent for the purpose of children's provisions under the present deed of entail, the Aberdeen Act did not determine the appropriate deductions, because these were prescribed by the deed itself.³ In the deed interest on debts was not specified as the subject of deduction for the purposes of younger children's provisions, and, accordingly, it did not fall to be deducted.⁴ This was all the more evident when the clause dealing with younger children's provisions was contrasted with that dealing with widows' annuities, in which interest of debts was specifi-

fully contended that interest upon debt charged upon the estate did not form a proper deduction from the rental to be taken as the basis for calculating the amount of the provision to younger children. The expression 'free rent' would appear to be used in the same sense as it is used in the Aberdeen Act (5 Geo. IV. cap. 87, sec. 4). It was, however, contended on behalf of the younger children that an examination of the different provisions of the deed showed that the entailer intended that the free rental should be ascertained, after deduction of public and parochial burdens payable annually, and without any deduction for interest payable on debt. This argument is founded mainly, if not exclusively, upon the circumstance that, in providing for a widow's annuity, free rent is to be computed 'after deduction of all annual, public, and parochial burdens and interests of debts and provisions,' while nothing is said about deducting 'interest of debts and provisions' in the case of a provision for younger children. I do not, however, think that the mere absence of these words in the later part of the deed necessarily leads to what appears to me to be an unnatural construction of the actual words used. It has to be kept in view, as pointed out by the Lord President in the case of *Lovat*, (1885) 12 R. 1179, at p. 1185, that it would be difficult to suppose that the entailer used the expression free rent 'in a sense which would allow the whole rents of the estate to be covered by provisions to widows and children so as to leave nothing at all for the heir in possession.' After he has expressly provided for the deduction of interest of debts and provisions from rental in computing a widow's annuity, the entailer speaks further on in the deed of 'annual burdens as aforesaid' as including the more detailed enumeration he had previously given. I think the same significance was intended to be given to the shorter expression when used in dealing with provisions to younger children. Besides, on the construction put forward on behalf of the younger children, I do not think there would be any necessity for the words 'but not of the existing liferents to wives or husbands.' These words are introduced as an exception from what has already been dealt with, and presumably because otherwise such liferents would have been deducted as annual burdens.

"The next question is whether interest on the amount of the estate-duty (including settlement estate-duty), payable in respect of Mrs Keith Mackin-

¹ 5 Geo. IV. cap. 87, sec. 4.

² Entail Amendment (Scotland) Act, 1868 (31 and 32 Vict. cap. 84), sec. 6.

³ *Callander v. Callander*, (1869) 7 Macph. 777.

⁴ *Lord Lovat v. Fraser, &c.*, (1885) 12 R. 1179.

cally stated to be a deduction. (2) Even if interest on debts were deductible, interest on the estate-duty payable in respect of the succession of the grantor of the present provisions could not be deducted. That duty was not a debt affecting the estate at the date of the deed whereby the provisions were granted, viz., 16th March 1909, because the duty had not then become payable; and interest on deferred payments only ran from the date when the duty became payable, and, even when running, such interest fell to be added to the duty.¹ There could be no charge by one heir of entail for duty leviable on the succession of another unless that duty had already been paid, and when the present heir succeeded the duty in question here was still unpaid.

Argued for the respondent;—(1) It was impossible to construe the deed of entail as containing any expressed intention to draw a distinction between widows' annuities and children's provisions so far as concerned the deduction of interest on debts, and, accordingly, such interest fell to be deducted in computing free rent for the purpose of provisions to younger children, just as much as in the case of annuities to widows. (2) It was immaterial that the estate-duty was not actually exigible at the date of the granting of the deed of provision, for it had already, in terms of the statute,² become a first charge upon

tosk's succession, ought also to be a deduction from the rental on which the younger children's provision is calculated. The reporter thinks that it ought not, because the rental to be taken is that at the date of the deed granting the provision after deduction of annual burdens then affecting the same, and by section 6 (8) of the Finance Act, 1894, the duty was not exigible for a year after Mrs Keith Mackintosh's succession opened, i.e., subsequent to the date of granting the provisions in favour of younger children. I am unable to agree with the reporter. By section 9 (1) of the Finance Act the duty is, in a question with the Crown, made a first charge upon the estate in respect of which it is leviable. It was therefore a statutory burden upon the estate as at the date when the succession to Mrs Keith Mackintosh opened. Such a burden diminishes the annual value of an estate so burdened. The amount of the annual diminution is practically the interest that has to be paid to the heir of entail, his executors or others who pay the duty and get a bond over the estate for the amount. I do not think the circumstance that the Crown postpones the demand for a year entitles the heir in possession to disregard the duty in providing for younger children. Under section 6 (6) of the Finance Act interest at the rate of 3 per cent per annum falls to be paid from the date of the death up to the date of the Inland Revenue affidavit or account or the expiration of six months after the death. As pointed out in the late Mr Hanson's work on Death Duties (5th edn.), p. 160, the effect of subsections (6) and (8) of section 6 is to leave an interval of at least six months during which interest is not payable. Apparently, therefore, at the date when the bond of provision was executed interest was running. In calculating the annual rate perhaps some allowance ought to be made for the period in respect of which interest is not exacted; but I doubt if it is sufficient to make an appreciable difference upon the stipulated rate in the bond.

"The last question argued was as to whether the petitioner is entitled to a charge on the estate in respect of the bond or bonds to be granted. Upon this point I agree with the reporter that, in view of the decision in *Laurie*, 25 R. 636, and the opinions there expressed, the petitioner's claim cannot be allowed."

¹ Finance Act, 1894 (57 and 58 Vict. cap. 30), sec. 6 (8); Finance Act, 1896 (59 and 60 Vict. cap. 28), sec. 18 (1).

² 57 and 58 Vict. cap. 30, sec. 9 (1).

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Oct. 29, 1912. *Mackintosh v. Mackintosh.* the property in respect of which it was due. It accordingly burdened the yearly rents of an entailed estate in the sense of the Aberdeen Act,¹ which supplied a correct analogy for application to the present case. Such a burden constituted the same obligation on the estate as that imposed by a bond for the amount of the duty,² and, as the estate could be charged with such a bond, the interest thereon fell to be deducted.³

At advising on 29th October 1912,—

LORD PRESIDENT.—In this case I agree with the Lord Ordinary, and I find it unnecessary to say anything more than he has said in his very careful note. I think that it is obvious that the expression “free rent” must be construed as the Lord Ordinary has construed it, and that in both branches of the case. Upon the second branch of the case—I mean the part of the case which deals with the estate-duty, about which the Lord Ordinary has disagreed with the view that the reporter brought before him—I think the Lord Ordinary is clearly right. I add one remark, because his Lordship has not made it, that this decision is a necessary consequence of the view which will be found expressed in my opinion, which was concurred in by Lord Halsbury, Lord Davey, and Lord Macnaghten, in the case of the *Earl of Moray's Trustees*.² I think the views I expressed there as to the effect of the Crown charge of estate-duty are right, and the necessary *sequitur* is that the Lord Ordinary's view in the present case is also right.

LORD KINNEAR and LORD JOHNSTON concurred.

THE COURT adhered.

J. & J. MILLIGAN, W.S.—MACKINTOSH & BOYD, W.S.—Agents.

No. 7.

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Free Church of Scotland v. MacKnight's Trustees.

THE FREE CHURCH OF SCOTLAND, Pursuers (Reclaimers).—

Constable, K.C.—J. R. Christie.

HUGH MARTIN AND OTHERS (A. E. MacKnight's Trustees),

Defenders (Respondents).—*Chree, K.C.—Valentine.*

Church—Dissenting churches—Trust—Administration—Allocation of trust funds by Churches (Scotland) Act Commissioners—Effect of allocation—Churches (Scotland) Act, 1905 (5 Edw. VII. cap. 12), sec. 1 (3), First Schedule, head 4.

A trust fund was administered by private trustees, in terms of a trust-deed which directed them to expend the annual income of the residue of the trust-estate upon the “Home Mission” in connection with the Free Church of Scotland, “in such way as they may think proper either through the Church or independently of it,” and provided for forfeiture of the bequest in certain events.

The Commission appointed under the Churches (Scotland) Act, 1905, to allocate between the Free Church and the United Free Church the “property in question” defined in the Act, which included property held for the purposes of any “mission,” pronounced an order allocating

¹ 5 Geo. IV. cap. 87, sec. 4.

² Lord Advocate v. Earl of Moray's Trustees, (1905) 7 F. (H. L.) 116.

³ Laurie, (1898) 25 R. 636; Hanson's Death Duties, 6th ed., p. 15.

to the Free Church and the Home Mission Committee thereof the whole rights and interests which the Free Church had in this trust fund, and declaring that the allocation should, to the extent of the capital value thereof, viz., £9340, be held as to account of a provision of £250,000 made by the Commission, in terms of the Act, for the support of ministers and itinerant preachers and for administration and management of the Free Church.

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On the trustees continuing to administer the fund independently of the Free Church, the latter brought an action to have it declared that the trustees were bound to pay over the income of the trust to them to be administered for any of the purposes for which the provision of £250,000 had been made.

Held that the effect of the Act and of the Order of the Commission had been to alter the administrative powers of the trustees and to render it necessary that the income of the trust should be administered through the Free Church; and declarator *granted* as craved.

On 13th March 1911 the Free Church of Scotland brought an action against Hugh Martin, S.S.C., and others, the trustees acting under the trust-disposition and settlement of the late Alexander Edward MacKnight, Advocate, for declarator (as amended) "(first) that the defenders, as trustees foresaid, are bound to pay over to the pursuers or their treasurer for the time being, or to such other person as may be authorised by them to receive the same, the whole free annual income of that portion of the means and estate of the said Alexander Edward MacKnight which, under the directions contained in the codicil dated 13th May 1898 to his said trust-disposition and settlement, was appointed to be administered and applied for the promotion of one or other or both of the missions therein described as '(1) the Mission to the Miners of Scotland promoted or being promoted by the Reverend James Hood Wilson of Edinburgh, and (2) the Home Mission in connection with the Free Presbyterian Church of Scotland,' for which missions it is declared in the said codicil that the residue is to form 'the capital fund for the same,' being the fund or moneys dealt with by the order of the Commissioners appointed for the purposes of and acting under the Churches (Scotland) Act, 1905 (5 Edw. VII. cap. 12), No. 1252, entitled 'Alexander Edward MacKnight's Trust,' and dated 10th day of November 1909, and also referred to in a further order of the said Commissioners of the same date, numbered 1253, entitled 'Provision for support of ministers and itinerant preachers, and for administration and management of the Free Church,' in order that the said income may be by the pursuers or their said treasurer, or other duly authorised representatives, applied for such one or other or more of the purposes specified in the said order of said Commissioners, numbered 1253 (being those enumerated under heads 4 (a) and 4 (b) in the first column of the First Schedule to the Churches (Scotland) Act, 1905), as the pursuers shall from time to time direct; or otherwise (second), that the defenders, as trustees foresaid, are bound themselves to disburse the said income in making such payments for the promotion of the said objects, or one or other or more of them as they may be required to make by the pursuers or those authorised to act on their behalf; and further, and in any event (third) that the defenders, as trustees foresaid, are not entitled, except for one or other of the purposes specified in the said order, No. 1253, to apply the income of the estate foresaid, and in particular that they are not entitled to apply

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the same in the conduct of missions not forming part of the organised work carried on under the authority of the said the Free Church of Scotland, nor in payment of salaries to missionaries, even though members of the Free Church of Scotland, who are not duly appointed and recognised by the said Church as its agents for the purposes of Home Mission work."

By the codicil to his trust-disposition above referred to the late Mr MacKnight provided:—"I direct my trustees after payment of all debts annuities legacies and expenses and the laying aside of the above sum of two hundred pounds for deserving families or persons as above provided to expend the free annual income of my estate in manner aftermentioned for the promotion of one or other or both of the following missions the residue of my estate to form a capital fund for the same, viz., (1) The Mission to the Miners of Scotland promoted or being promoted by the Reverend Dr James Hood Wilson of Edinburgh and (2) The Home Mission in connection with the Free Presbyterian Church of Scotland but not with the Established Church of Scotland which will be ultimately abolished such Church holding the Westminster Confession of Faith and standards declaring that should it depart from the said Confession and standards or adopt the false principle of abstinence and tamper with the administration of the Lord's Supper such grant from my estate shall cease and determine and in that event my trustees shall pay the free annual income of my estate to such religious or charitable purposes as they may think proper: Declaring that it shall be in the power of my trustees to engage Free Church missionaries or in their discretion other workers including laymen and lady missionaries or workers being members of the Free Church in the promotion of the above missions or either of them in such way as they may think proper either through the Church or independently of it such missionaries or other workers receiving suitable remuneration, or my trustees may should it be deemed by them more expedient pay over the free annual income of my estate to the respective treasurers of said missions or one or other of them to be applied to the purposes foresaid: Declaring further that should the said Mission to the Miners of Scotland be now or become non-existent the whole of said income shall be applied to the promotion of the said Home Mission."

The pursuers averred, *inter alia*;—(Cond. 4) "The defender, Hugh Martin, having made up title to and entered upon the management of Mr MacKnight's estate as trustee, and having implemented the purposes of the trust-disposition and settlement and codicils, so far as capable of immediate implement, found it necessary, on 1st March 1900, to raise an action of multiplepounding for the determination of certain questions. . . ." (Cond. 6) "On 4th April 1901 an interlocutor was issued by the Honourable Lord Low, Ordinary, in which he decided that the Home Mission in connection with the 'Free Presbyterian Church of Scotland' fell to be interpreted as meaning the Home Mission of the Free Church of Scotland, and that by the expression the 'Mission to the Miners of Scotland' was meant the Miners' Mission then carried on by the Free Church of Scotland as a branch of its said Home Mission and under the charge of its Home Mission Committee." (Cond. 7) "After the formation of the United Free Church of Scotland on 31st October 1900, the fund under Mr MacKnight's trust-disposition and settlement was for some time administered by his trustee in promoting the objects of a Miners'

Mission carried on in various places in Scotland under the charge of Oct. 26, 1912. the Home Mission Committee of the United Free Church of Scotland. By judgment of the House of Lords in the case of *Free Church of Scotland v. Lord Overtoun and Others* (7 F. (H. L.) 1, [1904] A. C. 515) ^{Free Church of Scotland v. MacKnight's Trustees.} as subsequently applied by the Court of Session, it was, *inter alia*, found and declared that the Free Church of Scotland, the present pursuers, are and lawfully represent the Free Church of Scotland; and the said Free Church of Scotland was held entitled to have applied for its behoof all property held for behoof of that Church." (Cond. 8) "By the Churches (Scotland) Act, 1905 (5 Edw. VII. cap. 12) provision was made for the appointment of a Commission to allocate between the Free Church and the United Free Church all 'property in question,' as defined by the said Act, in such manner as should appear to the Commission fair and equitable, having regard to the circumstances of the case, but subject to the provisions of the Act. . . ." (Cond. 9) "By section 1, subsection (3), of said Act it was further provided that 'The Commission in making their allocation of property under this Act shall, having regard to congregational contributions and other income of the Free Church, make adequate provision . . . for the support of the ministers of Free Church congregations to which congregational property has been allocated under this Act, for itinerant preachers, and for the general purposes of administration and management of that Church. The funds and property out of which provision may be made for each of the above-mentioned objects shall be those set out in the second column of the First Schedule to this Act, opposite the description of the object in the first column of that Schedule.' In the first column of the said First Schedule, item 4 is in the following terms:—'(a) Support of ministers of Free Church congregations to which congregational property has been allocated under this Act and of itinerant preachers. (b) General purposes of administration and management of the Free Church'; and the corresponding entry in the second column of said Schedule showing the funds and property out of which provision for these objects falls to be made is in the following terms:—'(4) Sustentation Fund; Home Missions Fund; Highlands and Islands Fund; any moneys which the Commission regard as applicable for these or similar purposes. . . ." (Cond. 10) "By Allocation Order No. 1252, dated 10th November 1909, and bearing to relate to 'Alexander Edward MacKnight's Trust,' the Commissioners appointed by his late Majesty King Edward under the said Act . . . did thereby make an allocation in the following terms:—'Therefore the Commissioners acting under the Churches (Scotland) Act, 1905, hereby allocate as from and after the thirtieth day of October Nineteen hundred, to the Free Church of Scotland and the Home Mission Committee of that Church the whole rights and interests which the Free Church of Scotland (otherwise the Free Presbyterian Church of Scotland), or the Home Mission Committee of that Church had at that date in the trust-estate of the said Alexander Edward MacKnight under his said codicil, dated 13th May 1898, and hereinbefore partly quoted: Declaring that the allocation hereinbefore contained shall to the extent of

* The Churches (Scotland) Act, 1905 (5 Edw. VII. cap. 12), enacts:—Sec. 2 (1). "The Commission may make any such orders as they may consider necessary for carrying into effect any allocation under this Act . . . Any such orders shall have effect as if enacted in this Act . . ."

Oct. 26, 1912. £9340, 11s. 5d. (being the amount of the capital value placed upon it for the purpose), be held as to account *pro tanto* of a provision of £250,000 made by the Commissioners for the support of ministers of the Free Church congregations to which congregational property has been allocated under the said Act, for itinerant preachers, and for the general purposes of administration and management of that Church, and which provision will be dealt with by a separate order entitled Order No. 1253—"Provision for support of ministers and itinerant preachers, and for administration and management of the Free Church." . . . Nothing in this order shall prejudice or affect any rights, duties, and liabilities as regards the property hereby allocated other than those of the Free Church and the United Free Church. . . ." (Cond. 11) "On the same date, 10th November 1909, the said Commissioners issued another allocation order, No. 1253, dealing with 'Provision for support of ministers and itinerant preachers; and for administration and management of the Free Church.' In this order the Commissioners did, *inter alia*, 'allocate to the Free Church of Scotland and the general trustees thereof, the following sums, viz., . . . (Second) the sum of £220,664, 10s. 1d. to meet *pro tanto* the provision of £250,000 hereinafter referred to, and which sum of £220,664, 10s. 1d. along with the further sums amounting to £29,325, 9s. 11d. specified in the schedule hereto annexed and to be allocated by the orders therein referred to make up a total of £250,000, being the amount of capital fixed by the Commissioners as a provision for the support of the ministers of Free Church congregations to which congregational property has been allocated under the said Act, for itinerant preachers, and for the general purposes of administration and management of the Free Church.' In the schedule referred to in the said order occurs an entry of the order referred to in the preceding article 'No. 1252 Alexander Edward MacKnight's Trust,' as allocating wholly to the Free Church the trust fund amounting to £9340, 11s. 5d. for the purposes specified in the order to which the said Schedule was appended, viz., Order No. 1253. Official copies of the said orders, Nos. 1252 and 1253 are produced and are referred to for their terms. . . ."

* In Order No. 1253 the sources from which the sum of £250,000 was secured were narrated as follows:—

"And which capital provision of £250,000 the Commissioners announced in a memorandum by them, dated 26th July 1907, would be secured from:—

A.			
'Sustentation Fund,	.	.	£100,000
'Home Missions Fund,	.	.	20,000
'Highlands and Islands Fund,	.	.	10,000
			<u>£130,000</u>

B.

"Moneys which the Commission regard as applicable":—

'Certain special funds,	.	.	£66,000
'Reserve Fund,	.	.	14,000
'Certain legacies received by the United Free Church since 30th October 1900, or vested prior to that date and not actually received,	.	40,000	<u>120,000</u>
			<u><u>£250,000</u></u>

and in a further memorandum, dated 10th February 1909, the Commis-

(Cond. 12) " . . . As at, and for some time prior to the date of Oct. 26, 1912. the said allocation orders, the Miners' Mission in question had ceased to be carried on as a separate mission in connection with the Free Church and had thereby become, in the sense of Mr MacKnight's codicil, 'Non-existent'; and, in accordance with the further provisions of the codicil, the whole of the income had become 'applicable to the promotion of the said Home Mission.' . . ." (Cond. 13) "Notwithstanding the said allocation orders, the defenders, as trustees of the said Alexander Edward MacKnight, have continued to administer the fund constituting the said bequest, and they claim right to do so. The pursuers, at an early stage, requested the trustees to meet a deputation representing them, with a view of coming to some arrangement whereby, while not excluding the defenders from the actual administration of the trust, the income of the funds might be effectually applied towards the support of ministers and itinerant preachers, and for the expenses of administration and management of the Free Church, in terms of the orders; but the defenders declined to have such a meeting. . . ." (Cond. 14) "The pursuers have so far received no benefit whatever for the purposes specified in the order from the application of the income of the fund in question by the defenders. The income has been applied by them in connection with a mission in Bathgate, which is the centre of a mining district. Said mission is not in any sense a Free Church Mission. It is not under the control of or in connection with the Free Church, although it is believed that the defenders have, since the date of the said allocation order, employed as a missionary in their service a missionary who, being originally a member of the United Free Church, became sometime after the judgment of the House of Lords a member and probationer of the Free Church. As such he has occasionally been employed to furnish temporary pulpit supply by the Church, being paid the usual fee for this. He is not, however, either a minister or an itinerant preacher of the Church. This employment at Bathgate has never been sanctioned by the Church, and the payment of a salary to him by the trustees who employ him is not an application of the bequest in terms of the allocation orders. The pursuers have no mission in Bathgate, and their Church has no following there."

The defenders admitted the averments quoted above, with some explanations, and referred to section 2 (5) of the Act, whereby it is

sioners approved of a scheme in the following terms for providing the sum of £66,000 hereinbefore referred to, which was to be secured from 'Certain Special Funds,' viz:—

'I. Funds which are applicable in terms of the trusts affecting them:—

'A. E. MacKnight's Trust, ...	£9,340 11 5
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'Total, ...	£66,000 0 0"
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In the Report issued by the Churches Act Commission the funds allocated by Orders Nos. 1252 and 1253 will be found dealt with at pp. 5, 97, and 134. The Report is also issued in the form of Parliamentary Papers (Cd. 5060 and Cd. 5061 for the year 1910), but in this form it is not complete, much of the text being omitted and the memoranda being printed as appendices and not as forming, as in fact they did, part of the Report.

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provided that the orders or proceedings of the commission "shall not prejudice or affect any rights, duties, and liabilities as regards any property in question as defined by this Act other than those of the Free Church and the United Free Church." They also averred:— (Ans. 14) "Denied that the pursuers have not received the full benefit contemplated in their favour under said orders, in so far as Mr MacKnight's trust is concerned. Admitted that the trustees have been carrying on a mission in Bathgate which is a mining centre. Explained that said mission has been carried on in terms of the trust purposes. Since the beginning of the year 1905, the date at which they commenced missionary work in terms of said bequest, the trustees have promoted Home Mission work and employed Free Church workers. The missionary, the Rev. J. Hood Wilson Macleod, who entered on his duties as missionary in January 1905, and who has carried on the mission work, became a licensed probationer of the Free Church of Scotland in the year 1890. He is an ordained preacher of the Free Church of Scotland and has ever since he entered on his said duties as missionary been a member of that Church. . . . The mission at Bathgate has been carried on in accordance with the doctrines and observances of the Free Church of Scotland."

The pursuers pleaded;—(1) The fund in question having been by virtue of the Churches (Scotland) Act, 1905, and the allocation orders of the Commissioners under said Act founded upon, affected with a statutory trust for the purposes enumerated under the fourth head in the first column of the First Schedule to said Act, and being now applicable thereto, the pursuers are entitled to decree in terms of one or other of the first two declaratory conclusions. (2) In any event, the pursuers are entitled in virtue of the said orders of allocation to decree in the terms of the last declaratory conclusion.

The defenders pleaded;—(1) The averments of the pursuers being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (2) The averments of the pursuers being in so far as material unfounded in fact the defenders should be assilized. (3) On a sound construction of Mr MacKnight's will, and of the statute and orders founded on by the pursuers, the defenders are entitled to apply the trust revenue at their own hand, and in their own discretion, for the purposes specified by the testator. (4) The defenders having administered said bequest in accordance with the said trust purposes, and in terms of law, they should be assilized from the whole conclusions of the action.

The documents lodged in process by the parties included, *inter alia*, correspondence between the agents of the defenders and the secretary of the Churches (Scotland) Act Commission with reference to the allocation by the Commission affecting Mr MacKnight's trust. On 13th February 1909 the agents wrote to the secretary as follows:—"We observe in Thursday's newspapers that, amongst the funds which your Commissioners have allocated to the Free Church, there is stated 'A. E. MacKnight's Trust, £9340, 11s. 5d.' We would point out that, as mentioned to you before, there is no gift of the residue of the estate to the Free Church or to the missions, the trustees being directed to *hold the same* in trust and to expend the free annual income as directed in the truster's settlement. Looking to the fact that there is no gift at all to the Church, and that the income from residue is being administered by the trustees independently of the

Church in virtue of the powers conferred upon them by the truster, Oct. 26, 1912. we cannot understand why the Commissioners have taken it upon themselves to make any allocation in reference to this trust. We shall, therefore, be glad to hear from you on what grounds the Commissioners claim to allocate the above, which, as we stated before, seems to us not to be a subject within the powers of the Commissioners to allocate as nothing was bequeathed to the Church." In reply the secretary of the Commission wrote as follows, on 16th February 1909:—"I duly received your letter of 13th inst., and in reply have to point out that my Commissioners' allocation affecting this trust will operate merely to identify the Church referred to in the late Mr MacKnight's settlement as being the Free Church and not the United Free Church."

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On 6th December 1911 the Lord Ordinary (Dewar) sustained the fourth plea in law for the defenders, and assoilzied them from the conclusions of the summons.*

* "OPINION.—[After narrating the facts his Lordship proceeded]—The pursuers maintain that the effect of these orders is to sweep the bequest from Mr MacKnight's estate into the general Church funds, so that it is no longer exclusively available for the purpose for which Mr MacKnight intended it, but may now be used for any of the specified purposes, viz., either for the support of ministers or itinerant preachers or for general purposes of administration and management, and accordingly that the defenders have no longer the right to administer the trust fund independently of the Church, as they have hitherto done; that they have been deprived of their discretion, and that it is now for the Church to decide how the money should be applied; and they conclude for declarator (1) that the defenders are bound to pay over to the pursuers or their treasurer the whole free annual income of the residue of Mr MacKnight's estate; or (2) that the defenders are bound to dispense the said income among the objects referred to in the said allocation order in such manner as the pursuers may direct; and (3), and in any event, that the defenders are not entitled to pay missionaries who are not duly appointed and recognised by the Church as its agents for the purposes of Home Mission work.

"It may be true, as the pursuers say, that the Church can administer the funds quite as efficiently and perhaps more economically without the assistance or interference of the defenders, but that is not the point. The question, and I think the only question, is whether the allocation orders have deprived the defenders of the discretion which Mr MacKnight reposed in them. I am of opinion that they have not.

"By Order No. 1252 the Commissioners allocate the 'whole rights and interests' which the Free Church had in Mr MacKnight's estate at 30th October 1900. And the codicil sets forth what these rights and interests were. The trustees are directed to 'expend the free annual income' of the residue of the estate in manner aftermentioned for the promotion of the said missions, and the manner in which it is to be expended is left absolutely to the discretion of his trustees: ' . . . It shall be in the power of my trustees to engage Free Church missionaries or, in their discretion, other workers including laymen and lady missionaries or workers . . . in such a way as they may think proper either through the Church or independently of it, such missionaries or other workers receiving suitable remuneration, or my trustees may, should it be deemed by them more expedient, pay over the free annual income of my estate to the respective treasurers.' Mr MacKnight desired to benefit Free Church Missions, but he did not give the Free Church control of the fund, he did not even think it prudent to permit the Church to have control of the income. He seems to have had more confidence in his trustees than in those who

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The pursuers reclaimed, and the case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Cullen), on 24th and 25th October 1912.

Argued for the reclaimers;—The beneficial interest in Mr MacKnight's trust, which had been allocated by the Churches Commission was undoubtedly "property in question" under the Churches (Scotland) Act,¹ and as it was destined to Home Missions, it was available for any of the purposes described in head 4 in the first column of the First Schedule to the Act. To this extent the trust purposes had been enlarged by the operation of the Act and the orders of the Commission, which fell to be read "as if enacted" in the Act.² The trust funds here, however, had really been diverted, not so much by the order of the Commissioners, as by the provisions of the Act itself, because the Act made the truster's codicil operate in favour of the purposes specified in the Schedule opposite the description of "Home Missions Fund." Accordingly, the Act placed it within the powers of the defenders to "pay over the annual income" in terms of the first declaratory conclusion of the summons, and the pursuers were entitled to force them to do so, as that was the only way in which the orders could receive due effect. In any event, the attitude of the defenders, as disclosed in their agents' letters on the subject of the Commissioners' allocation, entitled the pursuers to declarator in terms of the second or third conclusion of the summons. Section 2 (5) of the Act and the saving clause in the order of the Commissioners were to be read only as preserving the rights of third parties, if any, such as liferenters. It was a necessary consequence of the legislation dealing with these funds that the defenders should be deprived of their full administrative powers. If the annual income continued to be administered by them at their discretion, the allocation by the

managed the affairs of the Church. This may have been because he thought it possible that the Church might 'depart from the Confession of Faith, or adopt the false principles of abstinence.' But in any case he made it abundantly clear that he wished his trustees to administer his bounty, and he accordingly circumscribed and limited his bequest to the Church. All he gave was the right to have the annual income from his estate applied in the promotion of Church work at the discretion of the defenders, and it is this limited 'right and interest' which is allocated by Order No. 1252, and it is this limited 'right and interest' also which is declared by Order 1253 to form part of the fund of £250,000 which may be used for support of ministers, itinerant preachers, or general Church purposes. If the Commissioners had intended to extinguish the defenders' right to exercise their discretion in the manner in which the bequest should be applied, I think they would have said so in express words, or at all events it would have been clear by necessary implication that such was their intention. But I can find nothing to suggest this in either order. On the contrary, it is specially provided that 'Nothing in this order shall prejudice or affect any rights, duties, and liabilities as regards the property hereby allocated other than those of the Free Church and the United Free Church.' Now, it is both the right and the duty of the defenders under the codicil to use their discretion as to the manner in which they shall apply the income from the trust fund, and to act independently of the Church if they think proper. They have decided to act independently, and I do not think that the pursuers can interfere with them, and I accordingly sustain their fourth plea in law and assolve them from the conclusions of the summons."

¹ 5 Edw. VII. cap. 12, sec. 4 (1) and (3).

² 5 Edw. VII. cap. 12, sec. 2 (1).

Churches Commission of £250,000, in terms of Order No. 1253, would be defeated *quoad* the sum of £9340, being the capital value of that income, because to that extent the allocation would be illusory. Apart from all other considerations, the pursuers were entitled at common law to be relieved of the management by a trust of the income to the benefit of which they were entitled, seeing that such management had become cumbrous, unnecessary, and expensive.¹

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Argued for the respondents ;—It was the duty of the defenders to exercise the discretion conferred upon them by the truster in administering the income in question for the mission selected by him, and their duty was not affected by the Churches Act or the orders of the Churches Commission. The intention of the Act was that the orders of the Commission should be limited in their operation to discrimination between the Free Church and the United Free Church, and the allocation here in question had been made with that object only in view, as was clear from the letter of the Commissioners' secretary to the agents of the trust. Very direct provision would have been necessary in the Act to warrant interference with the rights and duties of third parties, and so far from there being any such provision these rights and duties were expressly safeguarded.² That the preservation of existing trusts was intended by the Act was clear from the language of the preamble in referring to the inability of the Free Church to carry out all the trusts affecting the property, and the orders of the Commission were consistent with that expressed intention. The orders now before the Court were to be read as having allocated, for purposes described under head 4 of the first column of the Schedule funds set out under that head in the second column which the Commissioners considered applicable by reason of trusts, if any, affecting them. Thus, in allocating to the Free Church the beneficial interest in the trust administered by the defenders, the Commissioners, having held that interest to be "Property in Question" under the Act, were to be understood as having so allocated with a view to preservation of the trust. In exercising the discretion conferred upon them by the truster the defenders could only pay over the annual income of the trust funds to the Free Church for the purposes of the trust. Therefore it could not be paid over in terms of the first conclusion of the summons, because it would thereby be made available, as indeed was maintained by the pursuers, for purposes outwith the trust, viz., any of the purposes described in the first column of the Schedule. For the same reasons decree could not be granted in terms of the second or third conclusion. There was no ground at common law for depriving the defenders of the rights conferred and duties imposed upon them by the truster, whereby he had attached limitations to his gift to the Free Church in giving his trustees power to act independently of the Church. The beneficial interest allocated by Order No. 1252 was to be regarded as so allocated subject to these limitations, and it would be inconsistent with the orders pronounced by the Commission in knowledge of the terms of the trust to construe the orders as making the benefit to be taken available for purposes other than those of the trust, particularly as it was expressly provided that that benefit was enjoyable subject to a forfeiture. It was not suggested that Home Mission work had ceased to be part of the work of the

¹ *Miller's Trustees v. Miller*, (1890) 18 R. 301.

² 5 Edw. VII. cap. 12, sec. 2 (5).

Oct. 26, 1912. **Free Church, and it might be said to be embraced in each of the purposes described in the fourth head of the Schedule. Therefore the defenders were carrying out the trust for the benefit of the Free Church wherever they paid a Free Church missionary. The trustees were quite willing to consider the application of the funds to districts other than that of Bathgate, though they were bound to exercise their discretion as to where the work was to be done.**

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At advising on 26th October 1912,—

LORD PRESIDENT.—The late Mr MacKnight, advocate, left a trust-disposition and settlement in which, with regard to the residue of his estate, he directed his trustees to expend the free annual income thereof for the promotion “of one or other or both of the following missions.” I leave out the first mission, because it has disappeared. The second mission was the Home Mission in connection with the Free Presbyterian Church of Scotland. There was a multiplepointing at the instance of Mr MacKnight's trustees, in which it was held that the Free Presbyterian Church was the body more correctly known as the Free Church of Scotland. This was at a time when the question which all of us know so much about was only just mooted. The question between the Free Church, as it is now known, and the United Free Church, as it is now known, took, as all of us are well aware, some years to decide. After being decided in the House of Lords, it was followed by the Churches (Scotland) Act of 1905.

The Churches (Scotland) Act of 1905 established a Commission, and by section 1 the Commission is directed to allocate between the Free Church and the United Free Church the property in question as defined by the Act. The definition of property in question is given in section 4 (1), and is “All property which,” on a certain date, “was vested in or held by or in trust for, or was payable to or for behoof of, the Free Church, or was held for the purposes of any school, scheme, mission, or other special object of the said Church.” Indubitably the Home Mission was a mission of the Free Church, and therefore it was held by the Commission—and I think rightly held—that Mr MacKnight's trust funds fell within the definition of “property in question,” and that therefore it became the duty of the Commissioners in terms of section 1 to allocate these funds between the Free Church and the United Free Church.

Now, by subsection (3) of section 1 the Commission, in making their allocation, are directed to make an adequate provision for the Free Church—I am reading the section shortly. The scheme of the statute was that, inasmuch as the Free Church was held by the decision of the House of Lords to be the Church which had what I may call the legal right to continuity with the old Church, and also as it was very much the smaller body, provision should be made to them out of the funds before the balance was given to the United Free Church. Then the section goes on to say the funds or property out of which provision may be made for objects mentioned shall be those set out in the second column of the First Schedule of the Act opposite the description of the object in the first column of that Schedule. Turning now to the First Schedule, one finds in the second column, heading 4, “Sustentation Fund; Home Missions Fund; Highlands and Islands Fund; any moneys which the Commission regard as applicable for these or

similar purposes." That is a category of the different classes of funds out of which, *inter alia*, the Commission were to make the provision. Oct. 26, 1912.

The next question is therefore, Did Mr MacKnight's trust, being part of the property in question, fall within this heading 4? Clearly, again, I think it did, because, although it is not in terms a Home Mission fund, it is money which the Commission regarded as applicable to that purpose. The Commission are made judges of that; and therefore I have no doubt that they quite rightly dealt with Mr MacKnight's fund under this head. The provision, as the Act of Parliament says, is to be to the objects in the first column opposite this heading. Now the heading 4 in the first column (that is, opposite heading 4 in the second) is "(a) Support of ministers of Free Church congregations to which congregational property has been allocated under this Act and of itinerant preachers. (b) General purposes of administration and management of the Free Church."

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Accordingly, the Commission, upon 10th November 1909, made an order in connection with Mr MacKnight's trust, wherein they set forth, after reciting their powers, the following allocation: They "hereby allocate, as from and after" a certain date, "to the Free Church of Scotland, and the Home Mission Committee of that Church, the whole rights and interests which the Free Church of Scotland . . . or the Home Mission Committee of that Church had at that date in the trust-estate of the said Alexander Edward MacKnight." They estimate that interest as of the capital value of £9000 odds, and it is to form an aliquot part of a sum of £250,000 which they are allocating under this head by a further order. A further order was pronounced which set out categorically the whole sum which they dealt with under this provision of Schedule I., heading 4. I need not call attention to it, because various sums are dealt with. It is enough to say that in the £250,000 Mr MacKnight's trust enters *in computo* for the £9000 odds.

Now, there was also in Mr MacKnight's settlement a sentence which I have not read, which provided that if the Church in the future deviated from what he considered correct doctrine and practice in the matter of the Holy Communion, they should forfeit the legacy. And inasmuch as there is a saving clause in very ample terms in the Act in section 2 (5), which provides that the orders or proceedings of the Commission "shall not prejudice or affect any rights, duties, and liabilities as regards any property in question as defined by this Act other than those of the Free Church and the United Free Church," the Commission did not attempt to transfer the capital sum away from the trustees. The trustees are still bound to hold the capital sum in order to make good this forfeiture if the occasion for it should ever arise.

What has happened is this. The trustees have not handed over the income to the present Free Church in order to allow them to spend it on the purposes mentioned in the Act of Parliament, but they have at their own hands instituted and continued a mission, of the character of a Home Mission, in the town of Bathgate, using for their missionary a Free Church preacher. The Free Church are anxious that the money should be transferred to them, and they allege two reasons for that. They say, in the first place, it is much more economical that there should not be separate

Oct. 26, 1912. administration of money; and they say, secondly, that it does not fit in with their schemes that there should be a mission in Bathgate. They say there are not many adherents of the Free Church in Bathgate, and that the mission which is held in Bathgate can in no sense be said to be a mission in connection with their Church.

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The reason that the trustees have been in any way able to do this at all is that, after the provision of the trust-deed dealing with the application of the residue, which I have already read, there is added a declaration to this effect: "Declaring that it shall be in the power of my trustees to engage Free Church missionaries or in their discretion other workers including laymen and lady missionaries or workers being members of the Free Church in the promotion of the above missions or either of them in such way as they may think proper either through the Church or independently of it." So that, as the trust stood originally, there is no question that the action of the trustees would have been well within their powers. I feel quite sure that the action of the trustees is not based upon any antagonism to the Free Church, but is in the exercise, according to the best of their abilities, of the discretion which was conferred upon them by the truster, and the exercise of which, for reasons which commend themselves to their minds and with which I have nothing to do, has led them to take the step that they have taken.

The question that is raised in this case, however, is whether their position is really now in accordance with what may be called the law of the case, and accordingly this action has been brought to try that question. It is an action of declarator at the instance of the Free Church asking that, as the first conclusion, the yearly proceeds of the trust funds should be handed to them in order that they may be enabled to apply these proceeds for the purposes for which the sums were allocated to them under the order—in terms, in other words, of the fourth head of the first column of the First Schedule.

I am of opinion that they are entitled to have their demand granted. The steps by which I reach that conclusion are really very simple. First of all, I think that one has to consider whether the fund in question fall within the powers of the Commission at all. If it did not, the whole matter would be *ultra vires*; and I take it that this Court, although under the Act and the section which I have already partly read we cannot interfere with the orders of the Commission, would naturally be able to check any *ultra vires* action. But my judgment upon that point is that it was not *ultra vires*, and I have already, by way of recital, said why. I think there is no question that this fund falls within the definition of "property in question."

The next step is, Does it fall within the enumeration in column two of the First Schedule as to which what may be called special statutory directions are given? There again I have given my reason in my recital. I think it does, because, although it is not actually a Home Mission fund, it is money which the Commission have regarded as applicable to that purpose. I do not think that we can interfere with the Commission there. I think the Commission are the judges of that. But if I may be allowed respectfully to say so, I think the Commission were clearly right, because,

although not actually part of a Home Mission fund, it is certainly for the purposes of a Home Mission and, therefore, under the terms of the Act of Parliament it was applicable for that or a similar purpose.

If that is so, the next step is one in which the Commission cannot help themselves. They have got to do what the Act of Parliament tells them—that is to say, if, out of this class of funds, they take this particular item which was entirely in their hands—and they have taken it—then the use to which that item is put really does not depend upon them or their order, but it depends upon the Act of Parliament; and the use to which it is to be put is the use which we find in the first column of the Schedule under head 4 thereof. Of course, they need not have touched Mr MacKnight's fund at all. If they had liked they could have made up the £250,000 out of other sums, because nobody supposes that the £250,000 exactly and precisely exhausts to a penny the funds of the category in the fourth heading of the First Schedule; but as they did touch it, and they were entitled to touch it, then the way in which they operated upon it really did not lie in their hands but was determined by Act of Parliament.

Accordingly, I hold that their proceedings being regular and *intra vires*, this fund of Mr MacKnight's is, by force of Act of Parliament, allocated to the Free Church for the support of ministers, of itinerant preachers, and for the general purposes of administration and management of the Free Church. Now, no doubt, that is to a certain extent an alteration of the trust purposes. That was inevitable. The trust purpose as it existed in all these trusts could not remain intact; for, after all, these trusts are constituted in favour of a Free Church. I think it is only the French Republic that was one and indivisible. The Free Church has shown that it was not indivisible, in one sense. Parliament had to deal with the new state of affairs where, although by law the continuity of the body was held to go on in what is now known as the Free Church, still there was the very large body known as the United Free Church, in which were the majority of the people who had been in the Free Church before the amalgamation with the United Presbyterian Church had been made. Parliament held that it was expedient in the interests of the kingdom that an allocation of property should be made between these two. So that, although it is true, as was argued for the defenders, that this is an alteration of the trust purposes, it is just one of those things that cannot be helped, and the alteration is effected by an Act of Parliament and therefore binds us.

But what of the discretionary power conferred upon the trustees? My answer to that is that the discretionary power is not, in one sense, superseded; it would be more accurate to say that it is inapplicable to present circumstances, for, although there could be independent action at the time when Mr MacKnight made his trust, there cannot be independent action now in the case of money which is allocated by Act of Parliament for a particular thing which must be done by the Church itself. Support of ministers of Free Church congregations of course must mean support of ministers through the Church. It does not mean that the Commissioners were to say that Mr A. B. was to have a stipend of £100 or £200, or whatever it may be; it is support through the Church. The itinerant preachers must be appointed through the Church, and the general purposes of admini-

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Accordingly, I think that the saving clause in the Act has really no application. The saving clause saves people who are outside. But this question is not outside; it is inside. It is not a question of what rights these trustees have which may possibly be contrary and antagonistic to the rights of the Church. That class of right is evidenced, for instance, by the forfeiture clause which survives and is still saved to them; but this right is an administrative right in connection with the trust purposes. It was an administrative right which was workable in connection with the old trust purposes. It is an administrative right which is not workable, in my judgment, in connection with the new trust purposes, which are the Parliamentary purposes, and supersede the old.

Upon the whole matter I come to the conclusion that the Free Church here is entitled to the declarator which it seeks under the first head. As to expenses, I think the trustees here have acted in perfectly good faith. It was quite a fair question to try, and I think parties ought to get their expenses out of the income.

LORD JOHNSTON.—I agree. The litigation which determined the rights of the Free Church and of the United Free Church of Scotland was concluded in 1904, and immediately thereafter a Royal Commission, which was appointed to inquire, reported that the Free Church could not adequately carry out all the trusts or administer all the property which the result of the judgment in the original action left in their hands. The Commission recommended that provision should be made for the allocation of that property, with this important rider, that provision should be made thereout for the equipment of the Free Church. I think it is essential and necessary to have regard to that word "equipment" in considering the meaning and effect of the Act which followed in the year 1905, and which provided for the allocation which the preamble of it indicates is desirable.

The property, roughly speaking, consisted of two different kinds. There were heritable subjects, consisting of churches, manse, schools, &c.; and there were income-producing funds—some of them in the hands of the Church itself, or, rather, of general trustees for the Church, and some of them in the hands of private trustees, but devoted notwithstanding to the purposes of the Church. I think that, dealing, as we are dealing here, with the second class of the second kind of assets, it must be perfectly apparent that Parliament approached this subject knowing that necessarily, if there was to be a practical allocation between the two Churches, it was impossible that the purposes of standing trusts should not require, to a certain extent, to be interfered with. The bare trust might remain, and yet to carry out the object of the statute it might be absolutely necessary to abrogate certain of the trust purposes or of the trust directions. I think it is also perfectly clear that in carrying out the object of the statute, to a certain extent the application of a broad axe was necessary. But Parliament did not apply the broad axe itself; they put it into commission for the purpose of doing that which the preamble set forth.

There are two provisions contained in the statute which I would refer to, Oct. 26, 1912. one of which your Lordship has referred to, but the other is of equal importance. In section 2 (1) it is said that any such orders of the Commission—referring to the orders necessary for giving effect to allocation—"shall have effect as if enacted in this Act." Accordingly the orders of the Commission come by force of the statute to have themselves the force of statute. It is also said, section 2 (5), as your Lordship has pointed out, that no Court shall have power to review or interfere with the orders or other proceedings of the Commissioners.

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Ld. Johnston.

Now, acting under this statute, the Commissioners have allocated, for certain of the purposes for which they were directed under the statute to provide, the funds under Mr MacKnight's trust. In doing so they have acted with the greatest discrimination. They have observed that these funds were held under an irritancy, and that it might so happen that they became forfeit; and accordingly they have not taken the fund itself and transferred it to, or even left it to be held simply in trust for, the Free Church. But they have very carefully worded their order so as to deal only with the interest of the Free Church in the fund. They have therefore left standing what I referred to as a bare trust in the trustees, but they have left the real interest of the Free Church to be held for the Free Church, but for the statutory purposes. And that real interest was in the income of the fund, subject, as I have said, to an irritancy.

I concur, therefore, in the judgment which your Lordship proposes.

LORD CULLEN.—I agree. Mr MacKnight devoted the income of this fund to the promotion of the Home Mission of the Free Church of Scotland, and he gave to his trustees an administrative power to expend the money themselves in Home Mission work as an alternative to paying it into the Home Mission Fund. The trustees have so far exercised this power. But now that the income has been appropriated by the allocation orders to the purposes mentioned under heads 4 (a) and 4 (b) of the first column of the First Schedule of the Act of 1905, it seems clear that this discretionary power given to the trustees of expending the money themselves on Home Mission work is inapplicable and is necessarily displaced, and that the pursuers are entitled to have the income applied in the manner formulated in the first conclusion of the summons as now amended.

THE COURT pronounced an interlocutor in the following terms:—

"Allow the pursuers to amend the first conclusion of the summons as proposed at the bar, and the same having been done, of new close the record, recall the said interlocutor [of 6th December 1911]: Find and declare in terms of the first conclusion as thus amended: *Quoad ultra* find it unnecessary to deal with the other conclusions, and decern: Find both parties entitled to expenses out of the income of the trust funds in the hands of the defenders, and remit," &c.

No. 8. WALTER MASON Junior, Petitioner (Appellant).—*J. R. Christie—
A. A. Fraser.*

Oct. 29, 1912.

Mason v.
Rodger.

WILLIAM RODGER (Master of Works of the Burgh of Dunoon),
Objector (Respondent).—*M'Lennan, K.C.—Mercer.*

ROBERT PATERSON, Objector (Respondent).—*D. P. Fleming.*

*Burgh—Street—New street—Intention to form a new street—Burgh Police
(Scotland) Act, 1903 (3 Edw. VII. cap. 33), sec. 11.*

The Burgh Police (Scotland) Act, 1903, enacts:—Sec. 11. "Every person who intends to form or lay out any new street . . . shall present a petition for warrant to do so to the town-council. . . . The Dean of Guild shall not grant warrant for the erection of any buildings abutting on any new street until warrant for the formation of such street has been granted."

Held that a proprietor in a burgh who proposed to build upon his own property a block of three-storey tenements, fronting upon and having access to a public footpath or esplanade lying without the boundary of his property, did not thereby propose to form the public footpath into a new street in the sense of the Burgh Police Act; and, accordingly, that the Dean of Guild was not justified in refusing his sanction to the proposed buildings until warrant for the formation of a new street had been obtained.

1st DIVISION.
Dean of Guild
Court,
Dunoon.

IN July 1910 Walter Mason junior, presented a petition to the Dean of Guild Court, Dunoon, for warrant to erect certain buildings.

The petitioner was proprietor of a piece of ground in Dunoon, being a feu on the estate of Milton, bounded on the north by Clyde Street, one of the main streets of Dunoon, on the east by a side street, known as Jane Street, leading from Clyde Street down to the seashore at the West Bay, and on the south by a footpath or thoroughfare known as the "Esplanade" or "Baugie Place," which lay between the southern boundary of the petitioner's property and the seashore of the West Bay, and on the west by the property of another feu. This site was occupied by a villa and garden, the villa having its main access from Clyde Street, the garden stretching to the south between the villa and the Esplanade, and having access to the latter by a door. The petitioner proposed to pull down the villa and to erect upon this site a set of three-storey tenements, forming three sides of a square, occupying the whole length of the north, east, and south boundaries of his feu, and fronting upon and having access from each of the three respective bounding thoroughfares already mentioned.

Various objections to the petition were lodged for William Rodger, Master of Works of the burgh of Dunoon, for Robert Paterson, C.A., Glasgow, another feu on the Milton estate, and for the trustees of the late Mr Moir of Milton.

The nature of the objection which is the subject of this report appears from the following statements made by the Master of Works, and answers thereto by the petitioner:—(Stat. 2) "The exact position of Baugie Place, described in petitioner's title as his south boundary, is not precisely known to the objector, but the present path along the West Bay of Dunoon is not a street within the meaning of the Burgh Police (Scotland) Acts, 1892 to 1903." (Stat. 3) "The said path is admitted to be a public passage for foot-passengers, but not

for any other form of traffic, and it is or forms part of a bank created by the tides and the silt of the Balgie Burn between the old bed of the burn and the sea. This bank is the only protection against the sea for the garden grounds belonging to petitioner and other proprietors in the West Bay. It consists of shingle and gravel, and was artificially strengthened some time ago in parts by wooden piles and by stones, and ultimately by a low concrete wall on the sea front to prevent encroachment of the sea and destruction of boundary walls by storm. The surface has been covered with tar-macadam to make it more comfortable for people to walk on, but in winter it is often covered with shingle and wreck, and boat hirers haul their boats on to it during storms or high tides." (Stat. 4) "The said passage has never been taken over or maintained by the Commissioners of Police or the Town-Council of the burgh as the road authority. The original strengthening was done by the owners of feus abutting on the shore. A further improvement was made by public subscription. In 1891 the then Town-Council approached the proprietors of houses fronting the West Bay with reference to constructing a new street along the said bank, but were unable to come to any agreement, and the matter dropped. The tar-macadam surface was afterwards laid by the Town-Council, and paid for from the general improvement rate of the burgh. Petitioner's answers to statements 2, 3, and 4 are denied so far as inconsistent therewith." (Ans. 2, 3, and 4) "Admitted that the petitioner's property is bounded on the south by a public thoroughfare or passage, 15 feet 10 inches or thereby in width, known as the Esplanade, which has been for a large number of years paved and maintained, lighted, and cleansed by the Town-Council out of the burgh rates. The Town-Council have a notice on said Esplanade prohibiting vehicular traffic thereon. Said Esplanade is a street within the meaning of the Burgh Police (Scotland) Acts, 1892 to 1903. *Quoad ultra* not known and not admitted." (Stat. 5) "The petitioner proposes to treat the said bank as a street, but he has not applied to the Town-Council in terms of section 11 of the Burgh Police (Scotland) Act, 1903,* for warrant to form or lay out this new street, or to widen, extend, or otherwise alter the present path." (Ans. 5) "Admitted, and explained that the petitioner is under no obligation to apply to the Town-Council for the warrant specified, as the said Esplanade is not a new street within the meaning of the Acts specified, nor does he intend to form, lay out, widen, extend, or otherwise alter the same."

The objector the Master of Works pleaded, *inter alia* ;—1. (1) The petitioner, not having obtained authority from the Town-Council to make a new street along the West Bay of Dunoon, is not entitled to warrant for the erection of any buildings fronting or abutting thereon until warrant for the formation of such street has been granted. (2) Alternatively, petitioner not having obtained permission from the Town-Council to widen, extend, or otherwise alter the passage or path along the West Bay, is not entitled to erect buildings until the

* The Burgh Police (Scotland) Act, 1903, enacts, section 11. "Every person who intends to form or lay out any new street or to widen, extend, or otherwise alter any street, . . . shall present a petition for warrant to do so to the town-council. . . . The Dean of Guild Court shall not grant warrant for the erection of any buildings abutting on any new street until warrant for the formation of such street has been granted."

Oct. 29, 1912. Town-Council has approved of the widened or extended street, and the petition should be dismissed, with expenses.

Mason v.
Rodger.

On 11th April 1911 the Dean of Guild Court pronounced an interlocutor finding:—“(1) That the general question of the loss of amenity is not one which the Dean of Guild Court can take cognisance of; (2) that the petitioner's property is, according to his title, bounded on the east by Jane Street and on the south by the walk or road called Baugie Place; (3) that Jane Street is a public street within the meaning of the Burgh Police (Scotland) Acts, 1892 to 1903, and that it extends from Hillfoot Street to the public thoroughfare or passage along the West Bay; (4) that the building proposed to be erected by the petitioner in Jane Street has not immediately adjoining it on the further side of the building from that fronting the said street on which it abuts an open space for light and ventilation equal in breadth at the narrowest part to the height of the building; (5) that the public passage, footpath, or Esplanade which runs along the foreshore of the West Bay and now forms the southern boundary of the petitioner's feu is not a street within the meaning of the Burgh Police (Scotland) Acts, 1892 to 1903; (6) that the buildings proposed to be erected by the petitioner along the said south boundary of his property will convert the said existing public passage into a new street; (7) that the Dean of Guild Court cannot grant warrant for the erection of any buildings abutting on a new street until warrant for the formation of such street has been granted by the Town-Council; therefore sustain the first plea in law for the respondent the Master of Works; sist procedure in the cause to enable the petitioner to present the necessary petition to the Town-Council for warrant to form a new street along the southern boundary of his feu in terms of section 11 of the Burgh Police (Scotland) Act, 1903; reserve all other questions as well as the question of expenses, and decern.”

The petitioner appealed, and the case was heard before the First Division on 19th June 1911, when it was continued to await the decision of a case then depending before the House of Lords, which, it was stated, might affect the question at issue. The case was again heard on 9th July 1912.

Argued for the appellant;—Section 11 of the Burgh Police Act had no application here, because there was no proposal to form a new street or to alter a street. Nothing that the petitioner proposed would affect the Esplanade; it would remain exactly as it was before. All he proposed to do was to erect buildings on his own ground adjoining the Esplanade, and it was absurd to contend that by that act he was forming the Esplanade, which did not belong to him and which he did not propose to touch, into a new street.¹ The Dean of Guild, therefore, was wrong in ordering a sist.

Argued for the respondents;—It was clear from the petitioner's plans that what he intended was in effect to convert this Esplanade, which could not at present be called a street in the ordinary sense of the term, into a street in such a sense²; and it was immaterial whether the Esplanade was or was not at present technically a street according to the definition of the Burgh Police Acts. Accordingly,

¹ *Mair v. Police Commissioners of Dumbarton*, (1897) 25 R. 298; *Glasgow and South-Western Railway Co. v. Hutchison*, 1908 S. C. 587.

² *Robinson v. Local Board for Barton*, (1882) 21 Ch. D. 621, (1883) 8 App. Cas. 798, *per* Selborne, L.C., at p. 801.

the provisions of section 11 of the Burgh Police Act when reasonably construed applied, and the Dean of Guild had followed the proper course. The fact that the petitioner's proposed operations were confined to his own property and were not to affect the *solum* of the Esplanade was not conclusive of the question whether by these operations he disclosed an intention to form a new street. That question must in every case be one of circumstances.¹

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At advising on 29th October 1912,—

LORD PRESIDENT.—This is an appeal from the Dean of Guild Court of Dunoon, and the question arises upon a petition for a lining, the applicant desiring to put up on the frontage to the West Bay some buildings which are certainly of a very different character from those which have been built there hitherto. The buildings proposed to be erected would form the corner at the junction of a road or passage fronting the sea—known sometimes as West Bay Esplanade, and sometimes, apparently, by the name of Baugie Place—with the street called Jane Street, which comes from inland right down to the sea. I know it is a matter of controversy whether the street where it actually comes to the sea and joins this Baugie Place is Jane Street or a continuation of Jane Street. At any rate the street comes down to the sea in a straight line at that point.

The Dean of Guild's judgment is contained in certain findings. He first of all finds that the loss of amenity is not a matter of which he can take cognisance. Then he describes the *locus*, and he finds that Jane Street is a public street within the meaning of the Burgh Police (Scotland) Acts, and that it extends from Hillfoot Street to the public thoroughfare or passage along the West Bay. Then he finds that the building proposed to be erected by the petitioner has not an open space for light and ventilation equal in breadth at the narrowest part to the height of the building; and then that the public passage, footpath, or esplanade, which runs along the foreshore of the West Bay and now forms the southern boundary of the petitioner's feu, is not a street within the meaning of the Burgh Police (Scotland) Acts, 1892 to 1903. And then the interlocutor proceeds:—“(6) That the buildings proposed to be erected by the petitioner along the said south boundary of his property will convert the said existing public passage into a new street; and (7) that the Dean of Guild Court cannot grant warrant for the erection of any buildings abutting on a new street until warrant for the formation of such street has been granted by the Town-Council; therefore . . . sists procedure in the case to enable the petitioner to present the necessary petition to the Town-Council for warrant to form a new street. . . .”

Now, the argument before your Lordships turned upon this last matter. There was really no argument upon the question of Jane Street, because the question of open space for light and ventilation can be put right by modification of the plans, and is really not before us.

The theory of the Dean of Guild's judgment is really based entirely upon the provisions of the 11th section of the Burgh Police (Scotland) Act, 1903.

¹ *Mair v. Police Commissioners of Dumbarton*, 25 R. 298, *per* the Lord Justice-Clerk, at p. 302.

Oct. 29, 1912. This Court has already considered that section very carefully and given judgment upon it in the case of the *Glasgow and South-Western Railway Company v. Hutchison*.¹ I may say that I adhere to the opinion that I there formed; and I am afraid that, if that opinion is carefully looked at, it is really destructive of the Dean of Guild's view here. I have reconsidered the matter, and see no reason to doubt the soundness of my opinion. In other words, section 11, when it speaks of "every person who intends to form or lay out any new street," is speaking of the physical act of laying out or forming a street; and it follows from that that it can only refer to an operation upon a man's own ground. Accordingly, as soon as one finds—as one finds here—that the petitioner's ground is bounded by the street and that therefore the street is not in the petitioner's ground, it is quite impossible to hold that he is forming or laying out a new street.

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Ld. President.

In so holding I am not, I think, running counter to the English cases that were cited; and in particular, if I may say so with respect, I entirely agree with the remarks of both the Master of the Rolls (Sir George Jessel) and also Lord Justice Brett in *Robinson's* case,² which was quoted. It is always to be kept in view that the word "street" has two significations. It may mean a street by definition, or a street in the ordinary popular sense. You must go to the particular Act of Parliament concerned. The definition of a street in the set of statutes known as the Burgh Police Acts in Scotland might not be—and probably is not—the same definition of street as in the Local Government Acts in England with which the learned Judges were dealing. But you may have a street by definition which is not a street in the ordinary sense of the word at all; and by practical operations a place that is a street by definition may become a street in the popular sense of the word. When precisely it becomes a street—whether it becomes a street by the erection of three or four houses, or whether it can so become by the erection of one house—is really a practical matter associated with the old puzzle known as the sorites; and nobody can lay down a general rule as to when a street by definition becomes a street in the popular sense of the word; each case would have to be judged on its own merits. But the English Judges were really dealing with that kind of case. They were dealing with a power in a Local Authority to make certain regulations as regards streets; and they held, in those cases, that "street" meant street in the popular sense of the word, and they also held, in the case before them, that the time had come at which what had been merely a street by definition should be held to be also a street in the popular sense.

That reasoning would, I think, apply to any provisions of our set of statutes which give certain powers as regards streets, but it obviously does not apply to the expression, "Every person who intends to form or lay out any new street." I do not think, with the utmost straining of language, you can truly describe a man as forming a street who simply proposes to build a house upon his own ground, although there is contiguous to it something that may be a street by definition. The opposite view, as we pointed out in *Glasgow and South-Western Railway Company v. Magistrates of Ayr*,³ would really lead to most inconvenient and unjust consequences, because

¹ 1908 S. C. 587.

² 21 Ch. D. 621.

³ 1909 S. C. 41.

then you would be entitled to build up to the boundary of your own ground Oct. 29, 1912. and proceed to form a street on somebody else's ground.

Now that being so, I am afraid the Dean of Guild's judgment sisting the cause in order that this gentleman may present a petition to the Town-Council cannot stand, because I do not think he is in a position to present a petition. He has no ground upon which he can form a street, and it is not necessary for him to form it. Nor does he come under the following words of the clause by proposing to widen, extend, or alter a street, upon the hypothesis that Baugie Place is a street already.

I think myself it is inadvisable, at this time, to pronounce on the question as to what is the precise position of Baugie Place. I do so for this reason: It may be a mere public passage, without being a street, of the class that we had to deal with in this Division, not long ago, in a case from Saltcoats.¹ On the other hand, it may be that it is within the definition of private street, in which case the Council, if these buildings are to be erected, might be in a position to call upon the owner to put the private street bounding his ground into a proper state. I do not want to take away from the Council the power of considering that matter. Therefore, I would propose that we should recall the fifth, sixth, and seventh findings, not thereby meaning that the fifth finding is necessarily wrong, but merely giving the Dean of Guild Court an opportunity to consider the matter now that the fifth finding cannot really form the basis upon which the sixth is rested. With that I think the case must go back to the Dean of Guild Court.

LORD KINNEAR.—I agree with your Lordship.

LORD JOHNSTON.—I have come to the same conclusion as your Lordship, but upon somewhat different and probably narrower grounds. The appellant in this case is the proprietor of a long and narrow strip of ground in Dunoon, bounded on the north by a main street called Clyde Street, on the east by a side street leading down to the shore called Jane Street, and on the south by what is termed the Esplanade, lying between his boundary wall and the shore. He holds in feu of the estate of Milton, and his west boundary is another feu—similar to his own—on the Milton estate. The feu to the east, and therefore on the opposite side of Jane Street, also holds of Milton. In the original charters of these three feus, executed between 1824 and 1829, the south boundary of the eastmost of the feus is described in 1824 as a public road to be made along the seashore of Baugie Bay, and in 1829 the south boundary of the appellant's and of the westmost feu is described as the walk or road called Baugie Place. It is obvious, therefore, that Baugie Place, now called the Esplanade, lies outside the appellant's south or seaward boundary.

At present there stands on the appellant's feu a villa residence at the end next Clyde Street, having its main entrance from that street, and the ground between this house and the Esplanade is in garden, with, I think, a door opening on to the Esplanade. The appellant, having these three open frontages, proposes to utilise his ground by pulling down the villa and

¹ Taylor v. Magistrates of Saltcoats, 1912 S. C. 880.

Oct. 29, 1912. building a long stretch of tenement buildings with a front to each of the three open spaces, making thus three sides of a rectangular oblong. In the present case we are only concerned with the frontage to Jane Street and the frontage to the Esplanade.

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Ld. Johnston.

The municipal authorities in Dunoon are not unnaturally concerned about the interference with the amenity of the town's sea frontage which the appellant's proposals would cause, and when his application for approval of his plans came before the Dean of Guild Court there was opposition. The Dean of Guild Court rightly held that they had no concern with the question of amenity, their functions being statutory only. When the case came before the Court the appellant's proposal was at his own hand to widen both Jane Street and the Esplanade by throwing a portion of his ground into these accesses. But, when he found that he could not do this without the authority of the Town-Council under the Burgh Police Act, 1903, section 11, he asked leave to amend his plans and application so as to show no widening or alteration of either Jane Street or the Esplanade, and this leave was granted.

Two points arose before the Dean of Guild Court. The first depended shortly upon whether there was sufficient width in the appellant's ground to admit of his proposed buildings facing Jane Street being erected without a breach of the statutory provisions with regard to free space behind. This matter is left by the Dean of Guild Court in such a position that it is not properly before this Court. We are only concerned with the question raised regarding the Esplanade and the buildings proposed to be erected *ex adverso* of that frontage. The Dean of Guild Court have come to the conclusion (1) that the public passage, footpath, or esplanade along the foreshore of the West Bay, which forms the southern boundary of the appellant's feu, "is not a street within the meaning of the Burgh Police (Scotland) Acts, 1892-1903"; (2) that the erection of the buildings proposed on this frontage "will convert the said existing public passage into a new street"; (3) that the Dean of Guild Court cannot grant warrant for the erection of buildings abutting on a new street until warrant for the formation of the street has been granted by the Town-Council; and they therefore sisted procedure to enable the appellant to present the necessary petition for warrant to form his new street in terms of section 11 of the Burgh Police Act, 1903. It is these conclusions of the Dean of Guild Court which we are called upon to review.

It is pretty clear that the appellant is seeking to force the hand of the Town-Council into the opening of the Esplanade as an ordinary means of access to his proposed buildings, and that the municipal authorities would like to checkmate him in some way or another. Whether their effort is justified in the public interest or not, we are not concerned with considering. The question before us is whether the Dean of Guild Court have rightly understood the situation, and are justified, by anything in the statutes, in the conclusion at which they have arrived.

It may be unnecessary for the purpose of this case to determine finally what are the rights of parties in the Esplanade. But a joint minute of admissions has been lodged, and a consideration of this and of the statements on record lead, I think, without doubt to the conclusion that the

Esplanade was nothing but a passage for foot-passengers, in other words, a Oct. 29, 1912.
footpath, and, as I have already said, that it was no part of the appellant's Mason v.
property. The appellant may or may not be entitled to build *ex adverso* of Rodger.
it in its present condition. But his proposing to do so will not make it a Ld. Johnston.
new street in the sense of the statute. If he proposes to widen, extend, or
otherwise alter it under section 11, he may apply to the Town-Council, and
then it will be decided whether he can compel the turning of an existing
foot-passage into an ordinary street for vehicular traffic for his benefit, and,
if so, on what conditions. But he is not proposing to do anything to the
Esplanade except to utilise it as an access to his houses. If he attempts to
use it without widening or alteration as anything but an access for foot-
passengers, the municipal authorities, under whose control the passage now
is, will no doubt take steps to prevent him, unless he can establish a right,
which does not at present appear on the papers, so to do.

But the Dean of Guild Court appears to me to have approached the matter from a wrong point of view. The question before them is whether a lining should be granted for the erection of certain buildings which will have a frontage to, and whose only access will be from, a footpath. There may be other objections to the proposed buildings, but the power of the Dean of Guild Court is statutory, and I do not find anything in the statute which justifies the Dean of Guild in refusing sanction to the erection of a building simply because the access to it is from a footpath, or in compelling a new street in the proper sense to be made by the intending builder on his own ground.

To arrive at a complete understanding of what is a public street and what a private street in the sense of the statute is no easy task, and it is rendered none the easier by the new definition in the Act of 1903, section 103. But I think that we are relieved from considering whether the Esplanade is a street, and what kind of a street, by section 128 of the Act of 1892 as amended by section 104 (2) (c) of the Act of 1903. The Esplanade is certainly a public footpath. The Town-Council, by that section as so amended, have "the sole charge and control" of it, and it is thereby vested in them accordingly.

Now, the Town-Council's authority in the matter of new buildings is derived from the Act of 1892, section 166. It requires the applicant for a lining to accompany his petition with a plan of the site, showing "the immediately conterminous properties, and also the position and width of any street, court, or footpath from which the property has access, or upon which it abuts." This clearly recognises that a new building may have its access from a footpath as well as from a street or court. If that be so, and there is no express enactment—and I can find none—empowering the Town-Council to enforce the substitution for the footpath of a "street" in the statutory sense as an access to the buildings as a condition of granting a lining, then it follows that the appellant may erect his buildings, if otherwise unobjectionable, with no access other than the footpath or Esplanade upon which his property abuts.

It follows that the judgment of the Dean of Guild Court falls to be recalled, though I doubt whether its recall will much advantage the appellant.

Oct. 29, 1912. LORD MACKENZIE.—I concur with your Lordship in the chair.

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THE COURT pronounced this interlocutor:—" . . . Recall the interlocutor of the Dean of Guild Court dated 11th April 1911; of new find in fact in terms of findings (1) to (4) inclusive therein, and remit to the Dean of Guild Court for further procedure. . . ."

JAMES G. BRYSON, Solicitor—ALEX. CAMPBELL & SON, S.S.C.—Agents.

No. 9.

DANIEL RAESIDE, Pursuer (Respondent).—*Blackburn, K.C.*—*C. H. Brown.*

Oct. 31, 1912.

ELIZABETH MILLER OR RAESIDE, Defender.

Raeside v.
Raeside.

C D, Minuting Defender (Reclamer).—*D. F. Dickson*—*Hon. W. Watson.*

Husband and Wife—Divorce for adultery—Process—Sisting of alleged paramour—Right of party sisted to judgment as to his guilt or innocence—Act of Sederunt, 17th July 1908.

In an action of divorce for adultery an alleged paramour, who has not been called as a defender and against whom there are no direct conclusions, but to whom the action has been intimated in terms of the Act of Sederunt of 17th July 1908 and who has appeared and been sisted to defend, is entitled to a decision as to his guilt or innocence.

Circumstances in which the Lord Ordinary (Dewar), while granting decree of divorce, assoilzied an alleged paramour, thus appearing, from the conclusions of the summons so far as implicating him.

EXTRA
DIVISION.
Lord Dewar.

ON 29th June 1911 Daniel Raeside brought an action of divorce for adultery against his wife, the conclusion of the summons being that "the Lords of our Council and Session ought and should find facts, circumstances, and qualifications proven relevant to infer guilt of adultery of the defender, Elizabeth Miller or Raeside, with C D, and therefore find her guilty of adultery with him accordingly; and our said Lords ought and should divorce and separate the defender from the pursuer and from his society, fellowship, and company. . . ." The defender did not enter appearance to defend the action.

On 15th July 1911 the Lord Ordinary (Dewar), in terms of the Act of Sederunt 17th July 1908,* appointed the dependence of the

* The Act of Sederunt of 17th July 1908 enacts:—Sec. 1. "In every action of divorce on the ground of adultery in which appearance has not been entered, and in which the person with whom the defender is stated to have committed adultery has not been cited as a co-defender, the Lord Ordinary before whom the action depends shall, before fixing a diet of proof, unless cause be shown to the contrary, appoint intimation to be made to such person in the form, or as nearly as may be in the form, contained in the Schedule hereto annexed; and such person, if he or she desires to dispute the truth of the averments made against him or her, shall be entitled to lodge a minute craving to be sisted as a party to the cause, and setting forth answers to the averments contained in the summons, so far as affecting his or her character and conduct; and on such person being sisted he or she shall become a party to the cause and be subject to the same procedure as if he or she had originally been cited as a co-defender, and with the same rights and liabilities as to the expenses occasioned by such intervention."

action with a double of the summons to be intimated to C D, and allowed him to lodge a minute with answers to the statements contained in the condescendence in so far as they related to him.

Oct. 31, 1912.
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Raeside.

C D thereafter lodged a minute in which, after craving to be sisted as a party to the cause, he denied the charge of adultery, and averred that the charge was made by the pursuer and defender acting collusively to extort money from him.

On 12th January 1912 the Lord Ordinary fixed a diet of proof, and sisted C D as a party to the cause.

On 13th April 1912 the Lord Ordinary having taken the proof, at which C D was represented by counsel and led evidence, pronounced an interlocutor in the following terms:—" . . . Finds facts, circumstances, and qualifications proved, relevant to infer the defender's guilt of adultery: Finds her guilty of adultery accordingly, and therefore divorces and separates the defender from the pursuer, his society, fellowship, and company in all time coming: Finds and declares in terms of the conclusion of the summons, and decerns." *

The minuting defender, C D, reclaimed, and the case was heard before the Extra Division (consisting of Lord Kinnear, Lord Dundas, and Lord Mackenzie) on 31st October 1912.

Argued for the reclamer;—The reclamer, after being sisted by the Lord Ordinary, became a party to the cause just as effectually as if he had been originally cited as a co-defender.¹ The result of that was that, by the ordinary rules of law and justice, he was entitled to have the judgment of the Court on the conclusions of the action so far as these were conclusions directed against him. The Lord Ordinary had not intended to pronounce any judgment upon the case so far as regarded him, but he had in fact, although inadvertently, pronounced an adverse judgment owing to the form of his interlocutor, which granted declarator in terms of the summons. With regard to the reclamer

* "OPINION.—This is an action at the instance of Daniel Raeside against his wife for divorce on the ground of adultery with C D. Mrs Raeside does not defend the action. She has admitted the adultery both by extrajudicial confession and on oath. But C D has appeared in the case, and has lodged a minute of amendment denying the adultery, and averring that the action is collusive, and that the pursuer and defender are acting in concert together for the purpose of extorting money from him.

"But for this minute the case would have been simple, because there is such strong presumption that a person will not admit adultery unless it is true that very little corroborative evidence is necessary to enable an injured spouse to obtain the remedy of divorce. Mrs Raeside's confession and certain letters she wrote, to which I shall presently refer, although not evidence against C D, are, I think, conclusive against her. But the averments contained in the minute are of such a grave character that it is necessary to examine them with great care in the light of the evidence. If they are true, divorce is, of course, out of the question; but if they are untrue the pursuer is entitled to a clear and unequivocal judgment to that effect. As there is no conclusion against C D in the summons, I do not require to consider how far the evidence is good against him. The only question I have to decide is whether it is proved that this action is really a collusive conspiracy between the pursuer and defender brought for the purpose of extorting money from C D. I am very clearly of opinion that it is not. [His Lordship then examined the evidence, and concluded]—There is no foundation for the grave charges which have been brought against the pursuer, and I am accordingly of opinion that he is entitled to decree with expenses."

¹ Act of Sederunt, 17th July 1908, sec. 1.

Oct. 31, 1912. the only possible judgment here was a judgment in his favour, because it was admitted by the pursuer that the case against the reclamer had not been proved. That being so the only just and equitable decree was one assolzieing¹ the reclamer from the charges which had not been proved. A decree of dismissal did not meet the situation. The fact that the word "dismiss" was used in the Conjugal Rights Amendment Act, 1861,² was quite immaterial. That Act in its terms and effect was different from the Act of Sederunt,³ under which the reclamer came. The Act of Sederunt made the party sisted a party to the cause in the fullest sense of the term with, accordingly, a right to demand the ordinary decrees: whereas the Conjugal Rights Amendment Act did not make the party cited a party to the cause, but merely conferred certain powers on the Court with regard to him, viz., a power to mulct him in expenses or to "dismiss" the action so far as regarded him. That being so there was no good reason why the Court should not now pronounce the decree craved. The pursuer admitted that he had not proved his case against the reclamer, so there was nothing to be gained by examining the evidence at length or sending the case back to be disposed of by the Lord Ordinary.

Argued for the respondent;—The pursuer admitted that in the present action he had not led evidence which proved that the reclamer was guilty of adultery. The only object, however, of the action, and the only point to which he had directed his evidence, was proof of his wife's adultery. The proper decree accordingly was a decree of dismissal, and not a decree of absolvitor. It was quite illogical that a party should be assolzied for ever from a matter which had not been the subject of the action to which he had voluntarily become a party. Suppose, for instance, that hereafter the respondent should raise an action of damages against the reclamer, it would surely be unjust that his action should be barred by a decree in a case in which he had not necessarily had occasion to lead all his evidence upon the question of the reclamer's guilt. The Act of Sederunt was not meant to turn an action of divorce against a wife into an action of damages against the party with whom she had committed adultery. It was significant that in section 7 of the Conjugal Rights Amendment Act, 1867, the word used was "dismiss"; and it was a decree of dismissal that was pronounced in *Miller v. Simpson*.⁴

LORD KINNEAR.—I think this case is in a somewhat unfortunate position but I cannot say I have any doubt as to the proper way of dealing with it. The action is one of divorce, and the Lord Ordinary has pronounced the decree of divorce which is brought before us on a reclaiming note by C D, who is not called in form as a co-defender but whose name is set out in the first conclusion of the summons as being the person with whom the pursuer alleges that his wife committed adultery. The first conclusion is that the Court should find "facts, circumstances, and qualifications proven relevant to infer guilt of adultery of the defender, Elizabeth Miller or Raeside, with C D." The action was intimated to C D. He put in a minute denying

¹ *Leitch v. Leitch*, (1906) 13 S. L. T. 742, 14 S. L. T. 396.

² 24 and 25 Vict. cap. 86, sec. 7.

³ July 17, 1908, sec. 1.

⁴ (1863) 2 Macph. 225.

his guilt and, at the same time, making certain other averments material to the cause which I need not further consider now. Oct. 31, 1912.

The Lord Ordinary has pronounced an interlocutor, in the first place, finding that the defender's adultery is proved and, therefore, divorcing her, and then finding and declaring in terms of the conclusion of the summons. The first part of that interlocutor is not reclaimed against, but the second part is on the ground that the declarator in terms of the conclusion of the summons means that it is proved that the defender had committed adultery with C D. C D reclaims against that finding and, as I understand, counsel for the pursuer and respondent does not maintain that he could hold it except under certain qualifications which, at present, I do not think it necessary to consider.

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Now, parties are chiefly in dispute as to whether the finding—whatever it be—which affects C D should be followed up by a dismissal of the action or by an absolvitor of C D from the conclusions of the action. I think there is a preliminary question which must be decided before the Court can possibly determine whether the form of judgment should be absolvitor or dismissal, and that is whether it is or is not proved that C D committed adultery with the defender. Now, upon the form of the interlocutor, I should have thought the Lord Ordinary had held it proved, and I think the interlocutor says so in plain words; but, then, his Lordship explains in his note that he had not in fact applied his mind to that question at all. He says: "As there is no conclusion against C D in the summons, I do not require to consider how far the evidence is good against him. The only question I have to decide is whether it is proved that this action was really a collusive conspiracy between the pursuer and the defender for the purpose of extorting money from C D."

Now, I cannot agree with the Lord Ordinary in thinking that there is no conclusion of the summons directed against C D. I think there is a declaratory conclusion which necessarily and directly tables the question for judicial determination whether he is or is not guilty of adultery with the defender in this action. The Lord Ordinary, when the procedure reached the proper stage, taking that view, directed that the action should be intimated to C D to give him an opportunity of appearing and attending the proof. C D accordingly put in a minute to the effect I have already mentioned, and I think that the result of that was that he and the pursuer joined issue upon a question of fact which is of vital importance to C D, namely,—whether he is or is not guilty of adultery with the pursuer's wife. I am of opinion that he is entitled to have a judgment upon that question, and that it is not reasonable or fair treatment of C D to say that it is not a question arising for decision because there is no operative conclusion in the shape of a money claim made against him. There is the declaratory conclusion which very clearly affects him.

Now, we are asked to supply the deficiency in the Lord Ordinary's judgment and to pronounce a finding, without having considered the evidence, that will relieve the minuter of the judgment in fact that has already been pronounced against him. We are asked, in some form or other, to find that the case is not proved against him. I think it quite impossible for this Court to do anything of the kind. We could pronounce

Oct. 31, 1912. no finding upon that question of fact without having the evidence properly brought before us and fully argued. But, even if that had been done, I think we ought to pronounce no such finding without knowing the Lord Ordinary's mind upon it. It is a question to which, in the opinion before us, his Lordship has not applied his mind. The first thing to be done is that he should be asked to apply his mind to it and to say whether, in his judgment, the case is proved against C D or whether it is not. I think it quite necessary to have that question distinctly decided before we consider whether the proper course is to dismiss or *assolzie*. The latter is quite a minor question, though, still, one of material importance; but the first step towards it is to find what is really proved or not proved against him.

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Therefore, what I should move your Lordships to do is to adhere to the first part of the interlocutor, but to recall it in so far as it finds and declares in terms of the conclusions of the summons, and to remit to the Lord Ordinary to consider and decide the question whether the case is or is not proved as against the minuter, C D, and to proceed as shall be just. I do not mean that the Lord Ordinary is to do nothing beyond finding the effect of the proof as regards C D's guilt or innocence. Having determined that question he should then proceed as shall appear to him to be just and decide whether the final disposal of the action should be by way of dismissal or by way of *absolvitor*, provided always he thinks the case is not proved against C D.

LORD DUNDAS.—I am of the same opinion. The dependence of this action was intimated to C D in terms of the recent Act of Sederunt—a very wholesome and useful Act of Sederunt, as I humbly think. C D was allowed to lodge a minute, if so advised, and did lodge a minute; and, in terms of the crave of that minute, he was sisted on 12th January 1912 as a party to the cause. The only position as a party which he could possibly occupy was, of course, that of co-defender; and, accordingly, in terms of the Act of Sederunt, on being sisted, he became a party to the cause and subject to the same procedure as if he had been originally cited as co-defender.

In that state of matters, C D being thus a co-defender, I think the Lord Ordinary ought to have decided the question and expressed an opinion as to whether the allegations made concerning him were or were not proved in fact. It was pressed upon us by the learned Dean that, although that had not been done in the Outer House, it might now be done here. I agree with your Lordship that that is impossible. The suggestion that we should proceed, without hearing any evidence, to make such a finding as is desired seems to me to be quite extravagant. And the alternative view—that we might have heard the Dean or his junior open the case, and then dispose of the matter—does not meet the situation either, because this is obviously a question where the Court is entitled to have the benefit of the views of the Judge of first instance. I therefore agree that the case should go back as your Lordship has indicated. If the Lord Ordinary should hold that the allegations made by the pursuer so far as concerning C D are not proved by competent and sufficient evidence, he will, of course, proceed to

consider and decide whether the proper course would be to assoilzie C D or Oct. 31, 1912. to dismiss the action so far as laid against him.

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LORD MACKENZIE.—I am entirely of the same opinion. I think that the course that the case has taken shows quite distinctly that one of the parties to the case is C D. He was sisted as a party to the case by the interlocutor of 12th January 1912, after having been allowed to lodge a minute by interlocutor of 15th July 1911. In that minute he denied the truth of the averments made with reference to him, which are contained in the third, fourth, and sixth articles of the condescendence. Having joined issue on those questions of fact, I think he was entitled to the judgment of the Court upon them; and that, the Lord Ordinary not having disposed of them, the case should go back to his Lordship in order that he may say whether, in his opinion, they are proved or not, as in a question with the minuter.

We were asked by the learned Dean of Faculty to make a finding that there was no evidence relevant to infer C D's guilt of adultery with the defender in this case, and it was suggested that the way was open for this Court making that finding by the admission that Mr Blackburn tendered at the bar. Mr Blackburn's admission was to the effect that he was prepared to admit that no evidence had been led which would justify him, as in a question with C D, arguing in this case that he had proved the averments made against him. But it was carefully pointed out that that admission was limited to the purposes of this case and he made it quite evident he desired to safeguard himself with regard to any future action of damages he might raise. In my opinion we cannot proceed to make a finding with regard to evidence as to the import of which we are entirely ignorant; and, in a case of this kind, I should entirely demur, for my own part, to expressing any opinion without knowing what impression that evidence made on the Lord Ordinary who heard and saw the witnesses. I agree with what your Lordships have said.

THE COURT pronounced the following interlocutor:—"Adhere to said interlocutor [of 13th April 1912] in so far as it finds facts, circumstances, and qualifications proved relevant to infer the defender's guilt of adultery: Find her guilty of adultery accordingly, and therefore divorces and separates the defender from the pursuer, his society, fellowship, and company, in all time coming: Recall said interlocutor in so far as it finds and declares in terms of the conclusion of the summons: And in place thereof find and declare the defender to have forfeited all the rights and privileges of a lawful wife, and that the pursuer is entitled to live singly or to marry any free woman, as if he had never been married to the defender or as if she were naturally dead: *Quoad ultra* adhere to said interlocutor: Remit to the Lord Ordinary to consider and dispose of the first conclusion of the summons so far as directed against the minuting defender, and to proceed as may be just, and decern."

THEREAFTER the Lord Ordinary (Dewar) pronounced this interlocutor:—"The Lord Ordinary, on the motion of the minuting defender, C D, for absolvitor from the conclusion of the sum-

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mons so far as directed against him, in respect that the pursuer admitted that no sufficient evidence had been led to infer that the said C D had been guilty of adultery with the defender—the pursuer not opposing the said motion—assoilizes the said C D from the said conclusion, and decerns.”

W. & W. FINLAY, W.S.—BRUCE, KERR, & BURNS, W.S.—Agents.

No. 10.

ANNIE AIKEN, Pursuer (Respondent).—*G. Watt, K.C.—
T. G. Robertson.*

Nov. 6, 1912.

THE CALEDONIAN RAILWAY COMPANY, Defenders (Reclaimers).—
Blackburn, K.C.—Hon. W. Watson.

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Reparation—Slander—Master and Servant—Liability of master for verbal slander uttered by servant on privileged occasion—Personal malice of servant.

In an action of damages brought against a railway company on account of a verbal slander uttered by the manager of one of their station bars, the pursuer, who had been employed as a barmaid at this bar, averred that, on the occasion of her dismissal from this post, the manager (who had the control of the servants employed at the bar) uttered the slander complained of—a charge of appropriating the company's funds—knowing it to be false and with the object of gratifying his private ill-will towards her. The occasion was admittedly privileged.

Held that the action was irrelevant, in respect that the pursuer's averments disclosed that the malice alleged as actuating the slander was personal to the manager and in no way connected with the business of the defenders, and, accordingly, that the defenders could not be held responsible.

Citizens' Life Assurance Company v. Brown, [1904] A. C. 423, and *Finburgh v. Moss' Empires, Limited*, 1908 S. C. 928, distinguished.

2D DIVISION.
Lord Dewar.

ON 3rd April 1912 Miss Annie Aiken brought an action of damages for defamation against the Caledonian Railway Company.

The pursuer averred that in July 1911 she was engaged as one of the barmaids at the defenders' Princes Street Station, Edinburgh, by Mr Kennedy, the submanager, with the consent of Mr Brown, the manager of the defenders' hotel and bars at that station; and that Mr Brown was empowered by the defenders, and it was part of his duty, to engage and dismiss, as well as to control, the persons employed at the station bars.

She further averred:—(Cond. 6) “The pursuer entered upon her duties in terms of her said engagement as barmaid at the second-class bar in Princes Street Station. At the same bar two other barmaids were also employed, namely Miss Stewart and Miss W., the latter being the head barmaid. Between Miss W. and Mr Brown a special friendship and intimacy existed, and he accorded to her privileges which were denied to the other barmaids. Each barmaid was supplied with a National Cash Register, in which to place cash received, and these registers automatically recorded and checked the cash received at each sale. . . .” (Cond. 7) “Early in the course of the pursuer's service under the defenders Miss W. conceived a dislike for her, and this dislike soon grew into an ill-will which manifested itself in many small ways. Miss W.'s ill-will towards the pursuer arose largely from the fact that certain customers who had

formerly been special friends of Miss W. now preferred to be served Nov. 6, 1912. by, and were specially friendly towards, the pursuer. To one of these customers the pursuer gave a credit for the sum of 7s. on an occasion ^{Aiken v. Caledonian Railway Co.} in July, receiving payment the following day. It is a recognised and usual custom for the defenders' barmaids to give credit to regular customers, and Miss W. frequently gave credit in this way. On this occasion, however, she attempted to make trouble for the pursuer, and reported the matter both to Mr Kennedy and to Mr Brown. Mr Kennedy paid no heed, but Mr Brown bore the matter in mind, and by this and similar tales carried regularly to him by Miss W. his mind was poisoned against the pursuer, and he also conceived a dislike and ill-will towards her, siding always with his friend, Miss W., and against the pursuer. The pursuer, although her relations with Miss W. remained strained, began to think that Mr Brown felt more favourably disposed to her (the pursuer) than he had done. On or about the 23rd day of December 1911, in one of the corridors of the Caledonian Hotel he attempted to take liberties with the pursuer and put his arms round her neck and tried to kiss her. This she resented and prevented, with the result that Mr Brown became very angry and ever after manifested an ill-feeling towards her." (Cond. 8) "On or about Saturday the 3rd February 1912, Miss W. informed Mr Brown that she suspected the pursuer of selling a flask of whisky and keeping the price, at the same time omitting to record the sale on her register. Mr Brown immediately sent for the pursuer, and said to her: 'You have not been ringing up your sales.' He thereby represented, and intended to represent, that the pursuer had received money from customers in payment for goods, and had not handed over the said money to the defenders, but had stolen the same. The said charge of theft was false, and was made by Mr Brown recklessly and maliciously, and without making any previous inquiry whatever. Mr Brown knew Miss W.'s ill-will towards pursuer, and that no reliance whatever was to be placed on her alleged suspicions. The pursuer denied the said charge. She had, however, been made aware previously that Miss W. was maliciously expressing unfounded suspicions concerning her, and went on to explain to Mr Brown the circumstances which Miss W. had maliciously expressed as being suspicious. He, however, refused to listen to any explanations or to make any inquiry. He said to the pursuer: 'This sort of thing has been going on too long,' meaning thereby that the pursuer had been engaged in a course of theft from the defenders. He then went on to say: 'You made a sale for 1s. 10d.; rang up the 10d. and put the 1s. in your own pocket.' He further said: 'You sold eight bottles of whisky for £2, when the proper charge was £2, 4s.' He further accused her of misconduct in connection with the credit given by her as above-mentioned in the previous July. The pursuer denied all the accusations made against her, which were in fact untrue, and called on Mr Brown to make proper inquiry and investigation. He, however, refused to do so, but suspended the pursuer at once from her duties, telling her to come back to him on the following Monday morning. . . . In connection with the credit sale of the previous July the pursuer gave Mr Brown the exact date of the sale, and told him without concealment precisely what happened." (Cond. 9) "On the following Monday the pursuer again called on Mr Brown at his office as instructed. Mr Brown then and there dismissed her from the service of the defenders, and said to her, as his reason for the

Nov. 6, 1912. dismissal: 'You have misappropriated the funds of the Company.' The pursuer protested that this was untrue, but he would not listen to her. He went on to say that the pursuer was not entitled to receive any wages on account of the reason of her dismissal, but offered to pay her what he termed her lying money (consisting of two days' wages), which the pursuer refused to accept. On the same day, and in his office at the Caledonian Railway Station, Mr Brown said to pursuer's mother, Mrs Aiken, who resides at 9 South St Andrew Street, Edinburgh, that the pursuer was 'dishonest, and had misappropriated the money of the Company,' or used words of the like import and effect. Both Mrs Aiken and the pursuer requested that full inquiry and investigation should be made, and in particular that Miss W. should be made a party to the interview. Mr Brown, however, refused to call in Miss W. or conduct any inquiry, but repeated his charges against the pursuer, and said in presence and hearing of the pursuer's mother that the pursuer was being dismissed 'for dishonesty.'" (Cond. 10) "Following on her dismissal the pursuer applied to Mr Brown for a reference. He replied that he would answer any inquiries made as to the pursuer. Thereafter the pursuer applied to a Mr Mackinnon for a situation, and referred him to Mr Brown. Mr Mackinnon thereupon wrote to Mr Brown in the matter but received no reply." (Cond. 11) "On 24th February 1912 the pursuer wrote to the secretary of the defenders' Company complaining of the circumstances in which she had been dismissed. He replied by letter of 5th March 1912, stating that inquiry had been made into the circumstances of her dismissal, and adding 'there does not seem to be any reason for interfering with the discretion of the hotel manager in the matter.' Thereafter the pursuer's agent wrote a letter direct to Mr Brown, and on 16th March he received a reply from the solicitor for the defenders in which it was for the first time stated 'Miss Aiken's services were dispensed with because they were no longer required by the Company.' The defenders' solicitor by the same letter offered payment of the sum of 18s. 6d. as a fortnight's wages in lieu of notice." (Cond. 12) "The pursuer has suffered very deeply in her feelings and in her reputation through the foresaid slanderous imputations of dishonesty made against her by Mr Brown. The said slanderous statements were made by Mr Brown maliciously in order to gratify the ill-will which, in common with and as an intimate friend of Miss W., he had conceived towards the pursuer. Moreover, the said slanderous statements were made and persisted in by Mr Brown most maliciously and recklessly without any inquiry as to their truth or falsehood, although inquiry was sought and pressed for both by the pursuer and by her mother, and would have at once revealed that there was no ground whatever for the said charge. Further, the said slanderous statements were made by Mr Brown in the course of his duties for the defenders, and ostensibly in their interests, as setting forth a reason for which alone he was entitled, in the exercise of his functions for the defenders, to discharge the pursuer, as he did discharge her, without notice and without adequate wages in lieu of notice. Further, the defenders through their secretary have homologated and adopted Mr Brown's actings in dismissing the pursuer and the slanderous statements of his reason for so doing, as above narrated. The said Mr Brown, though ostensibly dismissing the pursuer for dishonesty, knew well that it was a groundless charge, and himself afterwards gave information to the secretary of the

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defenders' Company upon which, as above narrated, he admitted in Nov. 6, 1912, writing that the pursuer was not dismissed for dishonesty. The pursuer will be greatly prejudiced in obtaining further employment if she does not vindicate her character. She has called on the defenders to withdraw the statements made concerning her, and to make adequate compensation, but they refuse or delay to do so, and the present action has accordingly been rendered necessary."

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The defenders pleaded, *inter alia*;—(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons, and the action should therefore be dismissed.

On 21st June 1912 the Lord Ordinary (Dewar), without delivering an opinion, approved of issues for the trial of the cause.

The defenders reclaimed, and the case was heard before the Second Division on 16th and 17th October 1912.

Argued for the reclaimers;—The respondent's averments were irrelevant. In *Barwick v. English Joint Stock Bank*¹ Willes, J., in a passage which had been approved by high authority,² laid it down that a master was liable for his servant's wrongful act only if the act was (a) within the scope of the servant's authority, and (b) for the master's benefit.³ In *Lloyd v. Grace, Smith, & Company*⁴ Farwell, L.J., observed that, in order to infer liability on the part of the master, both of these conditions must be satisfied, and that the words "for the master's benefit" in Willes, J.'s, statement of the law could not be disregarded; and, although in *Lloyd's* case⁴ the decision of the King's Bench had been reversed, the available reports⁵ of the opinions in the House of Lords indicated that the reversal proceeded on the facts of the case. In numerous actions laid on slander issues had been refused because one or other of these conditions had not been satisfied.⁶ It might be that an employer would be liable for a statement made recklessly by his servant, as in *Finburgh v. Moss' Empires, Limited*⁷; but there was a plain distinction between such cases and the class of case in which the servant was actuated by private malice.⁸ The present case fell within the latter category, for the pursuer distinctly averred that Brown's motive was the gratification of his spite towards her. The slander was, therefore, not uttered for the master's benefit. *Citizens' Life Assurance Company v. Brown*,⁹ which was first followed in Scotland in *Ellis v. National Free Labour Association*,¹⁰ was dis-

¹ (1867) L. R., 2 Ex. 259.

² *Mackay v. Commercial Bank of New Brunswick*, (1874) L. R., 5 P. C. 394.

³ Reference was made to *Limpus v. London General Omnibus Co.*, (1862) 1 H. & C. 526.

⁴ [1911] 2 K. B. 489, at p. 507.

⁵ (1912) 28 T. L. R. 547. [Since reported in [1912] A. C. 716.]

⁶ *Epile v. Caledonian Railway Co.*, (1898) 6 S. L. T. 65; *Cameron v. Yeats*, (1899) 1 F. 456; *Agnew v. British Legal Life Assurance Co., Limited*, (1906) 8 F. 422, *per* Lord Ardwall, at p. 425; *Beaton v. Corporation of Glasgow*, 1908 S. C. 1010; *M'Adam v. City and Suburban Dairies, Limited*, 1911 S. C. 430; *Riddell v. Glasgow Corporation*, 1911 S. C. (H. L.) 35. *Mackenzie v. Cluny Hill Hydropathic Co., Limited*, 1908 S. C. 200, and *Dinnie v. Hengler*, 1910 S. C. 4, were also referred to.

⁷ 1908 S. C. 928.

⁸ *Riddell v. Glasgow Corporation*, 1910 S. C. 693, *per* Lord Salvesen at p. 696.

⁹ [1904] A. C. 423.

¹⁰ (1905) 7 F. 629.

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tinguishable inasmuch as there the servant was acting in the furtherance of his employer's business. In any event the occasion was privileged, and no facts and circumstances sufficient to infer malice on the part of the defenders were averred.

Argued for the respondent;—The slander was uttered in the course of Brown's employment, and this was enough to infer liability on the part of the reclaimers. All that was meant by Willes, J.'s, statement that the servant's act must be for the benefit of the master was that the servant should be ostensibly acting in the interest of his master. It was not meant that the act must actually benefit the master. If, as Farwell, L.J., observed in *Lloyd's* case,¹ the act was within the scope of the servant's employment, "then such act was by legal intendment done" for the master's benefit. The Court would not inquire into the actual motive in the servant's mind when he did the act or spoke the words complained of. The fact, therefore, that the slanderous words were averred to have been uttered for the gratification of the servant's ill-will could not render the action irrelevant. Malice included "every wrong feeling in a man's mind,"² and if a master were relieved of liability where his servant acted maliciously, there would be few cases in which a master could be made liable for a servant's wrongous act. But in point of fact masters had been made liable even for their servant's criminal offences.³ In *Finburgh's* case⁴ the servant's act was reckless, and as regarded the master's liability no distinction could be taken between recklessness and deliberate intent. The master had put the servant in a position which enabled him to do the wrong. The *Citizens' Life Assurance Company's* case⁵ was an instance of the employer being made liable where the servant acted with deliberate malice. The principle of that decision was extended to verbal slander in *Finburgh's* case.⁶ The case of *Riddell*⁶ was not in point, for the decision there proceeded on the ground that the statement was made by the servant outwith the scope of his employment. It was not disputed that there was privilege in the present case; but the facts and circumstances averred on record were amply sufficient to infer malice.

At advising on 6th November 1912,—

LORD DUNDAS.—The Lord Ordinary has approved of issues for the trial of this case by jury. I am sorry that in doing so he did not see fit to give us the benefit of his reasons for holding the action to be relevant, as I have reached an opposite conclusion from his Lordship on that matter. The case raises an interesting and rather important question as to the vicarious liability of an incorporated company in damages for a slander uttered by one of their servants. The defenders are the Caledonian Railway Company. The pursuer entered their service about the end of July 1911 as a barmaid at the second class bar in Princes Street Station. She was engaged by, or at least with the authority and approval of, Mr James Brown, who admittedly was manager of the defenders' hotel and bars at that station, and was authorised to engage, control, and dismiss the employees at these bars. On 5th

¹ [1911] 2 K. B. 489, at p. 508.

² *Stuart v. Bell*, [1891] 2 Q. B. 341, at p. 351.

³ *Dyer v. Munday*, [1895] 1 Q. B. 742.

⁵ [1904] A. C. 423.

⁴ 1908 S. C. 928.

⁶ 1911 S. C. (H. L.) 35.

February 1912 Brown dismissed the pursuer from the defenders' service, Nov. 6, 1912. stating as the reason that she had misappropriated the funds of the Com-pany. The pursuer brings this action against the Company for slander. The slanders are alleged to have been uttered by Mr Brown on three occasions on 3rd and 5th February 1912 in presence of the pursuer, and, on the last occasion, of her mother also, and were to the effect that she had stolen money from the defenders and misappropriated their funds. The pursuer admits that the occasions were privileged, and that if issues are to be allowed malice must be put in them. It is important to emphasise at the outset that the action is one of slander pure and simple. It may well be that if the pursuer's averments are true the Company might be made liable to her by an appropriate action in the pecuniary consequences of the termination by Brown of her contract of service without notice. But that is another matter. The question here raised is whether the Company is to be held liable, upon the averments presented, in damages for Brown's alleged slander. In order to solve that question one must consider whether the pursuer has relevantly averred malice. Her averments are specific, and very peculiar. She says that a special friendship and intimacy existed between Miss W., the head barmaid in the second class bar, and Mr Brown; that Miss W. conceived a dislike and ill-will towards her, and carried tales about her to Brown, whose mind was thereby poisoned against her, so that he conceived a dislike and ill-will towards her. She states that on an occasion in December 1911 Brown attempted to take liberties with her, and that, on her resenting this, he became very angry and ever after manifested an illfeeling towards her. The pursuer goes on to aver that the "slandorous statements were made by Mr Brown maliciously in order to gratify the ill-will which, in common with and as an intimate friend of Miss W., he had conceived towards the pursuer"; that the "statements were made by Mr Brown in the course of his duties for the defenders and ostensibly in their interests"; and that Brown, "though ostensibly dismissing the pursuer for dishonesty, knew well that it was a groundless charge." These averments would clearly be relevant to support an action of slander against Mr Brown. The slandorous statements are said to have been to his knowledge false, and made with the sole object of gratifying his private spite and ill-will towards the pursuer. But it is, to my mind, almost equally clear that the averments do not support a case of malice as against the defenders. They exclude the idea of mere recklessness on the part of Brown, or of a mistaken overzeal in furthering his employers' interests. Brown's alleged malice was calculated and deliberate, to further his own private end: there is no room for dubiety in the pursuer's averments.

I think the case ought not to be sent to trial. There is no precedent for such a course, and there are many precedents against it. In my opinion the defenders cannot be held liable for a slander uttered by their servant upon a privileged occasion when, upon the pursuer's own showing, the malice she is at pains to allege was of a purely personal and private character, quite unconnected with the affairs and purposes of the Company.

There is, I think, now no doubt that an employer, whether an individual or a corporate company, may be liable in damages for slander uttered by a servant—just as he may be in the case of any other wrong done—if the

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Nov. 6, 1912. slander was uttered, or the wrong done, in the course and within the scope of the servant's employment, and in the interest of the employer. This doctrine is supported and illustrated by a number of decisions, Scots and English, to some of which I shall refer. It has been held to apply even when the servant's act amounted to a crime, *e.g.*, assault.¹ But in order to found such liability it must be clear upon the facts, or in a question of relevancy it must be at least consistent with the pursuer's averments, that the wrong was done subject to the limitations above indicated. The matter is well illustrated by the case of *Limpus v. London General Omnibus Company*.² The driver of an omnibus belonging to the defendants drove it across the road in front of a rival omnibus belonging to the plaintiff, which was thereby overturned. The defendants had instructed their drivers not to obstruct any omnibus. The report bears that at the trial Martin, B., directed the jury that a master was responsible for the reckless conduct of his servant in the course of the service; that if the jury believed that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, acted recklessly and wantonly and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then they were responsible; that if the act of the defendants' driver, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers, and so to interfere with the trade and business of the other omnibus, the defendants were responsible; that the instructions given to the defendants' driver were immaterial if he did not pursue them; but if the true character of the act of the defendants' servant was that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible. A Court of six Judges in the Exchequer Chamber held, with one dissentient voice, that the direction was right. Crompton, J., observed that the criterion is whether the act was done "in the course of the service and for his master's purposes."

The general rule of the matter has never, I suppose, been better expressed than it was by Willes, J., in the well-known case of *Barwick v. English Joint Stock Bank*.³ "The general rule," said his Lordship, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." The rule thus expressed has since been repeatedly approved and adopted in the House of Lords, the Privy Council, and the Courts both in England and Scotland, *e.g.*, *Mackay*,⁴ *Houldsworth*,⁵ *British Mutual Banking Company*,⁶ *Brown*,⁷ *Ruben*,⁸ *Ellis*,⁹ and *Finburgh*.¹⁰ In *Ruben's* case⁸ Lord Davey said that "Every part of the legal proposition stated by Willes, J., . . . is of the essence of it." I do not think that proposition has ever been success-

¹ *Dyer v. Munday*, [1895] 1 Q. B. 742.

² 1 H. & C. 526.

³ L. R., 2 Ex. 259.

⁴ L. R., 5 P. C. 394, 411.

⁵ (1880) 7 R. (H. L.) 53, 57, 5 App. Cas. 317, 326.

⁶ (1887) 18 Q. B. D. 714.

⁷ [1904] A. C. 423.

⁸ [1906] A. C. 439.

⁹ 7 F. 629.

¹⁰ 1908 S. C. 928.

fully impugned or materially qualified. We were referred by the pursuer's Nov. 6, 1912. counsel to some observations by the Lord Chancellor (Loreburn) in a recent case, *Lloyd* (26th July 1912, only as yet reported in 28 T. L. R. 547),¹ Aiken v. Caledonian Railway Co. which counsel represented as negating, or at least qualifying, the effect, of the words of Willes, J., "and for the master's benefit." It appears Lord Dundas. to me that Lord Loreburn in what he said was only guarding against an interpretation of Willes, J.'s, language as meaning that an employer will be entitled to escape liability for his servant's fraud if he can show that he in fact derived no actual benefit from it; and pointing out that the employer, though wholly ignorant of the fraud and in no way benefited by it, may under given circumstances be liable for its consequences if he has held out the fraudulent servant to the defrauded plaintiff as authorised by him to transact the business in the course of which the fraud was perpetrated. *Barwick's* case² was one of fraud. But Willes, J., broadly stated that "with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." Accordingly in *Citizens' Life Assurance Company v. Brown*³ the "general rule" was expressly applied to a case of libel. The decision, setting at rest some previous uncertainty upon the point, finally established that "a corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment." It is important for present purposes to note that the libel circulated by Fitzpatrick, a servant of the appellants, about the plaintiff, who had left their service and entered that of a rival life assurance company, was plainly written in the interest of the appellants and for their benefit, for it was "in order to counteract the mischief which Brown was doing to the business of the Company." In the Scots case of *Ellis*,⁴ where the "master" was a voluntary association, it was held (expressly following the rule in *Barwick*²) that "a master is liable for a slander uttered by his servant while acting within the scope of his employment although without special instructions." There was a dispute between the parties upon their pleadings whether the letter complained of was one falling truly within the scope of the secretary's employment or, as the defenders alleged, a private letter of his own, of which they had no knowledge and for which they were not responsible. An issue was accordingly adjusted in terms designed to leave open at the trial the respective contentions of parties upon that vital point. The case in this respect seems to me to afford a marked and useful contrast to the pleadings before us.

Agnew v. British Legal Life Assurance Company, Limited,⁵ was an action of damages against a company for a verbal slander uttered by one of their servants. The case was thrown out as irrelevant, on the ground that the statements complained of were not slanderous; but the Lord Ordinary (Ardwall) expressed the opinion that even on a contrary view the action could not be maintained against the company. His Lordship, after referring

¹ Since reported [1912] A. C. 716.

² L. R., 2 Ex. 259.

³ [1904] A. C. 423.

⁴ 7 F. 629.

⁵ 8 F. 422.

Nov. 6, 1912. to some of the reported cases, said—and I concur in his remarks:—"To hold that a company or corporation or other large employer is liable for all or any libellous language rashly used by anyone in their employment in the course of such employment would be to introduce an appalling extension of the law of defamation. I take it to be the sound rule that it is the person who utters or writes the defamatory matter who is alone responsible for it, and that it is only in very special circumstances that the principal may be held responsible for the language of his agent." The views thus expressed by Lord Ardwall were repeated and approved by this Division in *M'Adam*.¹ Other recent cases where actions against companies based on slanders by their servants have been thrown out as irrelevant are *Eprile v. Caledonian Railway Company*,² *Nicklas v. The New Popular Café Company, Limited*,³ and *Riddell v. Glasgow Corporation*.⁴ The pursuer's counsel sought to derive aid from *Riddell's* case.⁴ He pointed out that the ground upon which the House of Lords held the pursuer's record to be irrelevant was that the slander was uttered by the tax collector under circumstances in which he had no authority to express any opinion to the pursuer as to the genuineness, or the reverse, of her receipts; and he urged that here the slander was uttered by Brown under circumstances which not only authorised but bound him to state a reason for the pursuer's summary dismissal. There is nothing, I think, in this point. I do not see that Brown was bound to state a reason for the dismissal. As already said, it may be that the defenders are liable in the pecuniary consequences of that act; but assuming that to be so, it has no apparent connection with the uttering of the slander.

The only case, so far as I know, in which the Scots Court has allowed an issue against a corporate company in an action based on a verbal slander by its servant is *Finburgh v. Moss' Empires, Limited*.⁵ The case is an instructive one. I agree with Lord Ardwall when he said that "in applying the principle of liability to any particular case, the greatest care must be taken to secure that a principal is not made liable for a slander uttered by a servant or agent, unless it be made perfectly clear that the slander was uttered directly in the interests of the master's business and in the course of executing such business, and that the words or some of them complained of in any particular case were not merely the outcome of heated or hasty temper on the part of the servant, or spoken with a view to gratifying his own private spite or malice. . . . And not only must the words of the alleged slander be strictly scrutinised with the view of determining whether the expressions used were such that the principal can in fairness be held responsible for them, but it is incumbent on the pursuer in such action to set forth distinctly and specifically on record facts from which it may be inferred that the verbal slander complained of is a slander that should be held in law to be imputable to the principals, so as to justify the issue that it was a slander uttered by them by or through their servant."

¹ 1911 S. C. 430.

² 6 S. L. T. 65 (Outer House, Lord Kincairney).

³ (1908) 15 S. L. T. 735 (Outer House, Lord Mackenzie).

⁴ 1911 S. C. (H. L.) 35.

⁵ 1908 S. C. 928.

The words I have quoted seem to me not only to be sound, but to afford a Nov. 6, 1912, useful comment upon the present pursuer's record. I think the weight of the authorities to which I have referred, at perhaps too great length, goes to support the view I stated at the outset, that the action is irrelevant. I cannot see how Brown's slander can be held to be the Company's slander. It was uttered, it may be, in the course of his employment, but its utterance was not, in my judgment, in any true sense within the scope of that employment, nor for the purposes or the benefit of the defenders.

For the reasons now stated, I think we ought to recall the Lord Ordinary's interlocutor, sustain the defenders' first plea in law, and dismiss the action as irrelevant.

LORD SALVESEN.—This case raises an important question as to the liability of a corporation for a verbal slander uttered by a servant. The pursuer is a barmaid, and she was engaged as such by a Mr Brown, who was the manager of the defenders' hotel and bars at Princes Street Station, Edinburgh. Shortly stated, her averments are that Mr Brown, having conceived an ill-will against her because she refused to permit him to take certain liberties with her and on other grounds which need not be detailed, on 3rd February 1912 made certain statements to her, charging her in effect with misappropriation of the Company's funds, and suspended her from her duties; that two days later he dismissed her from the defenders' service, after repeating the slanderous statements already referred to. She avers that it was part of Mr Brown's duty to engage and dismiss as well as control the persons employed by the defenders at their station bars, and admits that the statement he made as to the cause of her dismissal is *prima facie* privileged. She seeks, however, to elide this privilege by averments of personal malice against Brown. In Cond. 12 she says: "The said slanderous statements were made by Mr Brown maliciously in order to gratify the ill-will which, in common with and as an intimate friend of Miss W., he had conceived towards the pursuer"; and again, "The said Mr Brown, though ostensibly dismissing the pursuer for dishonesty, knew well that it was a groundless charge, and himself afterwards gave information to the secretary of the defenders' Company upon which, as above narrated, he admitted in writing that the pursuer was not dismissed for dishonesty." Interlarded between these statements there are averments that Mr Brown acted recklessly without inquiry as to the truth or falsehood of the slanderous statements he made; but I am unable to see how these are consistent with the very pointed allegation that Mr Brown, in making the statements, knew that they were false, and made them for no other purpose than to gratify his own private spite.

I do not doubt that the pursuer's averments disclose a relevant case against Mr Brown if he had been the defender in the action. The question is whether they disclose any relevant case against the defenders as Brown's employers. It was decided in the case of the *Citizens' Life Assurance Company, Limited*,¹ that "a corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published

¹ [1904] A. C. 423.

Nov. 6, 1912. by its servant acting in the course of his employment." This decision was followed by this Division in the case of *Finburgh v. Moss' Empires, Limited*,¹ which, like the present, was an action based on a verbal slander of a privileged kind. In each of these cases, however, there were facts which in my opinion create a material distinction. In the *Citizens' Life Assurance Company*² the slander was published, not indeed with the employer's knowledge or consent, express or implied, but with the intention of benefiting his business. The writer of the letter had no object of his own to serve. His purpose was to counteract the mischief which the plaintiff, a former employee, was doing to the business of the company. In *Finburgh's* case¹ the slander complained of was uttered by an attendant in a theatre, part of whose duty it was to remove from the theatre women of immoral character. There was no allegation that the attendant acted otherwise than in good faith and in the intended performance of his duty towards his employers; but it was held that there were sufficient allegations that he had acted without due inquiry and without ordinary and reasonable regard to the character of the pursuer, so that a jury, if the statements were proved, might have drawn the conclusion that he had acted with such recklessness as to infer malice. The case is in this respect very analogous to those with which we are familiar of railway servants who, in the course of performing their duty of removing from the train a passenger who is travelling without a ticket, act with unnecessary violence so that their conduct in law amounts to an assault. For conduct of this kind the employers are responsible, because they have appointed the servants to perform this duty, and must take the risk of their performing it otherwise than in a lawful manner.

The present case does not appear to me to be ruled by either of these, the only reported cases in which an employer has been held responsible for a slander uttered by his servant. It is, of course, true that an employer may be liable for a criminal act of his servant which he has neither directly nor indirectly authorised. That was established by the case of *Barwick*³ where Willes, J., laid down the rule in terms that have often been quoted with approval. The ground of the decision there was that the fraud which gave rise to the action had been committed for the bank's benefit; and I apprehend that the judgment would have been otherwise if this fact had not been established. It may be that the words "for the master's benefit" must be construed as including a case where no actual benefit has been realised; but to my mind it is plain that they cannot be left out of account, and that the fraud of the servant for which the master may be liable must at least have been intended by the servant to effair to the master's benefit. If it were otherwise, all that would have to be proved would be that the servant had committed a crime in the ostensible performance of his duties although with the intention of benefiting himself personally, and, it may be, of injuring his employer. I know no principle which supports such a view; and indeed the contrary is implied in the reasoning by which the master's liability has been affirmed in the reported cases. In all of these the facts were either (first) that the wrongful act was committed in discharging a duty which

¹ 1908 S. C. 928.² [1904] A. C. 423.³ L. R., 2 Ex. 259.

the servant owed to his employer, or (second) that the wrong was deliberately planned with the definite intention of benefiting the master. Were it otherwise we should have to affirm the master's liability where (1) a coachman deliberately drove over a person or animal that he could easily have avoided; or (2) a railway servant made the performance of his duty in removing a passenger, whom he knew that he had no right to remove, a pretext for avenging a private injury; or (3) a bar tender threw a customer into the street because they differed on some political issue. Such liability has been expressly or impliedly negatived in the earlier cases of which *Gilespie v. Hunter*¹ *Robson*² and *Wardrope*³ are fairly typical. We were referred to the case of *Lloyd*⁴ where the judgment of the Court of Appeal has recently been reversed in the House of Lords, and the dissenting judgment of Vaughan Williams, L.J., given effect to. I see no difficulty in reconciling that decision with the views already expressed, although I do not find myself in entire accord with all the *obiter dicta* of the Judges. The view of the Lord Chancellor that a lawyer who employs a managing clerk to attend to the business of his clients contracts that he shall perform his duties faithfully and honestly was a sufficient ground for inferring responsibility. And I rather think that I should have reached the same result on the simple ground that the master had received the money of the client by the hands of a clerk and must account for it although it had in fact disappeared through the clerk's fraud. It is unnecessary, however, to pursue the matter further, because the decision has no bearing on the facts here. I have accordingly no hesitation in holding that the Lord Ordinary has erred in allowing an issue against the defenders, and that they are entitled to have the action dismissed.

LORD GUTHRIE.—I concur. This is a question of relevancy. It seems to me that the whole actings of Mr Brown which are complained of by the pursuer, namely, the dismissal, the slander, and the antecedent malice, are alleged to have been originated, and to have been carried out, by Brown, without any intention of furthering the purposes or interests, real or imaginary, of the defenders. It was suggested that the averments did not exclude the case of Brown having acted from a conviction that, in the interests of the defenders, either the pursuer or Miss W. must go, and that he thought Miss W.'s retention most in the interest of the defenders. But no such case is made by the pursuer. The only case on record involves the proposition that a limited company, defending an action of damages brought for a slander uttered by its manager in the course of his employment, loses its right to plead that the occasion was privileged, not because of any malice on the part of the company itself, or of any person or persons with a general and unlimited authority to act for it, but because the manager who uttered the slander did so knowing that the charge it contained was groundless, and solely with a view to revenge himself for a private grudge against the person slandered. This is the only case which the record discloses, and it seems to me that none of the cases cited, which have been fully commented on by

¹ (1898) 25 R. 916.

² (1876) 3 R. 876.

³ (1900) 2 F. 411.

⁴ [1911] 2 K. B. 489.

Nov. 6. 1912. your Lordships, support it. The pursuer's averments appear to me expressly to negative any case of mere recklessness or excess of zeal, in the real or supposed interests of the employer.

Aiken v.
Caledonian
Railway Co.

The LORD JUSTICE-CLERK concurred.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the first plea in law for the defenders, and dismissed the action.

ALLAN M'NEIL, S.S.C.—HOPE, TODD, & KIRK, W.S.—Agents.

No. 11. MRS MARY T. G. THOM OR GRANT OR HEATH, Pursuer (Reclaiming).—*M'Lennan, K.C.—Ingram.*

Nov. 6, 1912. MRS JANE E. BEATTIE OR GRANT AND OTHERS (William Grant's Trustees) AND ANOTHER, Defenders (Respondents).—*Cooper, K.C.—J. Smith Clark.*

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Succession—Heritable and Moveable—Jus Relictæ—Bond of trust company—Ex facie absolute assignation of bond in security of advances—Nature of cedent's reversionary interest.

A bond or deed of security of a trust company for £4000 bore that this sum was payable to A "or to his executors or assignees" at a term five years after its date, and that interest was to be paid by the company till repayment of the capital. A assigned this bond to the extent of £2500 to a bank; the assignation being *ex facie* absolute, but in reality (though there was no back-letter) in security of advances by the bank. On A's death his trustees paid up these advances, amounting to £1000, and obtained a re-assignation of the bond.

In an action to enforce her *jus relictæ* A's widow maintained that the bond was moveable; or, if this were not so, that *quoad* the £2500 A had, after the assignation, merely a claim for an accounting against the bank for the balance of that sum, and that this balance was therefore moveable.

Held that the widow was not entitled to *jus relictæ* to any extent out of the sum secured by the bond, in respect (1) that the bond was heritable *quoad* her claim; and (2) that the assignation to the bank did not alter the character of A's interest in the sum secured by the bond or any portion of it.

Executor—Incidence of debts—Liability of heritable bonds for debts—Debt secured on particular subjects—Succession—Jus Relictæ—Debts chargeable against jus relictæ fund.

A bond, which was moveable *quoad* the creditor's succession but heritable *quoad* his widow's *jus relictæ*, was assigned by him to a bank in security of advances.

Held (1) that, in a question with his widow claiming *jus relictæ*, the ordinary moveable debts of the deceased were chargeable solely against the fund available for *jus relictæ*, no portion of them being chargeable against the bond; but (2) that advances made by the bank on the security of the assignation formed a charge against the bond.

2D DIVISION.
Lord Hunter.

ON 25th May 1911 Mrs Mary T. G. Thom or Grant or Heath, with the consent and concurrence of her husband, Charles Johnstone Heath, brought an action against James H. T. Grant, the child of her former marriage with the deceased William Grant, farmer, Arbroath, and Mrs Jane Easton Beattie or Grant and others, the trustees acting

under William Grant's trust-disposition and settlement. The conclusions of the action were, *inter alia*, for declarator that the pursuer was free and entitled to elect to take her legal rights as widow of William Grant out of the whole estate of which he died possessed, and for count and reckoning, and for payment by the trustees of such sum as should be ascertained to be due by them as the balance of their indebtedness to her in name of *jus relictæ*, terce, and whole other rights as widow foresaid.

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On 31st January 1912 the Lord Ordinary pronounced an interlocutor finding that the pursuer was free to take her legal rights as widow of William Grant, and appointing the defenders as his trustees to lodge in process an account of their intromissions with his estate in order that the true balance due to the pursuer in name of *jus relictæ*, terce, and otherwise, from the estate might be ascertained.

An account was thereafter lodged by the trustees. In this account the amount of the moveable estate was brought out as £14,104, 5s., from which were deducted certain items including "bonds which are heritable as regards the widow, in virtue of the Act 1661, cap. 32, viz," two bonds or debentures of the Alliance Trust Company, Limited, for £1000 and £4000 respectively. These deductions being made, there remained a sum of £6604, 5s., from which were deducted in the account the debts due by the deceased per schedule of debts annexed to the inventory of the deceased's estate, funeral expenses, the expenses of confirmation, and other items, leaving a sum of £3289, 2s. 4d., which was available for, and to one-third of which the pursuer was entitled as, *jus relictæ*.

The bonds of the Alliance Trust Company for £4000 and £1000 were dated respectively 26th November 1907,* and 15th May 1908. Each bond contained an obligation by the company to pay interest half-yearly until the repayment of the principal sum. The term of repayment under the bond for £4000 was Martinmas 1912, and that under the bond for £1000 was Whitsunday 1912. Mr Grant died on 15th August 1909.

* This bond was in these terms:—"We, The Alliance Trust Company, Limited, a company duly incorporated under the Companies Acts, 1862 to 1886, grant us to have borrowed and received from William Grant, Baronhill, Forfar, the sum of Four thousand pounds sterling, which sum we bind and oblige ourselves to pay to the said William Grant, or to his executors or assignees, within our registered office at Dundee for the time being, at the term of Martinmas Nineteen hundred and twelve, or upon such subsequent day as may hereinafter be mutually agreed on, with a fifth part more of the said principal sum of liquidate penalty in case of failure, and the interest on the said principal sum at the rate of four per centum per annum to the term of payment before specified, and in the event of the said loan being continued as aforesaid, at such rate thereafter, for the period of such continuance as may be agreed on, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the term of Whitsunday next, for the proportion thereof which shall be due at that date, and the next payment of the same at the term of Martinmas following for the half year immediately preceding, and so forth by equal payments at the said two terms, yearly, termly, and continually thereafter, so long as the said principal sum shall remain unpaid, with a fifth part more of each of the said termly payments of liquidate penalty in case of failure in the punctual payment thereof. . . ."

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The pursuer lodged a note of objections to the defenders' accounts in which she stated, *inter alia*, the following objections:—(Obj. 1 (2)) "The bonds p. £1000 and £4000 with the Alliance Trust Company, Limited, are moveable estate, and would have been moveable estate according to the law prior to 16th November 1641. They ought, therefore, to be added to the *jus relictæ* fund." (Obj. 1 (3)) "To meet the event of the said bonds p. £1000 and £4000 being held not *per se* to form part of the fund for the pursuer's *jus relictæ*, it is explained that the bond p. £4000 was on 7th July 1909 assigned to trustees for the Royal Bank to the extent of £2500 by absolute assignation. An advance of £1000 was granted by said bank to the deceased on the faith of said assignation, and the bank undertook to account to the deceased and his executors for the balance of the sum recoverable by them under said bond after deducting the amount of the advance and interest thereon. The total amount of said advance at the date of deceased's death with interest accrued thereon was £1000 and interest £2, 10s. This sum forms a deduction from the sum recoverable by the bank under the bond assigned, and does not therefore fall to be deducted from or to diminish the fund for *jus relictæ*. Further, the balance of £1497, 10s. being a claim by the deceased against said bank is moveable as regards the deceased's succession. Pursuer is entitled to her third thereof." (Obj. 3) "The pursuer objects that the debts affecting the moveable estate are charged against the *jus relictæ* fund entirely; as the result of which the general moveable estate is relieved entirely of the debts which would naturally affect it. Pursuer claims that the debts which fall upon the executry fund should be borne by it proportionally, and that only a proportion thereof should be laid upon the fund which yields *jus relictæ*."

On 25th June 1912 the Lord Ordinary (Hunter) pronounced the following interlocutor:—" . . . (2) Finds that the bonds p. £4000 and £1000 respectively granted by the Alliance Trust Company, Limited, in favour of the deceased William Grant, do not pertain to the pursuer *jure relictæ* to any extent; (3) Finds that the pursuer is not entitled to claim *jus relictæ* out of the £2500 portion of the bond p. £4000, which the deceased on 7th July 1909 assigned in security of advances to trustees for the Royal Bank of Scotland, or out of the proceeds thereof in the hands of the bank or of the said trustees; (4) Finds that the said bank advanced to the deceased William Grant on the faith of said assignation £1000, and that the balance due by the deceased in respect thereof (after taking into account sums standing at the credit and debit of the deceased in the books of said bank), viz., £867, 15s., is a charge upon the portion of said bond p. £4000 assigned as aforesaid, and does not diminish the fund available for payment of *jus relictæ*; . . . (7) With reference to the third objection, finds that in a question with the pursuer the debts affecting the moveable estate fall to be borne entirely by the fund available for *jus relictæ*, and that exclusive of the said bonds p. £4000 and £1000, and all bonds and dispositions in security pertaining to the deceased William Grant: Therefore repels said objection"

* "OPINION.—In the course of the discussion which took place upon the objections for the pursuer and answers thereto for the defenders to the account, lodged by the defenders, showing the amount of the legal rights of the pursuer as widow of the late William Grant, a considerable number of

The pursuer reclaimed, and the case was heard before the Second Division (consisting of the Lord Justice-Clerk, Lord Dundas, and Lord Cullen) on 22nd October 1912.

Argued for the reclaimer;—(1) The bonds were moveable *quoad* the pursuer's legal rights. This appeared from the fact that the bonds were taken payable to Mr Grant and "his executors or assignees" (which meant his personal representatives or assignees¹); and this feature of the deeds distinguished the present case from *Dawson's Trustees v. Dawson*,² and *Bennett's Executrix v. Bennett's Executors*.³ *Downie v. Downie's Trustees*⁴ was distinguishable in respect that there, as appeared from the Scottish Jurist report, the term for repayment of the bond occurred during the husband's lifetime. (2) *Esto* that the bonds were not in themselves moveable, the assignation to the bank withdrew £2500 from the bonds; and, thereafter, Mr Grant's right in that sum was a "personal right consisting in obligations."⁵ He had then

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points were adjusted by the parties. As, however, there must be a material alteration in the account to which effect will fall to be given by agreement or remit, I think it right to take brief notice of all the objections. . . .

"The second head of the first objection raised the most important point that has to be determined. Part of the estate of the late Mr Grant consisted of two bonds for £4000 and £1000 respectively, granted by the Alliance Trust Company, Limited, in favour of Mr Grant, his executors or assignees. The defenders have left these bonds out of their statement of the fund available for payment of *jus relictæ* on the ground that by the common law of Scotland such bonds are heritable, and that, although by the Act 1661, cap. 32, they are made moveable for certain purposes, they remain heritable so far as the fisc and widow's claims are concerned. The pursuer, on the other hand, maintains that the bonds would have been moveable according to the law prior to 16th November 1641, the date taken in the Act 1661.

"The bonds are granted by a Scots company, and bear interest from their date, interest being paid periodically prior to the date stipulated in the bonds for repayment of the principal sum. Interest had in fact been paid on both bonds during Mr Grant's lifetime. According to the institutional writers—I quote from Erskine, ii. 2, 9—'Personal bonds bearing interest were, by a general rule of our ancient law, accounted heritable, as *quasi feuda* because, by the fixed yearly profits arising from them, they bore some degree of resemblance to rights properly feudal.' The author then points out that bonds payable on a determinate date are deemed moveable, as the creditor is presumed to have an intention of realising his bond upon that date. This rule also obtained where there was a stipulation for interest being paid along with the principal sum. 'But if the bond was so conceived as to make the term of payment of the interest prior to the term of payment of the bond the sum descended to the heir, if the creditor survived the period at which the interest fell first due, though he died before the principal sum was payable; because he was, after the first term of payment of the interest, presently entitled to a yearly profit on his bond, which was accounted sufficient to make the bond heritable.' These words appear to me to be entirely applicable to the two bonds in this case. The pursuer, however, relied upon the circumstance that the sums in the bonds are made payable to the executors or assignees of the creditor, no

¹ M'Laren on Wills (3rd ed.), vol. ii., p. 767.

² (1896) 23 R. 1006. ³ 1907 S. C. 598.

⁴ (1866) 4 Macph. 1067, 38 Scot. Jur. 554.

⁵ Union Bank of Scotland, Limited, v. National Bank of Scotland, Limited, (1886) 14 R. (H. L.) 1, per Lord Watson, at pp. 3 and 4.

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merely a right to call upon the bank to account to him for that sum. *Bartlet v. Buchanan*¹ was not in point, for there the assignee had granted a recorded back-bond. (3) The Lord Ordinary was right in holding that the debt to the bank was chargeable against the bond assigned to it, but he was wrong in holding that the bonds were not liable for any part of the testator's debts. The bonds were moveable *quoad* succession; the testator's debts were chargeable on his succession; and, therefore, the bonds must be made available with the rest of the estate in payment of the debts.

Argued for the respondents;—(1) The cases of *Downie*,² *Dawson's Trustees*,³ and *Bennett's Executrix*⁴ decided that bonds such as the present remained heritable as regards a widow's rights. (2) The question raised as to the £2500 was concluded against the reclamer by the decision in *Bartlet v. Buchanan*.¹ As the assignation here was in fact in security only, the absence of a back-bond was immaterial.

mention being made of heirs. She founded upon this as evidence that the creditor himself must be taken as having considered the sums in the bonds as moveable, and that therefore the rule as to their heritable character did not apply. I do not doubt that the ordinary destination in a personal bond was to A and his heirs, executors, or assignees. But the not mentioning of heirs does not exclude them; and I do not see why the destination actually used should not be read as giving the property to the executors in the event of there being no heir. The law as to the heritable character of personal bonds has been fully considered in the three cases of *Downie*,⁴ *Macph.* 1067, *Dawson*, 23 R. 1006, and *Bennett*, 1907 S. C. 598. In the first of these cases a mortgage by the Glasgow Waterworks Commissioners in favour of A B, his executors, administrators, and assigns, payable at a term three years after its date and bearing interest at 4 per cent payable half-yearly, was held heritable as regards the rights of the creditor's widow. There was, it appears, no expressed obligation to repay. Although this was so, the Lord President held that the mortgage was plainly of the character of an obligation to repay. I think the obligation was to repay those in whose favour the mortgage was granted, and that, therefore, I am bound by that case to hold the bonds of £4000 and £1000 heritable as in a question with the deceased's widow claiming her legal rights.

"The pursuer, however, maintains that as regards a portion of the bond for £4000 it ought to go to increase the fund available for payment of *jus relictae*. This argument arises in this way. On 7th July 1909 the deceased assigned this bond to trustees for the Royal Bank to the extent of £2500 by absolute assignation. Although in form absolute, the assignation was granted admittedly in security of advances to be made by the bank. At the date of his death the deceased was due a considerable sum to the bank. This sum was repaid by the defenders to the bank, who re-assigned the bond to them. The pursuer says that the effect of the transaction with the bank was that the deceased, after assigning the bond, had merely a right to an accounting from the bank so far as the £2500 is concerned, and that this claim for an accounting is moveable. The defenders, however, cited to me an old case, *Bartlet*, F. C., 21st February 1811, and 27th November 1812, as an authority for the proposition, which I think is sound, that where a debtor grants his creditors security for a debt, he does not thereby alter the character of the succession to him in the security subjects, or rather in his reversion thereto.

"In the last place, the pursuer argued that the debt to the bank ought

¹ Feb. 21, 1811, F. C., Nov. 27, 1812, F. C.

² 4 Macph. 1067, 38 Scot. Jur. 554.

³ 23 R. 1006.

⁴ 1907 S. C. 598.

(3) The bonds could not be used in paying any part of the testator's debts, for the effect of so doing would merely be to increase the amount of the reclaimer's *jus relictæ*.¹ What was due to the bank should also be levied on the general estate and not, as the Lord Ordinary held, on the bonds.² *Stewart v. Stewart*,³ which appeared to be against this contention, was only an Outer House decision.

Nov. 6, 1912.
Heath v.
Grant's
Trustees.

At advising on 6th November 1912, the opinion of the Court was delivered by

LORD CULLEN.—The pursuer and reclaimer is the widow of the late William Grant of Baronhill, Forfarshire, and the questions raised under the reclaiming note relate to the ascertainment of the amount of her *jus relictæ*.

Mr Grant, at the date of his death, held two bonds for £1000 and £4000 respectively, granted by the Alliance Trust Company, Limited, in favour of him and his executors or assignees. The date of the bond for £1000 is 15th May 1908, and the term of repayment under it Whitsunday 1912. The date of the bond for £4000 is 26th November 1907, and the term of

to be met out of the subjects assigned. The defenders place the whole of this debt on the fund available for payment of *jus relictæ*. No authority upon the question was cited to me by either party. By disposing the bond to the extent of £2500 and interest thereon absolutely to trustees for the bank, the deceased burdened the £4000 bond with payment of such advances as the bank might make to him. I think, therefore, that if he had made a special gift of the bond the legatee would have succeeded subject to the burden of payment, and would not have been entitled to call upon the executors to pay off the amount due to the bank. In Bell's Principles, sec. 1936, the author says,—‘The heir or executor paying a debt secured on a particular estate or laid on a particular heir is entitled to relief.’ The cases referred to in support of this proposition appear to deal with debts secured on land. I do not, however, see why the same rule should not apply where a valid burden has been created over moveable estate. If this is sound, I think that the executor paying the secured debt out of executry funds must, in a question as to the proper distribution of the estate among parties interested therein, place the debt upon the affected fund. I am therefore of opinion that what was due to the bank should, for the purpose of estimating the pursuer's *jus relictæ*, form a charge upon the proceeds of the bond for £4000 to the extent to which it was assigned to the bank.

“III. The pursuer complains that the defenders have charged the whole of the moveable debts of the deceased against the estate available to meet her claim of *jus relictæ*, and not against the general moveable estate. The result in the present case certainly seems hard upon the pursuer. The words of the Act 1661, cap. 32, are, however, that no part of such bonds shall pertain to the relict *jure relictæ* where the bonds are made to the husband. I think that the defenders are right when they say that these words can only be given effect to by treating the bonds in a question of apportioning debt as though they were heritable. To apportion any part of the deceased's moveable debts upon the bond would have the effect, contrary to the Act, of increasing the widow's *jus relictæ*. I therefore repel this objection.

¹ Ersk. ii. 2, 9, and 10; iii. 9, 22; Stair, iii. 4, 24; iii. 8, 47; Fraser on Husband and Wife (2nd. ed.), vol. ii., p. 985.

² Bell's Prins. (10th ed.) sec. 1877; McLaren on Wills, vol. i., p. 577.

³ (1891) 19 R. 310.

Nov. 6, 1912. repayment under it Martinmas 1912. Each bond contains an obligation for interest payable half-yearly until repayment of the principal sum.

Heath v.
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Trustees.

Lord Cullen.

The bond for £4000 was in 1909 assigned by Mr Grant to trustees for behoof of the Royal Bank of Scotland to the extent of £2500. The assignation was *ex facie* absolute. There was no formal back-letter. But it is common ground that the assignation was granted in security of advances by the bank to Mr Grant. After his death his trustees and executors paid up the debt due to the bank and redeemed the security.

The first question raised is whether the two bonds in question fall to be treated as part of the deceased's moveable estate in the computation of the pursuer's *jus relictæ*. The Lord Ordinary has answered this question in the negative, and I agree with him. Under each of the bonds the principal sum is repayable after a term of years, and there is an obligation for payment of interest half-yearly during that period. I think it is clear on the authorities that money so laid out on bond and bearing interest falls to be treated as heritable in a question with the widow, and excluded from computation in ascertaining the amount of her *jus relictæ*. The pursuer sought to make a point to the effect that the bonds were taken in favour of Mr Grant and "his executors or assignees," and not in favour of his heirs, executors, and assignees. I see nothing in this. The same element was present and founded on in argument in the case of *Downie*,¹ referred to by the Lord Ordinary. The bonds in question are, by statute, moveable save *quoad fiscum* and *jus relictæ*. They thus pass to the executor for distribution, although the distribution is governed by a rule different from that which applies to other parts of the moveable estate.

The next question relates to the transaction with the bank regarding the bond for £4000. To the extent of £2500 this bond was assigned by Mr Grant to the bank by way of security. It was redeemed by his trustees and executors on payment by them of the amount of the debt due to the bank. The pursuer maintains that, *esto* the bond was originally heritable *quoad jus relictæ*, the effect of the security transaction with the bank was to render it moveable to all effects to the extent of the balance of the £2500 after meeting the debt to the bank. The ground advanced for this contention was that, as Mr Grant had divested himself of the bond by an *ex facie* absolute assignation to the bank, there remained nothing *in bonis* of him but a money claim to the said balance. This appears to me, as it did to the Lord Ordinary, to be an untenable contention. The position at Mr Grant's death was that he was the radical owner of the bond for £4000 which he had encumbered with a security in favour of the bank. The right to the bond belonging to him and thus encumbered passed, on Mr Grant's death, in the same way as would have passed the unencumbered bond had no security been created over it in favour of the bank.

The next question (raised under the reclaiming note by the defenders and respondents) is whether the foresaid debt due to the bank falls to be charged against the £4000 bond on part of which it was secured, or against the moveable estate in which the pursuer is interested. The Lord Ordinary has held that it falls to be charged against the bond, and I agree with him.

¹ 4 Macph. 1067.

Had the security given for the debt to the bank been heritable there is, on Nov. 6, 1912. the authorities, no room for question that the heritage so burdened would have descended to the parties entitled to it in the succession of the deceased ^{Heath v. Grant's Trustees.} *cum onere*. The principle on which these authorities proceed appears to me to be equally applicable to encumbrances which have been specially imposed on moveable property of a deceased, as was held by Lord Kyllachy in the case of *Stewart*.¹

The next question relates to the mode in which the general debts due by the deceased, that is to say, debts which *ex lege* fall on his moveable succession in a question *inter hæredes*, have been treated in the trustees' account. The trustees have deducted the whole of these debts from the amount of the gross moveable estate as ascertained for the purpose of computing the *jus relictæ*. The pursuer's contention is that a rateable share of the debts should be borne by the bonds above mentioned. Now, in a question with the pursuer, these bonds fall to be treated as heritable, in the same way as they would have been prior to the Act of 1661, and the *jus relictæ* falls to be computed on that footing. That being so, it appears to me that, as the Lord Ordinary has held, the trustees are right in stating their account as they have done. Were the pursuer's contention to be given effect to, it would result in the amount of her *jus relictæ* being increased by the addition of a part of the two bonds which, in a question with her, are heritable and therefore excluded from computation.—[His Lordship then dealt with another question with which this report is not concerned.]

THE COURT adhered.

R. ARTHUR MAITLAND, Solicitor—J. & D. SMITH CLARK, W.S.—Agents.

GEORGE MUIRHEAD AND OTHERS (Dr and Mrs Claud Muirhead's Marriage-Contract Trustees), Pursuers and Real Raisers.—*Strain*.

No. 12.

ROBERT J. TORRIE AND ANOTHER, Claimants (Reclaimers).—

Nov. 12, 1912.

Macphail, K.C.—R. C. Henderson.

CAPTAIN CLAUD J. TORRIE AND OTHERS, Claimants.—

Muirhead's Trustees v. Torrie.

Macphail, K.C.—R. C. Henderson.

GEORGE MUIRHEAD AND OTHERS (Dr Claud Muirhead's Testamentary Trustees), Claimants (Respondents).—*Chree, K.C.—Cowan.*

Succession—Destination to "heirs and executors"—Period at which heirs ascertained—Vesting—Marriage-contract.

Under an antenuptial marriage-contract the trustees were directed to pay the income of the funds settled by the wife to her husband during his life should he survive her and, on the death of the survivor of the spouses, to pay these funds (1) to the children of the marriage if and when they attained majority; or (2) should the wife predecease her husband without leaving issue, or should issue survive her but predecease her husband without attaining majority, to such persons as the wife might appoint, and failing appointment, "to her heirs and executors whomsoever."

The wife died (without having made any such appointment), sur-

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vived by her husband and by one child. The child died in infancy during the lifetime of the husband.

On the death of the husband the funds were claimed (1) by his testamentary trustees, on the ground that the child, being also the wife's heir, had acquired a vested right therein, which had passed to the husband as its heir, and (2) by relatives of the wife as her heirs, at the date of (a) the child's death, or (b) the husband's death.

Held on a construction of the terms of the marriage-contract (*rev.* judgment of Lord Skerrington, *dub.* Lord Johnston), that the funds fell to be paid to the heirs of the wife as ascertained at the death of the husband.

Gregory's Trustees v. Alison, (1889) 16 R. (H. L.) 10, *distinguished*.

1st Division.
Lord
Skerrington.

BY antenuptial marriage-contract executed between Dr and Mrs Muirhead in 1873, Dr Muirhead made certain provisions for his wife in the event of her survivance, and undertook to pay £5000 to the children of the marriage on his death, if such children attained majority, in the case of sons, or attained that age or married, in the case of daughters. He also assigned to trustees a policy of insurance in trust to apply the proceeds thereof in payment of the above provision to the children; and, if there were no children alive at the dissolution of the marriage, or if the children predeceased the surviving spouse before attaining majority, or (in the case of daughters) marrying, then, if Dr Muirhead predeceased his wife, the trustees (after implementing the provisions in favour of Mrs Muirhead) were directed to pay the proceeds of the policy to Dr Muirhead's "executors or assignees whomsoever," and, if Mrs Muirhead predeceased, the trustees were directed to retrocess Dr Muirhead in the policy.

Mrs Muirhead (whose maiden name was Janet Jane Jameson Torrie), on the other hand, assigned to the same trustees her whole estate and effects "now belonging to her and which shall pertain and belong to her during the subsistence of the said intended marriage" in trust (1) to pay the income to her during her life; (2) if she predeceased her husband, to pay the income to him; (3) "upon the death of the longest liver of the spouses" to pay the funds to the "child or children to be procreated of the said intended marriage if they shall then have attained majority if a son or sons, or attained majority or be married if a daughter or daughters," in such shares as the spouses or the survivor of them should appoint, or, failing appointment, equally among them, declaring that if any child died before his or her share was payable that share should be paid to his or her issue, whom failing, to the surviving children; and (4) if the marriage was dissolved by the death of Dr Muirhead, without leaving issue, or if the issue died in the lifetime of their mother before attaining majority in the case of sons, or attaining majority or marrying in the case of daughters, the trustees were directed to pay the funds to Mrs Muirhead. The fifth purpose was in these terms:—"In the event of the said intended marriage being dissolved by the death of the said Janet Jane Jameson Torrie without leaving issue, or if the issue of the marriage shall all die during the lifetime of their father before attaining majority if a son or sons, or before attaining majority or being married if a daughter or daughters, that the said trustees shall, after the death of the said Claud Muirhead, pay over and convey the trust funds and property or the residue thereof held by them to such person or persons as the said Janet Jane Jameson Torrie shall by any testamentary writing or other deed or instrument

executed by her have directed and appointed, and failing such direction and appointment, then to her heirs and executors whomsoever." Nov. 12, 1912.

Mrs Muirhead died intestate, and without executing any such deed of direction or appointment, in 1874. The only child of the marriage, Janet C. M. Muirhead, died in infancy in 1875. Dr Muirhead died in 1910, leaving a trust-disposition and settlement. Muirhead's Trustees v. Torrie.

On the death of Dr Muirhead a multiplepointing was brought by the marriage-contract trustees to determine whether the funds settled by Mrs Muirhead, which consisted of moveable estate amounting to £5613, had vested (1) in her child, or (2) in her heirs other than her child, at (a) her death; or (b) the child's death; or (c) Dr Muirhead's death. Mrs Muirhead's heirs as at the date of her death or at that of her child were her brothers, Robert J. Torrie, Thomas J. Torrie, and Colonel Lawrence J. Torrie. Colonel Lawrence J. Torrie died in 1909, survived by children, and leaving a settlement in favour of his two brothers as his trustees. Mrs Muirhead's heirs, as at the date of Dr Muirhead's death, were Robert J. Torrie, Thomas J. Torrie, and the children of Colonel Lawrence J. Torrie.

A claim was lodged by Dr Muirhead's testamentary trustees, and another was lodged by Robert and Thomas Torrie as individuals, and as trustees of Colonel Lawrence Torrie.

Dr Muirhead's trustees maintained that the funds settled by Mrs Muirhead, not having been disposed of by her, vested in Janet C. M. Muirhead, her child and heir *ab intestato*; that, on the child's death, Dr Muirhead succeeded to the same as her heir; and that they were conveyed to the claimants as trustees by his settlement.

The claimants Robert and Thomas Torrie maintained that "the said child was not Mrs Muirhead's heir and executor within the meaning of the said destination; and that, under that destination, her brothers, who were her nearest relatives, were the heirs and executors to whom her estate was destined in the event of failure of children of the marriage. They also maintain that during the lifetime of the said child the right to Mrs Muirhead's estate under the said destination did not vest; and that *either* (1) on the death of the said child, the destination took effect, and the right thereunder vested at that date; and that Mrs Muirhead's brothers, who were then her heirs and executors, acquired a vested interest in her estate, settled in the said marriage-contract; or (2) *that vesting under the said destination was postponed till the death of the said Dr Muirhead, and that Mrs Muirhead's estate then fell to be divided and paid over in the proportions of one-third to each of her surviving brothers, and one-third to the issue of her brother who was then dead. As a further alternative,* these claimants maintain that the right to Mrs Muirhead's estate vested in the said Janet Catherine Mary Muirhead subject to defeasance in the event of her predeceasing Dr Muirhead before attaining majority or being married; and that the said event having occurred, her right was divested in favour of these claimants as Mrs Muirhead's heirs and executors." Their claim was:—"To be ranked and preferred to the whole fund in medio in the following shares, namely, one-third to the claimant Robert Jameson Torrie as an individual; one-third to the claimant Thomas Jameson Torrie as an individual; and one-third to the said Robert Jameson Torrie and Thomas Jameson Torrie as trustees under the trust-disposition and settlement of the deceased Colonel Lawrence Jameson Torrie; or, *otherwise, the claimants Robert Jameson Torrie and Thomas Jameson*

Nov. 12, 1912. *Torrie, as individuals, claim to be ranked and preferred, each to one-third share of the fund in medio.*"

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These claimants pleaded, *inter alia*;—(2) The said Robert Jameson Torrie, Thomas Jameson Torrie, and the deceased Colonel Lawrence Jameson Torrie, being the heirs and executors of Mrs Muirhead, to whom her estate was destined in the said marriage-contract failing issue of the marriage, the claimants should be ranked and preferred to the whole fund in medio, *in terms of the first alternative of their claim.* (3) The fund in medio having vested, on the death of the said Janet Catherine Mary Muirhead, in Mrs Muirhead's heirs and executors as at that date, the claimants should be ranked and preferred *in terms of the first alternative of their claim.* (4) *Separatim, the claimants Robert Jameson Torrie and Thomas Jameson Torrie, as individuals, being each entitled to one-third share of the fund in medio, ought to be ranked and preferred in terms of the second alternative of their claim.*

After the case was advised in the Inner House the claim for the claimants Torrie was amended by the addition of the words printed above in italics, and a claim was also lodged for the children of Colonel Lawrence J. Torrie to one-third of the fund *in medio* on the ground that Mrs Muirhead's heirs fell to be ascertained at Dr Muirhead's death, and that the fund was divisible into three shares, of which one was payable to these children, and one to each of Robert and Thomas Torrie.

On 14th November 1911 the Lord Ordinary (Skerrington) pronounced an interlocutor sustaining the claim for Dr Muirhead's trustees, and ranking and preferring them accordingly.*

* "OPINION.—The question in this action of multipointing and exoneration is as to the meaning and effect of a trust purpose or stipulation contained in the antenuptial contract of marriage, dated April 1873, entered into between the late Dr Claud Muirhead and Miss Jameson Torrie, afterwards Mrs Muirhead. There is nothing unusual either in the language of the contract or in its substantial provisions. The words to be construed occur in the fifth of the trust purposes relating to the property put in trust by Mrs Muirhead. These funds are said to be wholly moveable and to be now worth about £5600. In the events which have admittedly happened the trustees are now bound to pay and convey the wife's trust funds 'to her heirs and executors whomsoever.' The various events, the concurrence of which brings this direction into force, are—(1) the death of Mrs Muirhead before her husband and his subsequent death. She died in February 1874 and he died in June 1910. (2) The death of the whole issue of the marriage during their father's lifetime before attaining majority or marrying. The only child of the marriage, a daughter, died in infancy in 1875. (3) The failure of Mrs Muirhead to appoint 'by any testamentary writing or other deed or instrument executed by her' some person or persons to whom the trust funds should be conveyed. She executed no such writing either *mortis causa* or *inter vivos*. If Mrs Muirhead's 'heirs and executors whomsoever' are to be sought for at the time of her death the beneficial fee of the trust fund vested in her daughter as Mrs Muirhead's heir *in mobilibus ab intestato* to his daughter, and it now belongs to the claimants George Muirhead and others as Dr Muirhead's testamentary trustees. On the other hand, if the expression 'heirs and executors whomsoever' means the persons who would have been entitled to succeed to Mrs Muirhead as her heirs *in mobilibus ab intestato* if she had survived her child, then the parties designated must be sought for either immediately after the child's death in 1875, or alternatively as at the date of distribution in 1910. In either of

The claimants Robert and Thomas J. Torrie, as individuals and as trustees of Colonel Lawrence Torrie, reclaimed, and the case was heard before the First Division (without the Lord President) on 5th July 1912. Nov. 12, 1912.
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Argued for the reclaimers;—The construction put on the marriage-contract by the Lord Ordinary defeated the intention of the contracting parties as appearing in the deed, viz., that, failing issue of the marriage, Dr Muirhead's estate should pass to his family and that Mrs Muirhead's should pass to her family. Accordingly, at whatever date vesting was held to take place, the child was not entitled to take as heir or executor. Under the third trust purpose of the marriage-contract it was plain that children of the marriage could not acquire a vested interest until their majorities and until both of their parents were dead,¹ and the primary gift to the children being dependent on these conditions, it was highly improbable that the

these latter views the fund would belong to Mrs Muirhead's brothers, the claimants Robert Jameson Torrie and another. These two claimants are Mrs Muirhead's sole surviving brothers, and they also represent a third brother who died in 1909.

"The argument presented by the counsel for the Messrs Torrie was a very able one, but it proceeded upon what seems to me to be a fallacious assumption, viz., that the destination in favour of Mrs Muirhead's 'heirs and executors whomsoever' being merely testamentary, must be construed in the same way as if it had occurred in an ordinary will. The clause in question is undoubtedly testamentary in respect that it confers no contractual *jus quæsitum* upon the 'heirs and executors' (whatever that expression may mean) enforceable by them against the settler Mrs Muirhead. It is also testamentary in respect that the 'heirs and executors' might probably be entitled to confirmation in terms of section 3 of the Executors (Scotland) Act, 1900, as executors-nominate *qua* universal disponees of Mrs Muirhead. But the clause is primarily contractual. It forms part of a contract, one term of which compelled Mrs Muirhead to divest herself of the legal estate, possession, and control of her whole fortune, both present and future, in favour of trustees. Accordingly it was proper and natural that she should expressly stipulate as to the events on the occurrence of which she or her representatives should be entitled to a retrocession.

"I do not propose either to quote or to state in my own words the purport of the five trust purposes applicable to Mrs Muirhead's fortune. It is enough to say that, in my opinion, these purposes read as a whole and together show that the children of the marriage were not intended to acquire by contract any vested right to their mother's fortune except conditionally on their surviving both parents, and also attaining majority or marrying. If I am right so far, it follows that, notwithstanding the birth of a child of the marriage, Mrs Muirhead retained a vested right to the beneficial fee of her fortune under burden of her husband's contingent liferent and subject to divestiture in the event of a child of the marriage acquiring under the contract a vested right of fee. According to my reading of the marriage-contract Mrs Muirhead stipulated by purpose 5 that this vested right should pass to her assignees *inter vivos*, whom failing, to her assignees *mortis causa*, whom failing, to the persons who would have been entitled to succeed to her if she had died intestate. Such a stipulation seems to me very natural and also germane to a contract of the kind under consideration. It is, in my opinion, irrelevant to say that, in the absence of express stipulation, the law would have accomplished the same results. Mrs Muirhead was entitled to make her own bargain and to state it in express language. Further, if

¹ Bryson's Trustees v. Clark, (1880) 8 R. 142.

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parties should have intended that on the failure of these conditions the children should take as heirs. As to the destination to heirs, if there was vesting *a morte* under the destination, it must be in virtue of the principle of vesting subject to defeasance; but the application of that principle was confined to cases where there was no preferable object in existence between the claimant and his right but merely the chance of such an object coming into existence,¹ and, therefore, there could be no such vesting in the heirs during the lifetime of the child. The vesting in Mrs Muirhead's heirs was therefore necessarily postponed till the child's death, and the child could not take as heir. The heirs under a destination could be ascertained only at the date of vesting,² and hence, while the heirs of a testator were ascertained at his death where vesting was *a morte testatoris*, on the other hand where, as here, vesting was postponed till a subsequent date, the heirs could not be ascertained before that date.³ *Gregory's Trustees v. Alison*⁴ did not lay down any rigid rule of construction,⁵ and that case was distinguishable on the facts in respect that (1) there was there no trust conveyance, and (2) vesting was held to take place on the death of the predeceaser of the spouses. The Lord Ordinary was in error in holding that the rule of construction applicable to contractual provisions was different from that applied to testamentary gifts, and in any case the destination to Mrs Muirhead's heirs was really testamentary.⁶

purposes 4 and 5 had been left to implication it might have been argued that in the events which happened, viz., the birth and survival of only a single child, purpose 3 conferred upon that child a vested right as at birth subject to defeasance in favour of its own issue, if any.

"For these reasons, I do not think that this contract falls to be construed exactly in the same way as if it had been a will, nor do I see any unlikelihood in Mrs Muirhead making a stipulation in favour of her heirs *in mobilibus*. Even, however, if one were to write a will as much as possible on the lines of the contract I am not satisfied that there is any inconsistency between (1) a testamentary gift subject to a suspensive condition in favour of the children of the marriage who might attain majority or marry and survive both parents, and in favour of the issue of predeceasers, on the one hand, and (2) an immediate testamentary gift in favour of the whole children of the marriage who might survive Mrs Muirhead, but subject to a resolutive condition or defeasance in the event of the former gift coming into operation.

"I am of opinion, without reference to authorities, that Dr Muirhead's trustees fall to be preferred. There is, however, authority for the view that expressions such as 'heirs and executors' refer *prima facie* to persons answering this description at the date of the death of the *de cuius*. In the present case there is at best conjecture available to impose a secondary meaning upon technical legal language.

"For these reasons I sustain the claim for Dr Muirhead's trustees, and repel the claim for the Messrs Torrie."

¹ Gardner v. Hamblin, (1900) 2 F. 679, per Lord M'Laren, at p. 685.

² Thompson's Trustees v. Jamieson, (1900) 2 F. 470, per Lord Kyllachy, at p. 484.

³ Baillie's Trustees v. Whiting, 1910 S. C. 891; Johnston's Trustees v. Dewar, 1911 S. C. 722.

⁴ (1889) 16 R. (H. L.) 10.

⁵ Johnston's Trustees v. Dewar, 1911 S. C. 722, per Lord Kinnear, at p. 727.

⁶ Barclay's Trustees v. Watson, (1903) 5 F. 926, per Lord M'Laren, at p. 931.

Argued for the respondents;—Under the marriage-contract Mrs Nov. 12, 1912. Muirhead was not divested of her proprietary right in her estate except in so far as was required for the purpose of the contract, viz, ^{Muirhead's Trustees v. Torrie.} the provision to the children of the marriage.¹ As no child acquired a vested right under the contract, she retained the property in her estate, and as it was *in bonis* of her at her death, it passed (as would other property of which she had not disposed) to her heir *ab intestato*, namely, her child. The fourth and fifth purposes of the marriage-contract trust merely expressed what would have resulted under the law of succession had they been absent. The words “heirs and executors” were clearly words of succession. It was well settled that *prima facie* a testator’s “heirs and executors” were to be ascertained at his death,² and there was nothing in the present deed to displace that rule. Accordingly, the child being Mrs Muirhead’s heir, the right in the settled funds vested on her death in the child. All that could be urged against the respondents’ contention was that the child might have taken in another character. *Gregory’s case*,³ however, decided that there was immediate vesting in the child under a marriage-contract where that child was entitled to the funds both as child of the marriage and as heir under the destination-over to heirs failing children acquiring a vested right; and that decision was precisely in point. The cases relied on by the reclaimers were distinguishable. In *Baillie’s case*⁴ the question arose in regard to a destination of heritage, and other parties besides the heirs were called under the destination-over. The decision in *Johnston’s Trustees*⁵ turned upon the fact that the destination was to “next of kin,” which, unlike the word “heirs,” was not a designation referring to succession. Neither of these cases afforded any support to the reclaimers’ contention that an unnatural meaning should be attributed to words of succession such as “heirs and executors.”

At advising on 5th November 1912,—

LORD KINNEAR.—The question in this case depends upon the construction of a clause in the antenuptial contract of marriage between the late Dr Claud Muirhead and Miss Janet Torrie, who became his wife. I must regard it as a question of difficulty, since I have the misfortune to differ from the Lord Ordinary; but having considered it with the anxiety which that difference of opinion produces, I have come, for myself, to the conclusion that the clause in dispute expresses a perfectly simple and intelligible purpose in sufficiently plain language.

The Lord Ordinary has observed that it is material to consider that this question arises upon the construction of a marriage-contract and not of a will. But I do not know that that makes any material difference in the present case. I so far agree with his Lordship—although I do not draw the same inference as he does—that every passage which requires construction must be interpreted with due reference not merely to its immediate

¹ *Montgomery’s Trustees v. Montgomery*, (1895) 22 R. 824.

² *Gregory’s Trustees v. Alison*, 16 R. (H. L.) 10, *per* Lord Watson, at p. 14; *McDonald’s Trustees v. McDonald*, 1907 S. C. 65; *Haldane’s Trustees v. Murphy*, (1881) 9 R. 269, *per* Lord President Inglis, at p. 280; *Nimmo v. Murray’s Trustees*, (1864) 2 Macph. 1144.

³ 16 R. (H. L.) 10.

⁴ 1910 S. C. 891.

⁵ 1911 S. C. 722.

Nov. 12, 1912. context, but also to the main scope and purpose of the instrument in which it occurs. Now, if that be a sound view, the only observation which arises at the outset, with reference to the purposes of the deed in question, is that the scheme was that each of the spouses should settle funds, by ante-

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Lord Kinnear. nuptial contract of marriage, for the benefit of themselves and of the children of the marriage, and that on the failure of these purposes the funds settled by each should go to the settler, or his or her heirs or representatives, and not to the other spouse and the representatives of that other spouse. That seems to me to be the general scheme; but then I think that does not go very far, and we must determine the true meaning of the actual words used by Mrs Muirhead.

The facts to which we are to apply the provisions of the settlement in question are that the spouses married in 1873, and that the wife died in 1874 survived by the only child of the marriage, who died in infancy on the 13th February 1875. Therefore the wife died leaving a child who died in infancy. The husband survived until 1910, and during the period of his survivance the income of the funds settled by his wife was paid to him according to the provisions of the marriage-contract. The question arises now between the testamentary trustees of Dr Muirhead on the one hand, and the nearest heirs *in mobilibus* of Mrs Muirhead as at the date when Dr Muirhead died, on the other, as to which of these two competing parties is entitled to the funds settled by Mrs Muirhead.

Now, I think that depends upon the fourth and fifth purposes of that portion of the marriage-contract which contains Mrs Muirhead's settlement; and the true effect of these purposes is to be ascertained by interpreting the words used according to their ordinary and natural meaning. We must therefore consider the meaning of the provisions, in the first place, apart from any perplexities which beset the legal conceptions of vesting and the rules of construction which may have been established by previous decisions regarding other deeds.

The first question, and I think the last, is, What do the words in question mean? Now, by the third purpose the trustees are directed, on the death of the longest liver of the spouses, to "pay over or convey the said trust funds and property to the child or children to be procreated of the said intended marriage, if they shall then have attained majority if a son or sons, or attained majority or be married if a daughter or daughters; and if not, then upon their respectively attaining majority if a son or sons, or attaining majority or being married if a daughter or daughters." Now, I apprehend that that is quite clearly a conditional gift to the children. There is no direct gift to the children at all, but there is a direction to pay to them in a certain event, and in a certain event only,—if they attain majority, or, in the case of daughters, if they marry, then the trustees are to pay to them; and, so far, there is no other gift in their favour at all. Then, by the fourth purpose, it is declared, in case the marriage should be dissolved by "the death of the said Claud Muirhead without leaving issue, or if the issue of the marriage shall all die during the lifetime of their mother before attaining majority if a son or sons, or before attaining majority or being married if a daughter or daughters, that the said trustees shall pay over and convey the said trust funds and property or the residue thereof held by them to the

said Janet Jane Jameson Torrie." After that event, the whole money Nov. 12, 1912.
settled by her is to go back to her. Then comes the clause which is appli-
cable to the event which has happened, namely :—"In the event of the Muirhead's
said intended marriage being dissolved by the death of the said Janet Jane Trustees v.
Jameson Torrie without leaving issue, or if the issue of the marriage shall Torrie.
all die during the lifetime of their father before attaining majority if a son Lord Kinnear.
or sons, or before attaining majority or being married if a daughter or
daughters, that the said trustees shall, after the death of the said Claud
Muirhead, pay over and convey the trust funds and property or the residue
thereof held by them to such person or persons as the said Janet Jane
Jameson Torrie shall by any testamentary writing or other deed or instrument
executed by her have directed and appointed, and failing such direction and
appointment, then to her heirs and executors whomsoever."

Now the whole question is, How are the trustees to carry out that perfectly explicit direction? If the children had survived and attained majority, the trustees would have been in a position to convey to them. The children having failed to acquire any interest under the settlement by the death of the only child in infancy, then the trustees are directed, on the death of Dr Muirhead, to pay over the funds to the heirs and executors of Mrs Muirhead unless she has otherwise disposed of these funds by a last will and testament. The Lord Ordinary has held that under that provision no right under the contract of marriage vested in the children, and I entirely agree with him. I take it to be settled, as Lord President Inglis said in the case of *Bryson's Trustees v. Clark*,¹ that when nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event and not otherwise, and, failing him, to other persons as conditional institutes, then, if he does not survive the period, he takes no right under the settlement. But while I refer to the authority of that statement, at the same time, I desire rather in this case to consider what, according to the ordinary signification of language, this provision actually means; and I think it plain enough that it means that the children are to get nothing unless they survive their parents and attain majority, and, in case they do not, the trustees on Dr Muirhead's death are to pay the funds to the wife's heirs and executors.

But the Lord Ordinary has held that, notwithstanding that the marriage-contract gives nothing to the children, Dr Muirhead took a right upon his child's death as her heir *in mobilibus*, and that the right which he so took is carried by his testamentary settlement to his trustees. The question, therefore, is whether the wife meant that, in the event which has happened, the money was to go to the child's heirs, i.e., to Dr Muirhead and his relatives, or whether it was to go to her own heirs who must be different persons altogether. Now I take it that, upon a plain construction of the words, she did not intend that, in the event described, her money should go to the children's heirs, who would be quite different persons from hers and who would be in no way related to her, because, in the event supposed, the children's heirs must be the father or other heirs *in mobilibus* claiming through him. I think that such a disposition of the fund was necessarily

Nov. 12, 1912. what Mrs Muirhead intended to prevent, and she directs the trustees, therefore, in that event, to pay the fund not to the children but to "my nearest heirs and executors." It is said—and said quite truly—that in strict language nobody can have more than one heir or one body of heirs, and that is the person or class of persons to whom the succession opens after the death of the deceased. In strict language there is no other heir than that; and therefore it is said that you must inquire only who, according to the law of moveable succession, would have taken Mrs Muirhead's moveable estate as her heir in *mobilibus*. And the answer is that that must have been the child who died in infancy. But then, although that is a perfectly correct statement of law, the word "heirs," as we know in a great variety of cases, is not necessarily so strictly interpreted. I do not think there is any exposition in the institutional writers or by any of the lecturers on conveyancing explaining what is meant by the term "heirs" which does not begin by saying that it is a flexible term and that it means different things according to different circumstances. And therefore I should have no difficulty derived from the strict interpretation of the word to which I have adverted in holding that, when the settler in this case spoke of her nearest heirs and executors, she meant the persons who might stand in the relation of heirs and executors to her at a particular period—to wit, the period of her husband's death.

I do not think it is necessary to go further for authority for that interpretation than the case of *Gregory's Trustees v. Alison*,¹ upon which the respondents mainly based their argument, because in that case Lord Watson, in the passage to which our attention was specially directed by the respondents, laid down the canon of construction exactly in accordance with the view which I have indicated. He says, after examining two English cases decided in the House of Lords, that these were not Scotch cases, "but in neither did the judgment of the House proceed upon any specialty of English law, and the canon of construction which they recognise appears to me to be applicable to the language of a Scotch deed which has not acquired technical significance, and falls to be construed according to the intention of the maker." Now the provision that his Lordship was engaged in construing was a direction that in a certain special event the whole funds and estate settled by the husband should "fall to and become the property of his own (i.e., the husband's) nearest of kin." Lord Watson says these are not words which have acquired any technical significance, and therefore they must be construed according to the intention of the maker; and then he proceeds to state more specifically what the rule of construction is. He says it "is simply this, that in cases where a testator or settler, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. In my opinion the rule has no other effect than to attribute to the words used their natural and primary meaning, unless that meaning is displaced by the context."

¹ 16 R. (H. L.) 10.

Accordingly, we have to consider whether, in the clause under construction, what Lord Watson has called the primary meaning of the words is or is not displaced by the context. I think, in the first place, we have to consider this—that there is, as I have said, no direct gift to anyone. The gift is made in the form of an express direction to the trustees to pay and make over. Well, they are told to make over to the children if they survive; if not, to the nearest heirs and executors of the wife. I think that is a plain direction to pay to persons alive, and capable of taking, at the time it is carried out. It cannot mean that the trustees are to pay to the children. The children are dead. And there is no previous gift to the children which would enable the words to be construed as covering a gift to their heirs. The trustees are not told to pay to the heirs of the child. They are told to pay to the heirs and executors of the wife; and I take it that that expression, in the position in which it occurs in the deed, means something other than the children and the heirs of the children. If you pay to the heirs of the children, then, I apprehend, the plain purpose of the provision is defeated, the provision being intended to give the money to the wife's relations and not to the relations of the children. I therefore come to the conclusion that the true interpretation of the direction to the trustees is that they are to pay to the persons who, at the time when the gift takes effect, are the persons who stand in the relation of heirs *in mobilibus* to Mrs Muirhead, and these are the surviving brothers and the children of a deceased brother.

The case of *Gregory v. Alison*¹ was, in effect, decided in the opposite way from that in which I consider that this question should be decided; but then that was because the question of construction arose in a different way. In the first place, the conveyance to be construed in that case—a conveyance of the funds and estate belonging to Dr William Gregory—was to be found in a postnuptial contract of marriage, and the words of conveyance involved a direct gift to children already born and not to children *nascituris*. There was a direct conveyance of the estate in life to the surviving spouse and in fee to the children of the marriage; and there were children in existence and capable of taking at the time when the contract was executed. Then there followed certain declarations upon which the question in dispute really arose. In the first place, there was a reservation of power to the spouses severally to dispose of their own estate by testamentary writing; and, in the second place, there was a provision that in the event of there being no children alive at the death of the predeceasing spouse, or of the decease of all such children in the lifetime of the survivor, the estate belonging to the said William Gregory should fall and become the property of his own nearest of kin. Two questions were raised. One was whether the vesting in the children of the marriage, which had undoubtedly taken place, was subject to defeasance owing to the first of these two declarations; and the second was whether it was actually defeated by the second declaration, which provided that, in the event therein mentioned, the estate should go to the nearest of kin of Dr Gregory. The House of Lords held that it was defeated

¹ 16 R. (H. L.) 10.

Nov. 12, 1912. by neither, but, upon this ground, that there was undoubted vesting of the fee in the children, and that there was nothing in either of these clauses inconsistent with that vested right remaining undefeated. The only question which has any bearing upon that which we have to consider in the present

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Lord Kinnear. case was whether the ultimate gift to the nearest of kin of Dr Gregory was inconsistent with the idea of vesting having already taken place and still subsisting in the child who was his sole nearest, or one of the nearest, of kin; and the House of Lords held that it was not. On this point Lord Watson observes, "I can find nothing adverse to that interpretation of the deed" (i.e., the interpretation of the deed according to the primary meaning of its language) "unless it be the suggestion that it is improbable the spouses should have intended to make a direct conveyance to their children and also to include them in the destination to their 'nearest of kin.' That is a kind of probability which has frequently been put forward without success in cases of this description; and wherever it is, as here, unsupported by the context, it can only afford material for conjecture." But the ground for our construction of the present instrument is of a totally different character. It is not that it is improbable that Mrs Muirhead should have intended to include in the destination of her estate to her nearest "heirs and executors" children to whom she had already given birth. That is not the question. The question is whether she, by these words, intended to make a new gift to the children, to whom nothing had yet been given in the event which had occurred, and to defeat the gift which she had given to persons expressly in consequence of the failure of such children to survive the period at which they could take. The question is, When she said, "Pay to the children of the marriage if they survive to attain majority or marriage and not otherwise, and if they do not survive to attain majority or marriage then pay to my nearest heirs and executors," did she mean by that, "Pay to my children as my heirs and executors just as if they had survived and attained majority," or did she mean, "Pay to the persons who then stand in the relation of my heirs and executors"? I think that she meant her direction to be understood in the latter sense; and while I agree that the question is one of considerable difficulty, I think this conclusion is the only one which is consistent with the expressed intention of the deed.

I am not, however, able to follow the Lord Ordinary's argument, which is that, although there was no vesting in the children under the contract of marriage, the father's trustees nevertheless take through them. His Lordship seems to hold that, although there was nothing given to the children, their heirs *in mobilibus* may, nevertheless, take in the same way as if the funds had vested in them and been carried by succession to their heirs, because he holds that the right to the fee of Mrs Muirhead's fortune still remained in herself subject to divestiture only in the event of the children of the marriage acquiring a vested right to the fee under the contract. Accordingly, he sustains the claim of the respondents based on the view that Mrs Muirhead's estate remained vested in her, as if she had executed no marriage-contract at all, and passed by the ordinary laws of succession on her death. I cannot assent to that view of the case. Of course, if it were possible to say that all the trust purposes had lapsed because of there being no one to take under the provisions of the marriage-contract, then

the radical right of Mrs Muirhead would, no doubt, have survived. But Nov. 12, 1912. there is no lapsed trust so long as there is any effective direction to the ^{Muirhead's} trustees for the benefit of someone other than the truster. Here the truster ^{Trustees v. Torrie.} quite plainly directs her trustees to give to her children in a certain event, and in case that event does not occur, then to give to certain other people. ^{Lord Kinnear.} The only question, then, that seems to me to arise is, What did she mean by that conditional institution of others? If it is a gift in favour of ascertained or ascertainable persons, then it is a gift which takes effect by her own deed. She divested herself in favour of trustees for the benefit of ascertainable persons; and I cannot see, therefore, that there is any room for the theory that the estate is to be treated as intestate succession of Mrs Muirhead at her death.

I am very sensible of the inconvenience which may be occasioned—and always must be occasioned—by holding, as I do, that the vesting of a right settled by will or by marriage-contract is suspended for an indefinite period. But I do not think we have anything to do with the consideration of that question. I do not think that we can ascribe to the settler an intention to make a complete and logical scheme which will, in all probable events, result in the most convenient disposition of her estate. In my opinion we can only ascribe to her the intention to do what she did, namely, to provide for a certain event in terms which are clear or become clear when the deed is construed; and if there be no difficulty in the application of her language to the event which has occurred, we have no concern with the questions which might have been raised in other events which do not come within the meaning of the words.

On the whole matter, I am prepared to uphold the claim of the Messrs Torrie; but I think the record will require to be amended. It follows from what I have said that I think the persons favoured are the nearest heirs in *mobilibus* of Mrs Muirhead at the time when the direction in their favour takes effect; and therefore I rather imagine there will be no practical difficulty or difference in the working out of that view, because the children of Colonel Lawrence Torrie will take under the law of moveable succession and not under their father's settlement, as would be the case if the heirs were ascertained at an earlier date.

LORD JOHNSTON.—I also have experienced great difficulty in coming to a decision in this case, and, having had the advantage of reading and considering the opinion to be delivered by my brother Lord Mackenzie (in which your Lordship in the chair intimated to me your concurrence) and fully recognising the weight of the argument on which that opinion proceeds, I should have been prepared to accept your Lordships' judgment. But in respect that that judgment is a reversal of the Lord Ordinary, I feel bound to say that, had I been sitting alone, I should have come to the same conclusion as his Lordship has done, though perhaps on somewhat different grounds, and that I still have considerable doubt as to the propriety of reversing his decision.

I do not propose to enter, in these circumstances, at length upon the case. I think that the result of the five heads of Mrs Muirhead's side of the marriage-contract is, as stated by the Lord Ordinary, that the

Nov. 12, 1912. children of the marriage took no *jus quæsitum*, under the contract, in their mother's estate unless they attained majority or, if daughters, married, and unless they survived their last surviving parent. But in the event of that not happening, Mrs Muirhead reserved a right to dispose of her own estate at will, and failing her executing any dispositive deed, left it to go to her heirs and executors whomsoever. It may be said that the law of intestacy is not left to operate *ipso jure*, but that it is invoked. But the reclaimers have to maintain something different, and perhaps more difficult, viz., not that the law of intestacy is invoked, but that there is a substitution, not of the lady's heirs and executors whomsoever, but of those who would have been her heirs and executors had she survived the date of her own death by the space of, as it so happened, thirty-six years. Lord Watson has said in *Gregory's case*,¹ that it is an accepted rule "That in cases where a testator or settler in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour." I doubt extremely whether any such expressions can be found here. Personally I am not aware of any case, though, having regard to Lord Watson's language, I assume they must have occurred, in which, not being concerned with a destination of heritage, they have been found. One case indeed was referred to—*Lord Hawke's case*,²—which, so far as the minority opinion goes, is an exception. But though I think I should myself have concurred in the very weighty opinion of Lord Kyllachy, concurred in by Lord Adam and by your Lordship in the chair, the result, and it must not be forgotten that it is the conclusion of a minority of the Court, is arrived at on consideration of a set of provisions wholly different from the present. And the contrast appears to me to support the view I am inclined to hold in the present case rather than the reverse. I feel that to extract indications of "a different intention" from Mrs Muirhead's provisions goes perilously near making a will for her, merely because the natural result of what she has said is, we are all agreed, not what she would most probably have desired had the present situation of matters been fully before her mind; though I can imagine another set of circumstances in which, could she have been appealed to, she would have greatly regretted that such a conclusion must perforce—for different circumstances raising the same question would not justify a different judgment—have been reached. Had the circumstances been that Miss Muirhead, instead of dying as an infant, had survived and married, but though reaching say, even the age of thirty-five, had died childless survived by her husband and father, she would have been debarred on your Lordship's judgment from settling anything on her husband—can we be sure that that result would have been what Mrs Muirhead really intended? My doubts are indeed strengthened by the consideration that the same judgment must, as I have said, fit all sets of circumstances which might have occurred. Here is another set. Mrs Muirhead might have left no

¹ 16 R. (H. L.), at p. 14.

² *Thompson's Trustees v. Jamieson*, 2 F. 470.

child, and her husband have survived her for the same thirty-six years. Nov. 12, 1912. Her heirs and executors of 1874 presumably would not be, and in fact were not, those she would have left had she survived till 1910. Could it then have been contended that Mrs Muirhead intended, by a provision expressed as that in question, to effect the disheirison of her heirs and executors in the natural acceptation of the term, and the holding up of her estate for the benefit of those who would have been her heirs had she lived as long as her husband. I desiderate expressions which clearly indicate an intention to give a non-natural and unusual meaning to the words used, and not finding them, I prefer the natural and usual.

I do not enter into a consideration of the authorities beyond saying that in my opinion the case is wholly distinguishable from *Lord Hawke's* case,¹ but that the decision in *Gregory's* case,² which I read somewhat differently from your Lordship in the chair, is much more nearly in point.

It is for these reasons that I entertain the grave doubts which I have ventured to express.

LORD MACKENZIE.—The decision of this case depends upon the construction to be put upon the fifth purpose of the marriage-contract. The reclaimers say that Mrs Muirhead's heirs and executors whomsoever are to be found as at the date when the marriage-contract trustees are directed to pay over the trust funds. The respondents maintain that the heirs and executors are to be ascertained as at the date of her death.

The view of the Lord Ordinary is that the fifth purpose as it occurs in a contract is not to be construed in the same way as if it had been in a will. In my opinion the duty of the Court in either case is to find out what was meant by the language used. After having made careful provision in the preceding purposes for the issue of the marriage in the events therein contemplated, the fifth purpose provides for the events which did happen, viz. :—(1) The dissolution of the marriage by the death of the wife ; and (3) The death during the lifetime of the father of the issue of the marriage before attaining majority or being married. It was in contemplation of these events, which have happened, that the further provisions of the fifth purpose were made. These were obviously intended to provide for a situation which had not previously been dealt with. It was on the occurrence of these events that the trustees, who held the funds, were directed after the death of the husband to pay over the trust funds in accordance with the instructions which follow, that is to say, either to such person or persons as the wife should by any testamentary writing or other deed or instrument executed by her have directed and appointed, and, failing such directions and appointment, then to her "heirs and executors whomsoever." We were referred to the case of *Gregory's Trustees*² as an authority for the proposition contended for by the respondents that *prima facie* the term "heirs and executors" is descriptive of a class to be ascertained on the death of the wife. Lord Watson, however, points out that the general rule applies only in the absence of expressions indicating a different intention.

¹ *Thompson's Trustees v. Jamieson*, 2 F. 470.

² 16 R. (H. L.) 10.

Nov. 12, 1912. It was argued by the respondents' counsel that to interpret the term "heirs and executors" as referring to any other period than the death of the wife was to give the words a non-natural meaning. I do not think so. The direction is to pay after the death of the husband to the "heirs and executors" of the wife. The natural meaning of this direction as used in the marriage-contract appears to me to be that the word "heirs" means the heirs of the wife at the date when the payment is to be made. It was argued that the last words of the fifth purpose indicate no intention on the part of the wife other than this, that if the whole of the preceding purposes fail she wished her funds to go as the law directs, *i.e.*, to her heirs *in mobilibus ab intestato*. This is really to ascribe to the words no meaning at all, because without them the same thing would have happened. According to the argument submitted on behalf of the reclaimers, the last words operate as a clause of return to Mrs Muirhead's own family. This I think was what was intended, and I think the language of the clause is sufficient to give effect to the intention. It is not probable that, after making careful provision for the various contingencies in relation to the issue of the marriage under which vesting was postponed, it was intended by the last words of the fifth purpose to vest the fee in the issue of the marriage on their mother's death. If the fee of the wife's funds did so vest, then Dr Muirhead would have been entitled immediately on the death of his daughter to have demanded a conveyance of the trust funds and to have terminated the trust. This is contrary to the main provisions of the contract. No doubt Mrs Muirhead might have executed a testamentary writing by which she could have given a vested right to her daughter, but this does not tell against the construction of the clause according to which it was contemplated that the appointment by will should be to some person or persons other than the issue of the marriage. If this is not the true construction it is difficult to see why the power of appointment by will should be expressed to be contingent upon the predecease of the issue of the marriage. There have no doubt been cases in which it has been held that there was vesting in the child of the marriage by virtue of an ulterior destination to the father's next of kin. *Gregory's Trustees*¹ was such a case. In that case however the postnuptial marriage-contract was in different terms. There was no conveyance to trustees but a direct destination to those entitled to take. The provision there as regarded the whole funds and estate belonging to the husband was that they "shall fall to and become the property of his own next of kin." That case therefore is not inconsistent with the view I take of the true meaning of the contract here.

As is pointed out by Lord Kyllachy in *Thompson's Trustees*² there is not any legal anomaly in ascertaining the heirs of a deceased person otherwise than at the time of his death. In such cases as the present the question is not technical but simply one of intention. I am accordingly unable to agree in the view taken by the Lord Ordinary, and am of opinion that the claim for Robert Jameson Torrie and Thomas Jameson Torrie, which however requires amendment, should be sustained. One-third will go to the family of Colonel Lawrence Jameson Torrie, as representing their father,

¹ 16 R. (H. L.) 10.

² 2 F., at p. 484.

and thus being heirs *in mobilibus*. They do not take under their father's settlement, as he died in 1909 and therefore predeceased Dr Muirhead who died in 1910.

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ON 12th November 1912 the Court pronounced the following interlocutor:—"The Lords having considered the reclaiming note for the claimants Robert Jameson Torrie and another against Lord Skerrington's interlocutor of 14th November 1911 and heard counsel for the parties, and having also considered the note for Captain Claud Jameson Torrie and others, No. 20 of process, and claim for them, No. 21 of process, allow said claim to be received: Recall said interlocutor: Repel the claim for George Muirhead and others, trustees of the deceased Dr Claud Muirhead, No. 6 of process: Sustain in the second alternative the claim of the said claimants Robert Jameson Torrie and another, No. 7 of process, as amended at the bar: Sustain also the said claim for Captain Claud Jameson Torrie and others, No. 21 of process, and remit to the Lord Ordinary to rank and prefer the said parties accordingly, and to proceed as accords. . . ."

MELVILLE & LINDESAY, W.S.—WALLACE & GUTHRIE, W.S.—Agents.

HURST, NELSON, & COMPANY, LIMITED, Pursuers (Respondents).—

No. 13.

D. P. Fleming.

SPENSER WHATLEY, LIMITED, Defenders (Objectors).—*J. R. Christie.*

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Expenses—Taxation—Fees to counsel—Statements prepared for use of counsel—Fees to local agent acting as witness.

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Whatley,
Limited.

In a complicated action with regard to the maintenance, reconstruction, and hiring of railway wagons, the proof lasted twelve days, and there were two adjournments, each of some months' duration. The successful party having obtained decree with expenses, the Auditor, in taxing his account, allowed (1) fees of thirty guineas to senior counsel for the first day of the proof and for the first day's resumption of the proof after each adjournment; (2) charges for tabulated statements, prepared for the use of counsel, of facts and figures compiled from the books and other documents in process; and (3) fees as an ordinary witness to the successful party's Glasgow agent.

Objection having been taken to these three items, the Court *sustained* the objection to the allowance of thirty guineas to senior counsel, and in lieu thereof allowed twenty-five guineas, but with regard to the other objections *refused* to interfere with the Auditor's decision.

Is cross actions, which were conjoined, between Hurst, Nelson, & Company, Limited, Motherwell, and Spenser Whatley, Limited, London, arising out of a number of contracts for the maintenance, reconstruction, and hiring of railway wagons, a proof was led which lasted twelve days, with adjournments on two occasions during its course, on the first occasion from 28th May till 19th October 1909, and on the second occasion from 23rd October 1909 till 18th January 1910.

The merits were disposed of on 9th March 1910 by an interlocutor in the Outer House, with a finding as to expenses modified to three-fourths, in favour of Hurst, Nelson, & Company, the pursuers in the

1ST DIVISION.

Nov. 12, 1912. principal action. Spenser Whatley, Limited, the defenders, reclaimed, and on 8th March 1911 the First Division varied the Lord Ordinary's interlocutor in certain particulars, and repeated his Lordship's finding as to expenses, modified however to one-half.*

Hurst,
Nelson, & Co.,
Limited, v.
Spenser
Whatley,
Limited.

The Auditor having reported on the pursuers' account of expenses, the defenders presented a note of objections to his report in which they stated, *inter alia*, the following objections:—

Objection I., to fees of thirty guineas allowed to senior counsel for the first day of the proof and for the first day of each resumption thereof after adjournment. They maintained that each of these fees was excessive to the extent of five guineas.

Objection II., to the allowance of charges with reference to certain numbers of process, viz., [omitting the sums charged]:—"153. Framing statement from Spenser Whatley's Truck-running Books (Nos. 73 and 74 of pro.) and Working Rly. Wagon Book showing when wagons at Spenser Whatley's depots in 1905-06, and 07, and calculation. 29 shs. figs. 3 copies thereof 29 shs. figs. ea. 154. Framing statement of runnings of wagon No. 686 from 1st Jan. 1904 to 15th April 1909 taken by Hurst, Nelson from Spenser Whatley's Working of Running Wagons Books D. and E. (Nos. 77 and 78 of pro.) and from Truck Running Books (Nos. 73 and 74 of pro.). 7 shs. figs. Three copies thereof. 7 shs. figs. ea. 216. Framing history of repairs and repainting of wagons belonging to Spenser Whatley, Ltd., executed by Hurst, Nelson, & Co., Ltd., during currency of the contracts for repairs, 356 large folio and figured. Three copies thereof, Do. 221 and 222. Framing (2) statements from invoices and Spenser Whatley's Repair Books showing repairs and paintings since December 1907 to April 1909—together, 254 shs. figs. Three copies thereof, 254 shs. figs. ea. 241. Framing statement of comparison of reports . . . by Mr Crosbie Turner, writer, Glasgow. 75 shs. figs. Three copies thereof. 75 shs. figs. ea." The objectors stated:—"The said items are objected to *in toto* as not being necessary or competent evidence in the case—the books from which they were compiled being there to speak for themselves, and the documents charged for not having been competently proved—and as not being properly chargeable as judicial expenses against an opponent. These documents are spoken to only by Mr Crosbie Turner, the local solicitor in the case, who does not speak to them except as collated from other documents; and they are rather of the nature of criticisms on evidence or memoranda explanatory of evidence than themselves evidence."

Objection VI., to the allowance of two guineas a day for five days, and expenses, to Mr Crosbie Turner, the pursuers' Glasgow agent. The objectors stated:—"Mr Turner was in attendance as the pursuers' law-agent and gave his evidence on 18th January 1910, and the defenders therefore object to more than one day being charged, and submit that the above £10, 10s. should be disallowed to the extent of £8, 8s., and also that the above £2 for expenses should be reduced to the first-class railway fare of 7s. 6d., and therefore disallowed to the extent of £1, 12s. 6d."

Parties were heard before the First Division (without the Lord President) on 19th October 1912.

* The circumstances of these cross actions are narrated in the report of a subsequent action between the same parties, *Hurst, Nelson, & Company, Limited, v. Spenser Whatley, Limited*, 1912 S. C. 1041, at p. 1042.

The argument for the objectors is disclosed in their submissions, Nov. 12, 1912, quoted *supra*. They referred to the undernoted authorities.¹

Argued for the respondents;—(1) The case was a peculiarly heavy and complicated one, and £7000 was at stake in the cross actions. The proof was lengthy, and demanded examination of details during eight or ten years with reference to hundreds of wagons. The fees, therefore, allowed to senior counsel were not unreasonable in view of what had been laid down in the most recent decision as the true test, viz., remuneration upon the case as a whole.² The case of *Goodwins, Jardine, & Co., Limited, v. Brand & Son*³ was distinguishable, because in that case the proof was short and the case was not nearly so complex as the present. In a case more nearly comparable with this one fees which, taken over all, were substantially the same as the present had been allowed.⁴ (2) The alternative to preparation of the statements objected to would have been to supply, for counsel and the Court, copies of great masses of documents and of books which were withdrawn from process for current business, and this would have led to much greater expense. (3) As the respondents were only entitled to charge for the attendance of their Edinburgh agents as agents, the Auditor had properly treated their Glasgow agent as an ordinary witness.

At advising on 12th November 1912,—

LORD MACKENZIE.—The first of these objections relates to the fees allowed to senior counsel in the Outer House. The proof lasted twelve days, during which there were two adjournments, the first from 28th May till 19th October, and the second from 23rd October to 18th January following. In addition to a fee of ten guineas for consultation prior to the proof the Auditor has allowed thirty guineas for the first day of the proof, and the same fee for the first day of each of the adjourned diets. The defenders object to these three latter fees as excessive to the extent of five guineas each. The question of the principle to be applied by the Auditor in dealing with counsel's fees was under consideration by this Division of the Court in the recent case of the *Caledonian Railway Company v. Glenboig Union Fireclay Company, Limited*.⁵ It was there laid down that the question of counsel's fees must, within certain limits, always be a question of degree, and that they must be considered not necessarily with a view merely to the day for which the fee is allowed but with a view to remuneration for the case as a whole. It was there recognised that there are certain limits, and no case could be referred to in the argument in this case in which a fee larger than twenty-five guineas had been allowed to senior counsel by the Auditor as against an unsuccessful litigant for the first day of a proof. While reserving

¹ *Goodwins, Jardine, & Co., Limited, v. Brand & Son*, 1907 S. C. 965; *Earl of Kintore v. Pirie*, (1903) 11 S. L. T. 216; *Dobell, Beckett, & Co. v. Neilson and Another*, (1905) 12 S. L. T. 747.

² *Caledonian Railway Co. v. Glenboig Union Fireclay Co., Limited*, 1912 S. C. 511.

³ 1907 S. C. 965.

⁴ *Boyd & Forrest v. Glasgow and South-Western Railway Co.*, 1911 S. C. 1050.

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Limited.

Nov. 12, 1912. my opinion on the question whether in any case a larger fee than twenty-five guineas should be allowed, I am of opinion that there is not sufficient cause
 Hurst, Nelson, & Co., for a larger fee being allowed here for the first day. This is what was
 Limited, v. allowed in the cases of *Goodwins, Jardine, & Company*¹; *Earl of Kintore*
 Spenser v. *Pirie*²; and *Boyd & Forrest v. Glasgow and South-Western Railway*,³
 Whatley, all exceptionally heavy cases. It necessarily follows that no larger fee
 Limited. should be allowed for the other days in question. In coming to this con-
 Lord Mac- clusion full weight has been given to the fact that the fees of only two
 kenzie. counsel have been allowed. Therefore, without saying anything that will
 in the least weaken the principle laid down in the *Glenboig* case,⁴ I am of
 opinion that the first objection should be sustained.

The second objection relates to a group of charges for certain statements made up for the purposes of the proof. The argument against these statements may be summarised thus: That they were a mere digest of documents already in process; that although they might have been of use to counsel yet they are not such as form a legitimate charge against an opponent; that certain of them contained matter which was of the nature of criticism or comment on evidence already led, and that the documents were unnecessary and not proved. Obviously the extent to which the preparation of such documents is legitimate must depend entirely on the circumstances of the particular case in hand. We are able to judge of the circumstances of this case because there was a hearing in the Inner House extending over many days. Certain of the matters in dispute in the Outer House were not reopened, as the facts had been sufficiently ascertained to enable the parties to realise which side was right, but it was evident from the documents laid before us that it was essential to collect and tabulate the materials in order to present the case to the Court in an intelligible state, and to avoid an amount of detail which would have been intolerable. I have examined the productions here objected to and, keeping in view especially the claim of damages made by Spenser Whatley & Company of £2751, I am unable to take the view that the Auditor should have disallowed any of them. Those which were objected to with most effect are Nos. 221, 222, and 241 of process, especially No. 241. If I had been able to take the view that these were papers prepared for the purpose of presenting in print what were really points in argument, or of the nature of comment or criticism, they would not have been allowed. I do not so regard them. On a consideration of the proof I think that the statements referred to are sufficiently proved. It was argued that in any view the charge should be limited to copying fees only, and that drawing fees should not be allowed. I do not think we should interfere with the discretion of the Auditor in such a matter. If the documents are allowed I think it necessarily follows that it was legitimate to make the number of copies allowed in practice. This objection should therefore, in my opinion, be repelled. . . .

Objection six is to allowances made to Mr Turner, the Glasgow agent of the pursuers. It was, however, explained that there were not in the account any charges for Mr Turner's attendance as agent, and that he had been dealt

¹ 1907 S. C. 965.² 11 S. L. T. 216.³ 1911 S. C. 1050.⁴ 1912 S. C. 511.

with on the same principles as a party who appears as a witness in the Nov. 12, 1912. cause and is entitled to be treated as an ordinary witness. The Auditor was, I think, right in taking this view of the sixth objection, which should therefore be repelled.

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Limited.

LORD KINNAR concurred.

LORD JOHNSTON.—I also concur. But I should like to add that while I accept the consideration which guided the Court in the case of *Caledonian Railway Company v. Glenboig Union Fireclay Company*¹ as a most important consideration in determining the proper fees to be paid to counsel, and one which is quite properly applicable to the present case, I do not think it by any means the only consideration, and I do not suppose your Lordship intends to represent it as such. I think there are other considerations, which have been taken into account in the cases which have been before the Court, especially in the course of the last few years, and it is on consideration of all of these cases that I have come to the same conclusion as your Lordship.

THE COURT sustained the first objection and reduced the fees in question to twenty-five guineas each; and, subject to that deduction, decerned in favour of the pursuers for the taxed amount of their account of expenses.

P. GARDINER GILLESPIE & GILLESPIE, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF
EDINBURGH, Petitioners (Respondents).—*Morton.*

No. 14.

THE UNION BILLPOSTING COMPANY, LIMITED, Respondents
(Reclaimers).—*A. J. P. Menzies.*

Nov. 12, 1912.

Company—Winding-up—Process—Winding-up order pronounced by the Lord Ordinary on the Bills in vacation—Reclaiming note—Competency—Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), sec. 181.

Magistrates
of Edinburgh
v. Union
Billposting
Co., Limited.

It is competent to reclaim against an interlocutor pronounced by the Lord Ordinary on the Bills in vacation granting an order for the compulsory winding-up of a company.

ON 17th July 1912 the Lord Provost, Magistrates, and Council of 1ST DIVISION. the city of Edinburgh presented a petition for the compulsory winding-up of the Union Billposting Company, Limited.*

¹ 1912 S. C. 511.

* The Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), enacts:—

Sec. 135. "The Court having jurisdiction to wind up companies registered in Scotland shall be the Court of Session in either division thereof, or, in the event of a remit to a permanent Lord Ordinary, that Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills."

Sec. 181. "(1) Subject to rules of Court, an appeal from any order or decision made or given in the winding up of a company by the Court under this Act shall lie in the same manner and subject to the same conditions as

Nov. 12, 1912.

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The Company lodged answers, and on 3rd August 1912 the Lord Ordinary officiating on the Bills in vacation (Kinnear) pronounced an interlocutor ordering the Company to be wound up.

The Company reclaimed, and on the calling of the case in Single Bills of the First Division on 16th October 1912, counsel for the petitioners objected to the competency of the reclaiming note, and argued;—A winding-up order pronounced by the Lord Ordinary on the Bills in vacation was equivalent to an order pronounced by one of the Divisions,¹ and was therefore final so far as the Court of Session was concerned. If an interlocutor granting such an order was reclaimable, the provisions of the Act with reference to winding-up proceedings during vacation would be rendered nugatory.

Argued for the reclaimers;—The Act contained in section 181, subsection 2, when read with the Fourth Schedule, an exhaustive statement of orders pronounced by the Lord Ordinary on the Bills in vacation which were not to be subject to review, and it followed that every order other than those therein specified was subject to review. An order for the winding-up of a company was not among those specified, and therefore it could be reclaimed against.

At advising on 12th November 1912,—

LORD PRESIDENT.—The Lord Provost, Magistrates, and Council of the city of Edinburgh, presented a petition in the ordinary form for the winding-up of the Union Billposting Company, Limited. The usual order for intimation and service having been pronounced, the petition came before the Lord Ordinary on the Bills in vacation after the *inducis* had expired, and his Lordship, on 3rd August, pronounced an interlocutor ordering the Company to be wound up. This is a reclaiming note against that interlocutor; and the point was taken, for the petitioners, that the reclaiming note was incompetent.

an appeal from any order or decision of the Court in cases within its ordinary jurisdiction.

(2) Provided, in regard to orders or judgments pronounced in Scotland by the Lord Ordinary on the Bills in vacation, that—

- (i.) No order or judgment under the provisions of this Act specified in the first part of the Fourth Schedule to this Act shall be subject to review, reduction, suspension, or stay of execution; and
- (ii.) Every other order or judgment (except as hereinafter mentioned) shall be subject to review only by reclaiming note, in common form, presented within fourteen days from the date of the order or judgment.

Provided that orders or judgments under the provisions of this Act specified in the second part of the Fourth Schedule to this Act shall, from the dates of those orders or judgments, and notwithstanding any reclaiming note against them, be carried out and receive effect until the reclaiming note is disposed of by the Court."

The Fourth Schedule, Part I., is headed, "Orders pronounced in vacation in Scotland which are to be final," and Part II. is headed, "Orders pronounced in vacation in Scotland which are to take effect until reclaiming note disposed of." A winding-up order is not included among the orders enumerated in either part of the Schedule.

¹ 8 Edw. VII. cap. 69, sec. 135; London County and Westminster Bank, Limited, 1911 S. C. 1073.

The jurisdiction of the Lord Ordinary to wind up a company depends upon the 135th section of the Companies (Consolidation) Act 1908. That section has already been under judicial interpretation,¹ and, in accordance with the decision there given, there is no question that the Lord Ordinary has jurisdiction to pronounce an interlocutor ordering the winding-up of a company. But section 135 *per se* does not deal with the competency of a reclaiming note against such an interlocutor. That, however, is dealt with by section 181, which says that "Subject to rules of Court, an appeal from any order or decision made or given in the winding up of a company by the Court under this Act shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction." "The Court" there, means the Court of Session in either Division, and it would mean that the ordinary rules apply that apply to appeals to the House of Lords. Where, however, the Court is described as the Lord Ordinary during session or, in time of vacation, the Lord Ordinary on the Bills, that introduces the ordinary rules as to reclaiming notes against decisions of Lords Ordinary; and undoubtedly a reclaiming note is competent against any interlocutor of the Lord Ordinary on the Bills.

But section 181, subsection (2), contains a special proviso as regards orders or judgments pronounced by the Lord Ordinary on the Bills in vacation in the following terms :—[His Lordship quoted the subsection].

Now, when you come to the schedule you find: "Part I. Orders pronounced in vacation in Scotland which are to be final": and among the orders enumerated there you do not find an order directing the winding up of a company. In the same way, in Part II., again—which enumerates orders "to take effect until reclaiming note disposed of"—you do not find it. It seems to me that the statute has dealt specially with those things which it thought necessary to deal with specially. And this particular case is not one of the cases which are dealt with specially. And then, for everything else, it says that the ordinary rules for reclaiming notes are to obtain. It follows, therefore, I think quite clearly, that this reclaiming note is competent.

LORD KINNEAR.—I am entirely of the same opinion. I think the matter is clearly and conclusively provided for by section 181.

LORD JOHNSTON.—In this application for compulsory winding-up of the Union Billposting Company, the Town-Council of Edinburgh, as chargers on an extract decree, on 18th July 1912 obtained an order for intimation. Answers were lodged by the Company, but the Lord Ordinary on the Bills, vacation having commenced, having considered the petition and answers, on 3rd August granted an order for compulsory winding-up. The Company on 15th August reclaimed. Is the reclaiming note competent, or is the Lord Ordinary final, so far at least as this Court is concerned?

The Court having jurisdiction to wind up companies registered in Scotland is, under the Companies Act, 1908, section 135, in time of vacation the

¹ London County and Westminster Bank, 1911 S. C. 1073.

Nov. 12, 1912. Lord Ordinary on the Bills, for he takes the place both of the Division and, in event of a remit, of the permanent Lord Ordinary.¹

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Co., Limited.

Ld. Johnston.

It was, I think, accepted that the orders of the permanent Lord Ordinary, where there has been a remit, would be subject to review in ordinary course, unless the Act contained some distinct proviso to the contrary. Not only does it not do so, but it makes the subjection to review of such interlocutor matter of express enactment. For section 181, subsection (1), says that an appeal from any order or decision made or given in the winding-up of a company by the Court under this Act shall lie in the same manner and subject to the same conditions as an appeal from any order of the Court in cases within its ordinary jurisdiction. The Court, where there is a remit, is the permanent Lord Ordinary. And though "appeal" is not, in the ordinary language of our Courts, the appropriate term for the process of review of a Lord Ordinary's order or decision, it is made quite clear that it is used as equivalent to "process of review." For subsection (3) goes on to provide that the mode of reviewing a permanent Lord Ordinary's order, &c., shall be limited to reclaiming note presented within fourteen days.

Now if the order or decision of a permanent Lord Ordinary sitting in session, and fully seized with the business of the liquidation, is yet subject to review, it would be an unexpected result of these provisions regarding the Court having jurisdiction in winding-up, and would on general considerations be anomalous, that the order or decision of the Lord Ordinary on the Bills, called in *ad hoc*, during vacation, and having no necessary acquaintance with the business and progress of the liquidation, should, as contended by the respondents in the reclaiming note, be final. If it was so intended, one would expect to find some very precise declaration to that effect. Instead of that we have in subsection (2) the provisions, first, that no order of the Lord Ordinary on the Bills specified in the first part of Schedule 4 to the Act shall be subject to review; and second, that every other order shall be subject to review, only by reclaiming note presented within fourteen days. As the order in question is not among those specified in the first part of Schedule 4, this would appear to conclude the question. But then it is said that the second provision is coupled with the rider that orders or judgments of the Lord Ordinary on the Bills specified in the second part of Schedule 4 shall not be stayed by reason of a reclaiming note being taken against them. The order in question is not among the orders so specified. But this does not lead to the result that it is not reviewable, but only to the result that if brought under review in the mode defined by the statute the ordinary consequence follows, viz., that its effect is stayed till the reclaiming note is disposed of.

LORD MACKENZIE concurred.

THE COURT repelled the objection to the competency of the reclaiming note, and sent the case to the Roll.

Sir THOMAS HUNTER, W.S.—ARTHUR C. M'LAREN, Solicitor—Agents.

¹ London County and Westminster Bank, 1911 S. C. 1073.

WILLIAM GORDON, Pursuer (Appellant).—*M'Lennan, K.C.*—
D. M. Wilson.

No. 15.

ROBERT MACKENZIE, Defender (Respondent).—*A. M. Hamilton*—
James Stevenson.

Nov. 15, 1912.

Gordon v.
Mackenzie.

Reparation—Negligence—Dangerous animal—Vicious dog—Contributory negligence—Patting unknown dog.

In an action of damages brought against the owner of a dog for personal injuries caused by its biting the pursuer, the defender maintained that the pursuer had been guilty of contributory negligence in that he, although the dog was unknown to him, had patted it.

Held that this did not amount to contributory negligence, and damages awarded.

Proof—Proof of facts subsequent to raising of action—Damages for injuries caused by dog—Proof of dog's conduct subsequent to raising of action.

In an action of damages brought by a person bitten by a dog against its owner, *observed, per* the Lord Justice-Clerk, that evidence of attacks made by the dog on other persons after the date of the raising of the action was admissible for the purpose of showing that the dog was of a vicious disposition.

In May 1911 William Gordon, shoemaker, Cromarty, with the consent of his father as his curator-in-law, brought an action in the Sheriff Court at Cromarty against Robert Mackenzie, hotel-keeper, Balblair, near Invergordon. The pursuer's claim was for £100 as damages for "personal injury sustained by pursuer through a dog belonging to the defender, and which he well knows to be of a vicious nature, being negligently allowed to be unchained or [not] kept in proper custody, and which on 9th April 1911 as pursuer was standing on the public road near defender's residence at Balblair, attacked him and severely bit him on the cheek and lips and tore his clothes."

The pursuer pleaded, *inter alia*;—(1) The pursuer having been bitten by a dog which belonged to the defender, and which was known by him to be of a vicious disposition, he is entitled to compensation for his injuries from the defender.

The defender pleaded, *inter alia*;—(2) The pursuer having interfered with and irritated the defender's dog, and the said dog having hitherto been of a quiet and friendly disposition, the action should be dismissed, with expenses.

A proof was allowed. In the course of the proof the pursuer proposed to lead evidence that the dog had bitten a lady on 22nd December 1911. The defender's agent having objected to this evidence on the ground that the incident had happened since the raising of the action, the Sheriff-substitute (MacWatt) sustained the objection.

The facts established in the proof are set forth in the following interlocutor pronounced by the Sheriff-substitute on 24th January 1912:—"Finds (1) that on the occasion libelled, and on the public road, the pursuer was severely bitten by the defender's dog, which was known to the defender to have bitten other persons previously, and to be vicious; (2) that the defender was in fault in allowing the dog to be at large; (3) that the pursuer, who was a stranger to the dog, was patting the dog at the moment of the occurrence; (4) that the pursuer was in fault in so doing; (5) that the pursuer has

2D DIVISION.
Sheriff of Ross,
Cromarty, and
Sutherland.

Nov. 15, 1912. failed to show that the injury sustained by him, was, in the circumstances, directly attributable to the fault of the defender: Finds, therefore, in law that the defender is not liable in damages to the pursuer; therefore assoilizes the defender from the conclusions of the writ. . . ."

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The pursuer appealed to the Court of Session, and the case was heard before the Second Division on 15th November 1912.

At the hearing counsel for the respondent ultimately admitted that they were unable to maintain that the appellant in patting the dog had been guilty of contributory negligence.¹

LORD JUSTICE-CLERK.—This case divides itself into two parts, as all cases necessarily do where there is an allegation that the pursuer has contributed by his own negligence to the accident that happened. As regards the second part of the case—namely, the question of contributory negligence—it was not in the end contended on behalf of the defender that there was such negligence on the part of the pursuer; and in any case I am very decidedly of opinion that the Sheriff-substitute erred in holding that there was anything of the kind.

The dog apparently was in the habit of being outside the door of the defender's house and of wandering about the street. Now, if the dog was dangerous—and that is the assumption we must proceed on on the question of contributory negligence—it was wrong to allow it to go about the streets

* "NOTE.— . . . I come to the conclusion that in point of fact the pursuer was patting the dog when the thing occurred. In so acting towards a dog to which he was a stranger I think he was doing a rash thing, and was in fault. No prudent person will touch another's dog in the street unless he knows that it is of an amiable character. Many a dog, if touched by a stranger, will bite—either through fear or vice—which would not if left alone. Now the effect of pursuer's action is, in my opinion, this—that it is impossible to say that the dog would have bitten had pursuer not interfered with it; and it is, therefore, impossible to affirm that the damage was directly due to the fault of the defender. It is, of course, equally impossible to say that the occurrence was in fact due to the pursuer's contributory negligence, as the bite might have been given even had pursuer not touched the dog. But it is, in my opinion, a case where *sibi imputet* applies. As the pursuer has failed to show that he was injured directly through the fault or negligence of defender, the defender falls therefore to be assoilized. I regret this result, because pursuer was rather severely bitten, and will be marked for some time, if not for life. If I had decided in his favour I should have assessed the damages at £35. . . ."

¹ At the hearing the following cases were cited by the appellant:—(1) *As to the liability of the owner of an animal for injuries caused by it.*—Burton v. Moorhead, (1881) 8 R. 892; Cowan v. Dalziels, (1877) 5 R. 241; Hennigan v. M'Vey, (1882) 9 R. 411; Smillies v. Boyd, (1886) 14 R. 150, as contrasted with Daly v. Arrol Brothers, (1886) 14 R. 154; Renwick v. Von Rotberg, (1875) 2 R. 855; M'Donald v. Smellie, (1903) 5 F. 955; Charlwood v. Greig, (1851) 3 Car. & K. 46; May v. Burdett, (1846) 9 Q. B. (Ad. & Ellis, New Series) 101; Worth v. Gilling, (1866) L. R., 2 C. P. 1; Filburn v. People's Palace and Aquarium Co., (1890) 25 Q. B. D. 258; Baker v. Snell, [1908] 2 K. B. 825. (2) *As to contributory negligence.*—M'Martin v. Hannay, (1872) 10 Macph. 411, *per* Lord Neaves, at p. 413.

The respondent cited Harris v. Mobbs, (1878) 3 Ex. D. 268.

alone. All that can be maintained against the pursuer on the evidence Nov. 15, 1912. upon that matter is that he had stretched out his hand to pat the dog or had actually patted it. That is said to be a thing that nobody should do to an unknown dog on the street. I cannot assent to that for a moment. The public are entitled to expect that a dog that is allowed to wander about the street unattended is not a dangerous dog; and I cannot hold that a person who when a dog approaches him pats it or puts out his hand to pat it, either from friendliness or it may be in order to conciliate it, is guilty of contributory negligence.

The pursuer being free from blame, the only other question is whether the defender is at fault in allowing such a dog to wander about the street. [His Lordship reviewed the evidence, and found that the dog bit the pursuer and was, to the knowledge of the defender, dangerous.]

I should like to say, however, before closing, that I think the Sheriff-substitute erred in not allowing the evidence of the witness which was objected to because the incident on which her evidence was based happened after this action was raised. I think that, in order to prove that a dog is a vicious dog, it is perfectly competent to show that it not only committed the act complained of but that it did similar things to other people and put them in danger, the tendency of this evidence being to indicate that the act complained of was not an isolated incident, such as may happen once in the lifetime of a well-behaved dog, but that the dog was disposed to be vicious. I hold that that is evidence that the Sheriff-substitute should have allowed. But I think there is enough in the evidence to enable us to decide the case without getting the evidence of this lady. I therefore move your Lordships to alter the judgment of the Sheriff-substitute.

LORD DUNDAS.—I am of the same opinion, and on the same grounds. I agree with your Lordship in holding that it is sufficiently proved by trustworthy evidence that the defender's dog was a dangerous dog, and that that was known to him. Now, if that is so, it is well settled that a man who chooses to keep a dog of that character keeps it at his own peril, and that if it bites anyone he will probably be liable for the consequences. Therefore I quite agree with the learned Sheriff-substitute so far as his first and second findings are concerned.

In the Court below the defender set up a case of contributory negligence. When a defender does this, I apprehend the burden of proof is upon him, and that that burden is exactly similar to the original burden which rested on the pursuer at the beginning of the case. This being so, I think that on the facts the defender has entirely failed to discharge the burden. The alleged fault of the young man is that he patted this dog. The Sheriff-substitute lays it down that "no prudent person will touch another's dog in the street unless he knows that it is of an amiable character." If that be intended as a statement of personal opinion, or as a practical rule of wise conduct with regard to dogs, I should be disposed to agree with it; but if it is put forward as a doctrine affecting the law of civil liability for negligence upon which we are to proceed, then I demur to accepting the doctrine. It is obviously a matter on which opinions may differ; but the Sheriff-substitute seems to have reached his conclusion on the ground that there is

Nov. 15, 1912. a legal rule to the effect stated in the sentence I have quoted, for just before it he says that the pursuer was patting the dog and that "in so acting towards a dog to which he was a stranger, I think he was doing a rash thing, and was in fault." I am unaware of any case, and none was cited, where contributory negligence was held to have been established upon so slender a basis as that which is here suggested. The point was quite properly maintained by junior counsel at our bar, but his senior frankly admitted that the Sheriff-substitute's decision on this point was untenable. Accordingly, I disagree with the fourth finding of the Sheriff-substitute. Instead of that, we should find that the defender has failed to prove that the pursuer's actings materially contributed to the occurrence, and award damages. I agree in thinking that £35 is a fair sum to award.

LORD SALVESSEN.—I concur with your Lordships on the same grounds.

LORD GUTHRIE.—I also agree.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, and recall the said interlocutor appealed against: Find in fact in terms of the first three findings in fact in the said interlocutor appealed against, and find in fact (4) that the defender has failed to prove that the pursuer materially contributed to the injury sustained by him: Find in law that the defender is liable to the pursuer in damages: Therefore assess the same at the sum of £35, and decern."

R. CUNNINGHAM, S.S.C.—MACKENZIE & WYLLIE, W.S.—Agents.

No. 16. JOHN S. BOYLE (Owner of the Steam Trawler "Glenogil"), Pursuer
(Reclaimant).—*Burn Murdoch*.
Nov. 15, 1912. FRED OLSEN (Owner of the S.S. "Balduin"), Defender (Respondent).
Boyle v. —*Horne, K.C.—Lippe*.
Olsen.

Expenses—Tender—Order for proof coinciding with tender—Expenses of preparation for proof—General Regulation No. 3 appended to Act of Sederunt 15th July 1876.

The pursuer of an action obtained an order for proof but, before the interlocutor granting the order was signed, the defender lodged a tender. The tender having been accepted decree was granted in terms thereof, the pursuer being found entitled to expenses.

Held (rev. judgment of Lord Dewar) that, an order for proof having been pronounced, the Auditor was entitled to include among the expenses allowed to the pursuer the expense incurred by him in preparation for the proof.

1ST DIVISION. (REPORTED *ante*, 1912 S. C. 1235.)

Lord Dewar.

In conjoined actions at the instance of two separate pursuers against the owners of the s.s. "Balduin" the defenders, having made a tender to the pursuers jointly in settlement of their claims, were required, if they desired to make their tender valid, to apportion the sum tendered between the pursuers.

Thereafter, in one of these actions, which was at the instance of John S. Boyle, owner of the steam trawler "Glenogil," against Fred Olsen, the owner of the "Balduin," the Lord Ordinary delayed pro-

nouncing an order for proof for three days to allow the defender an opportunity of considering what revised tender he was prepared to make. Nov. 15, 1912.
Boyle v.
Olsen.

No tender having been lodged, on 16th July 1912 an order for proof was granted, but before the interlocutor was signed by the Lord Ordinary a minute of tender was lodged by the defender. The tender having been accepted by the pursuer, an interlocutor was pronounced by the Lord Ordinary officiating on the Bills, on 21st August 1912, granting decree in terms of the tender and acceptance, and finding the defender liable to the pursuer in expenses up to the date of the lodging of the tender.

The defender lodged a note of objections to the Auditor's report on the pursuer's account of expenses, in so far as he had allowed certain charges for preparations for proof.*

On 31st October 1912 the Lord Ordinary (Dewar) sustained the defender's objections and granted decree for the taxed amount of expenses less the sum objected to.

The pursuer reclaimed, and the case was heard before the First Division on 15th November 1912.

Argued for the reclamer;—The lodging of the tender was in fact subsequent to the granting of the order for proof; but, even if it were not, the expenses fell, in the circumstances, to be taxed as if that order had been duly pronounced.¹ Accordingly the charges for preparing for proof—which could not be delayed as the salved ship was a foreign one—fell, in terms of the General Regulations,² to be

* The items in the pursuer's account of expenses which were the subject of objection were as follows :—

“Preparations for Proof.

1911.

Decr. 4. Instructions for precognitions, ...	£1 11 6
Meeting and instructing Mr David Anderson, consulting engineer, to value the 'Balduin,'	0 10 0
Paid him fee, ...	4 4 0
Drawing precognition, 1 sh., ...	0 3 0
Meeting and instructing Mr John Rust to value the cargo of the 'Balduin,'	0 10 0
Paid him fee, ...	3 3 0
Drawing precognition, 1 sh., ...	0 3 0
Meeting and instructing Captain W. L. Main to survey damage to 'Glenogil,'	0 10 0
Paid him fee, ...	3 3 0
Drawing precognition, 1 sh., ...	0 3 0
Drawing precognition of Captain Rix, 5 shs., ...	1 10 0
Drawing precognition of F. A. Morton (mate), 5 shs., ...	1 10 0
Three copies precognitions, 13 shs., ...	1 19 0
	£18 19 6"

¹ Mica Insulator Co., Limited, v. Bruce Peebles & Co., Limited, 1907 S. C. 1293.

² No. 3 of the General Regulations appended to the Act of Sederunt 15th July 1876 provides: "The expenses to be charged against an opposite party shall be limited to proper 'expenses of process,' without any allowance (beyond that indicated in the Table) for preliminary investigations, subject to this proviso, that precognitions (so far as relevant and necessary for

Nov. 15, 1912. allowed. *Walker v. Barclay*¹ was an Outer House decision and was not binding.

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Argued for the respondent;—The Lord Ordinary was right in sustaining the objections to the Auditor's report, for the Auditor had failed to exercise his discretion. He had apparently regarded himself as bound by the over-strict interpretation which he had put on the terms of Regulation 3. The pursuer was aware, when enrolling for an order for proof, that the defender was considering the apportionment of the joint tender, previously made, and the tender was being signed when the motion was made for an order for proof. Expenses of preparation for proof could not be *bona fide* incurred if a tender, which it was known was being considered, was made simultaneously with the order for proof.¹ If these expenses, then, were not *bona fide* expenses of preparation for proof, they were expenses of preliminary investigations, and such expenses could not be charged against an opponent.² Even if chargeable, they were not in conformity with those allowed by the Table of Fees.³

LORD PRESIDENT.—I think this is a very clear case, and that the Auditor here was quite right. I do not think the Lord Ordinary would have interfered with the Auditor unless he had thought he ought to be influenced by the opinion of Lord Salvesen in the Outer House in the case of *Walker v. Barclay*.¹ Of course a decision of one Lord Ordinary in the Outer House does not bind another Lord Ordinary. But I need not say anything about Lord Salvesen's decision, because I think each of these cases must be decided upon its own merits. That this case comes within the words of the Act of Sederunt, 15th July 1876, I have no doubt. Here there was an order for proof pronounced, and I am quite willing to give the defenders the benefit of the doubt and to treat the tender as synchronous with the order for proof being pronounced. By an order for proof it is shown that the case demanded proof if the facts were not admitted, and I think the meaning of the Act of Sederunt is quite clear that by an order for proof being pronounced it is shown that there was a case requiring investigation. That being so, when expenses are found due to the pursuer the intention is that that should carry the expenses of investigations so far as necessary, even although those investigations were made prior to the order for proof being pronounced, and although, owing to the further conduct of the parties—the defender having made a tender—the proof itself never in fact came to be led. I think the defender here had himself to blame, because he could have put in his tender at such a time as to have put the pursuer in bad faith when he applied for an order for proof. If the tender had been put in and had been brought to the knowledge of the pursuer, I do not

proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced either approving of issues or allowing a proof."

¹ *Walker v. Barclay*, 1909, 1 S. L. T. 500.

² *Mica Insulator Co., Limited, v. Bruce Peebles & Co., Limited*, 1907 S. C. 1293.

³ *Parliament House Book* (1912-13), G. 32, V. 1 (2).

think he could then, without considering the tender, have rushed in to get an order for proof. Nov. 15, 1912.

I rather agree with what has fallen from my brother, Lord Mackenzie, during the debate that the Act of Sederunt, if it errs at all, errs on the side of undue severity to the pursuer. I therefore think that what the Auditor did was right, and that Lord Dewar's interlocutor upon that matter must be recalled and the finding of the Auditor restored.

Boyle v.

Olsen.

Ld. President.

LORD KINNEAR concurred.

LORD JOHNSTON.—I also concur, and I think the matter is largely disposed of by the case of *Mica Insulator Company v. Bruce Peebles & Company*.¹

LORD MACKENZIE concurred.

THE COURT recalled the Lord Ordinary's interlocutor, repelled the defender's objections to the Auditor's report, and granted decree against him for the taxed amount of the pursuer's account of expenses.

MACKENZIE & KERMAK, W.S.—ALEX. MORISON & Co., W.S.—Agents.

DAVID FRANCIS PARK AND OTHERS (Glover's Trustees), First Parties. No. 17.
—*Blackburn, K.C.—Kirkland.*

THOMAS GLOVER AND OTHERS, Second Parties.—*Blackburn, K.C.—Kirkland.* Nov. 16, 1912.

MRS JANET GLOVER OR PARK AND OTHERS, Third Parties.—*Constable, K.C.—Pitman.*

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ALEXANDRIA MALCOLM GLOVER, Fourth Party.—*Chres, K.C.—C. H. Broum.*

Succession—Testament—Construction—Provision to daughter of "liferent use and enjoyment" of house—Incidence of burdens—Insurance premiums—Interest on bonds—Allowance for upkeep "at the rate of" so much per annum—Arrears.

A testator directed his trustees "to retain for the liferent use and enjoyment of my unmarried daughter or daughters" two residences, and to pay out of the income of the estate an allowance "at the rate of £400 per annum towards the upkeep" of these residences.

Held that his only unmarried daughter occupying the residences was liable, not only (following *Johnstone v. Mackenzie's Trustees*, 1912 S. C. (H. L.) 106) for feu-duties, landlord's taxes, and repairs, but also for the annual interest on bonds and the premiums on insurance over the residences.

Held also that, in the event of there not being in any year sufficient revenue to pay the allowance in full, payment of arrears fell to be made up out of the income of future years.

THOMAS CRAIGIE GLOVER, of Mount Grange, Edinburgh, and Earls-ferry House, Elie, died on 7th July 1904, leaving a trust-disposition and settlement, the seventh purpose of which was in the following terms:—"I direct my trustees to retain for the liferent use and

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enjoyment of my unmarried daughters or daughter my residences of Mount Grange and Earlsferry House, and the household furniture, plenishing, and other effects therein not hereinbefore specially bequeathed, or in lieu and place of Earlsferry House and furniture, my villa at Earlsferry known as Gordon Villa, with the furniture, plenishing, and effects therein as my said unmarried daughters or daughter may elect: And I also direct my trustees to pay to my said unmarried daughters or daughter out of the income of my estate an allowance at the rate of Four hundred pounds per annum towards the upkeep of said residence: Declaring that, on the death or marriage of the last of my unmarried daughters, the said allowance shall cease and the said residences liferented as aforesaid and the household furniture, plenishing, and effects therein so far as belonging to my estate shall be sold, and the proceeds thereof shall form part of the residue of my estate and be divided amongst the same persons in the like proportions and subject to the like conditions and restrictions as are hereinafter provided with regard to the residue of my estate: Declaring that my sister the said Ann Liston Glover shall be entitled to live in family with my said unmarried daughters or daughter so long as she desires to do so, and that my said unmarried daughters or daughter shall be bound to receive her."

With regard to the residue of the estate, the trustees were directed to realise it at such times as they thought fit, and divide it among the testator's sons and daughters, the shares of the former being payable to them on their attaining majority, the shares of the latter being only liferented and the fee going to their issue, with a power, however, to the trustees, notwithstanding the fact that the daughters' shares were only liferented, to advance to any daughter the capital of one-fourth of her share.

Various questions having arisen after the death of the testator with regard to the construction of his trust-disposition and settlement, a special case was presented for the opinion and judgment of the Court.

The parties were—David Francis Park and others, the testamentary trustees of Thomas Craigie Glover, *first parties*; Thomas Glover, a son of the testator, and others, being the persons entitled to shares of the fee of the residue of the trust-estate, *second parties*; Mrs Janet Cumming Glover or Park, a married daughter of the testator, and others, being the persons entitled to the liferent of shares of residue, *third parties*; Alexandria Malcolm Glover, the only unmarried daughter of the testator, *fourth party*.

The only questions with which this report is concerned arose in connection with the seventh purpose of the settlement quoted *supra*, with regard to which the case stated:—"The testator's daughters other than the fourth party are married. His sister, Miss Ann Liston Glover, is dead. Since the testator's death the fourth party has resided at Mount Grange and Gordon Villa, and has received from the first parties payment of the said annual allowance of £400, under deduction, however, of the feu-duties, landlord's taxes, insurance premiums, and repairs effecting to the said houses, and the insurance premiums for the furniture therein. The average annual amount of said deductions is upwards of £80. In addition to these deductions the fourth party has also to pay, in respect of her occupancy of said houses, tenant's rates and taxes, amounting on an average to upwards of £60 annually. The assessed rental of Mount Grange is £230, and the assessed rental of Gordon Villa is £50. At the testator's death

Mount Grange was burdened with two bonds for £2600 and £1000 Nov. 16, 1912. respectively, the annual interest on which amounted, less tax, to £124. 9s. The bond for £1000 was repaid at Whitsunday 1907. ^{Glover's Trustees v.} The fourth party has not hitherto been debited by the first parties Glover. with interest on said bonds."

The contentions of the parties were stated as follows:—"The first parties maintain that the fourth party is liable for the interest on said sum of £3600, which will fall to be charged against her said allowance. The fourth party maintains that the right conferred on her with regard to Mount Grange and Gordon Villa is a right of occupancy and not a proper liferent, and that the first parties are not entitled to debit her with the feu-duties, landlord's taxes, insurance premiums, and repairs effeiring to said houses, nor with the insurance premiums for said furniture. She also maintains that the first parties are not entitled to debit her with the interest on the bonds above mentioned. She further maintains that in the event of there not being in any year sufficient revenue to yield said allowance of £400, any part thereof unpaid falls to be paid out of the income of future years. The first, second, and third parties maintain that, on a sound construction of the said trust-disposition and settlement, and more particularly its seventh purpose, the right conferred on the fourth party is one of proper liferent, and not one of occupancy merely, and that she is liable in payment of the feu-duties, interest on bonds, landlord's taxes, insurance premiums, and repairs affecting the said houses. They further maintain that, in any event, the said annual burdens form proper charges against the said allowance. They likewise maintain that, in the event of there not being in any year sufficient revenue to yield said allowance of £400, the fourth party is not entitled to receive payment of any unpaid portion thereof out of the income of future years."

The following questions of law were, *inter alia*, stated for the opinion of the Court:—" (3) Do the feu-duties, landlord's taxes, insurance premiums, repairs, and interest on bonds effeiring to the said houses of Mount Grange and Gordon Villa, and insurance premiums for said furniture therein, or any and which of them, form proper charges against the fourth party, or, otherwise, against said allowance of £400? (4) In the event of there not being in any year sufficient trust revenue to meet said allowance of £400 to the fourth party in full, is she entitled to payment of any arrears thereof out of the income of future years?"

The case was heard before the Extra Division (consisting of Lord Kinnear, Lord Dundas, and Lord Mackenzie) on these questions on 5th November 1912. An argument upon certain other questions, upon which the case was not reported, was heard by the same Division in the preceding May.

The first, second, and third parties argued that the case was ruled by *Johnstone v. Mackenzie's Trustees*,¹ and that interest on bonds and premiums on insurance policies were governed by the same considerations as feu-duties, landlord's taxes, and repairs.

The fourth party argued that the present case was distinguishable from *Johnstone*¹ in respect that under the trust-disposition and settlement the trustees had estate in their hands out of which the burdens could be paid. She also argued that in any case she was

¹ 1912 S. C. (H. L.) 106, [1912] A. C. 743.

Nov. 16, 1912. not liable for interest on bonds and premiums of insurance,¹ as these were not among the burdens which the ownership of land necessarily entailed—the only burdens for which a liferenter was liable.²

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At advising on 16th November 1912,—

LORD DUNDAS.—[After narrating the facts, and referring to the third question of law]—When the case was before us in summer, counsel for the parties very properly suggested that we should defer consideration of this question, seeing that the case of *Johnstone v. Mackenzie's Trustees*,³ which obviously bore a marked resemblance to this aspect of the present case, was under appeal to the House of Lords. The House of Lords has since recently decided that appeal⁴; and having now heard counsel at our bar, we are in a position to answer the third question. I can see no ground for making any material distinction between the provisions of the present trustor's settlement above quoted and those of the testator in *Johnstone's* case,⁴ which directed his trustees to "give to" his wife "the liferent use and enjoyment" of his house. It seems to me, therefore, that, in accordance with the decision of the House of Lords, we must find that the feu-duties, landlord's taxes, and repairs form proper charges against the fourth party.

The question, however, so far as relating to the interest on bonds and the insurance premiums, is not expressly covered by *Johnstone's* case.⁴ As regards the former of these items, I can see no good reason to differentiate the interest from the other matters which, in accordance with the House of Lords judgment, must be charged against the fourth party. The insurance premiums seem to present a somewhat different question. I am not aware of any direct authority by way of decision on the point. We were referred to an Irish case, *Kingham*.¹ The testator there directed his trustees to allow his wife, if she pleased, to occupy his house during her life, with the use of the furniture, &c. Chatterton, V.-C., held that the widow must pay the head rent and taxes payable in respect of her period of occupation, and do such repairs as a tenant would be liable for in absence of express contract, but that, as it was the duty of the trustees to keep the premises sufficiently insured against fire, "so as to preserve the property for their *cestuis que trust*," they could not require these premiums to be repaid to them by the widow. The decision seems to me, with all respect, to be inconclusive; for I should have thought that the liferentrix (or occupant) was a *cestui que trust*, as well as the fiars of the house. In the case before us I do not doubt that it was a proper act of trust administration for the trustees to insure the houses and furniture in question against risk of fire. I think that in theory there might be something to say, under given

¹ *Kingham*, [1897] 1 I. R. 170.

² *The following authorities were referred to during the arguments*:—*Ersk. Inst.* ii. 9, 61; *Bell's Prin.* 1060 *et seq.*; *More's Notes to Stair*, ccxv.; *Lady Forbes*, (1765) 2 Pat. App. 84; *Brand v. Scott's Trustees*, (1892) 19 R. 768; *Cathcart's Trustees v. Allardice*, (1899) 2 F. 326; *Clark v. Clark*, (1871) 9 Macph. 435; *Smart's Trustee v. Smart's Trustees*, 1912 S. C. 87; *In re Courtier*, (1886) 34 Ch. D. 136; *In re Baring*, [1893] 1 Ch. 61; *In re Redding*, [1897] 1 Ch. 876; *In re Tomlinson*, [1898] 1 Ch. 232; *In re Betty*, [1899] 1 Ch. 821; *In re Giers*, [1899] 2 Ch. 54.

³ 1911 S. C. 321.

⁴ 1912 S. C. (H. L.) 106, [1912] A. C. 743.

circumstances, for the view that, insurance being truly for the benefit of all parties concerned, the cost of it might fairly be debited proportionally against liferent and fee respectively; and if the parties had been willing to concur in this view, such an arrangement might have afforded a fair and equitable solution of the problem. However this may be, the present case supplies no material for any attempt at apportionment of the sum, which cannot be a large one. It seems to me that, as the question is put to us, there is no sufficient ground for treating these premiums—which *prima facie* are yearly payments appropriate as charges against revenue—in any different way from the items of charge already dealt with; especially looking to the express terms of the truster's allowance of £400 a year "towards the upkeep of said residence." I am therefore for answering the third question, in the circumstances of the case before us, by finding that all the items mentioned in it form proper charges against the fourth party.

The last question has regard to the truster's direction, already quoted, to his trustees to pay to his unmarried daughters or daughter, out of the income of his estate, "an allowance at the rate of £400 per annum towards the upkeep of said residence." The fourth party contends that "in the event of there not being in any year sufficient revenue to yield said allowance of £400, any part thereof unpaid falls to be paid out of the income of future years." The matter is to some extent one of impression; but I think the contention is right. The yearly allowance is to be "at the rate of" £400. I see no reason why the shortcoming of that rate in one year should not be made good, by way of arrears, out of the income of a succeeding and more prosperous year. I am therefore for answering the fourth question in the affirmative.

LORD KINNEAR and LORD MACKENZIE concurred.

THE COURT answered the third question by finding that all the items mentioned in it formed proper charges against the fourth party; and answered the fourth question in the affirmative.

THOMAS WHITE & PARK, W.S.—T. & R. B. RANKEN, W.S.—
LINDSAY, HOWE, & Co., W.S.—Agents.

THE PARISH COUNCIL OF THE PARISH OF GLASGOW, First Party.—
Murray, K.C.—Hon. W. Watson.

No. 18.

MUNGO MACDOUGAL GRAHAM AND ANOTHER, Second Parties.—
Clyde, K.C.—J. H. Henderson.

Nov. 16, 1912.

Glasgow
Parish Council
v. Graham.

Rates and Assessments—Poor and School rates—House Letting and Rating (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 53), sec. 7—Small dwelling-house—Responsibility of owner for occupiers' assessments—House entered in Valuation-roll as unoccupied—Deduction of percentage for cost of collection—Method of deduction.

Held (1) that, under the House Letting and Rating (Scotland) Act, 1911 (which makes the owner of a small dwelling-house responsible for all assessments liability to pay which is imposed on the occupier thereof), a parish council is entitled to recover the occupiers' portion of the poor and school rates for the whole financial year from such an

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owner, even though the house is entered in the Valuation-roll as unlet and unoccupied, subject to a right of repayment for any portion of the year during which the premises are in fact unoccupied.

Held (2) that the owner of a small dwelling-house is entitled at the time of payment to deduct from the occupiers' assessment the statutory percentage allowed him for cost of collection, but that, if he subsequently claims repayment of any portion of that assessment, he must allow a counter-deduction of the same percentage on that portion.

1ST DIVISION. THIS was a special case presented for the determination of certain questions which had arisen under the House Letting and Rating (Scotland) Act, 1911.¹ The parties were—*first party*, the Parish Council of Glasgow; *second parties*, two owners of "small dwelling-houses" in Glasgow, one of which was unlet during the whole year, and the other was unlet at the time when the Valuation-roll was made up, though it was subsequently let.

The case narrated sections 33, 34, and 40 of the Poor Law (Scotland) Act, 1845,² and section 44 of the Education (Scotland) Act, 1872,³ and proceeded:—

"5. In the practical working out of the foregoing Acts of Parliament and the Local Government (Scotland) Act, 1894, section 37, the first party, in the month of July yearly, proceed by resolution to raise the funds requisite for the poor and school expenditure in the current year by assessment on the owners and the tenants or occupants, one-half to be imposed on and payable by the owners as a class and one-half by the occupiers as a class. Who the owners and the tenants or occupants may be is not known at the time the assessment is made, because their names only appear on the Valuation and Assessment-rolls to be made up later in the year. The first party on receipt of the Valuation-rolls after 30th September yearly make up under the above quoted section 40 a parish assessment-roll and proceed to levy the rates in conformity therewith by sending a demand note to each individual ratepayer intimating the amount payable by him and the date on which the same is payable. On default of payment a warrant for recovery is obtained. Although the rate is struck in July and the demand notes issued during October and November, the person whose name appears in the Valuation and Assessment-rolls then current (made up from information obtained in the preceding months of May and June) is liable for the whole year's rates, although during the course of the financial year from May to May he has ceased to own or occupy the subjects in respect of which he was assessed. Such owner or occupier has, by decisions in the Sheriff Courts, been allowed relief against the succeeding owner or occupier for the proportion of the year's rates applicable to the period during which the successor owned or occupied the particular subject. Apart from the House Letting and Rating (Scotland) Act, 1911 (1 and 2 George V. cap. 53), where a house is unlet no 'occupier' is entered under the existing Acts in the occupier column of the Valuation-roll or Assessment-roll, and no occupiers' assessment is or can be imposed, but in these cases the owners' assessment is imposed.

"6. The first party have been in the habit of preparing a Supplementary Assessment-roll in virtue of the powers contained in the

¹ 1 and 2 Geo. V. cap. 53.

² 8 and 9 Vict. cap. 83.

³ 35 and 36 Vict. cap. 62.

Glasgow Corporation Tramways Order, 1903, section 21, in the month of March yearly of all subjects not included, and of all subjects included but entered as unoccupied, in the Valuation-roll made up at 15th August yearly, which may have come into existence or been in occupancy after the Whitsunday preceding. Advantage is taken of this Supplementary Assessment-roll to supply omissions or make corrections on the preceding Assessment-roll. The first party recover poor and school assessments from the owners and occupiers appearing in said Supplementary Assessment-roll. The provisions in regard to the Supplementary Valuation and Assessment-rolls apply only to so much of the parish as lies within the municipal boundaries of the city of Glasgow. In certain portions of the landward portion of the parish the House Letting and Rating Act applies, but being outwith the municipal boundaries these portions have not the advantage of a Supplementary Valuation and Assessment-roll." Nov. 16, 1912.
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After referring to the provisions of the House Letting and Rating Act,* the case proceeded:—"10. In conformity with the interpreta-

* The House Letting and Rating (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 53), enacts:—

Sec. 7. "Subject as hereinafter provided, the provisions of all Acts applicable within the respective areas in which this Act may be in operation respecting the liability for, and the imposition and recovery by an assessing authority of, any assessment, shall subsist in full force and effect: Provided that within every such area—

"(1) The occupier of a small dwelling-house shall, in no case, be liable to pay occupiers' assessment thereof in respect of any period prior to the commencement or subsequent to the termination of his occupancy, but any liability to pay occupiers' assessment, which would by law be imposed on a person occupying the small dwelling-house throughout the year from Whitsunday to Whitsunday, shall be imposed on any such occupier or successive occupiers during the year, whether their names appear in the Valuation-roll or not, to such extent or in such shares as shall be proportionate to the period or periods of their respective occupancies of the small dwelling-house:

"(2) Subject as hereinafter provided, the owner of a small dwelling-house shall be responsible for all assessments liability to pay which is imposed on the occupier thereof, and the same shall not be recovered or recoverable by the assessing authority from the occupier, but shall be recovered by the assessing authority from such owner in the same manner as provided for under existing Acts with respect to the recovery of assessments from owners, and the assessing authority shall be entitled to recover occupiers' assessments from the owner for the year from Whitsunday to Whitsunday, notwithstanding that the house may not be occupied throughout the year, and for that purpose to issue to the owner through their collector or other officer appointed by them any notice, schedule, demand-note, or intimation which, under existing Acts, may be issued in respect of the year's assessments to the occupier:

"(3) Notwithstanding any payment by the owner of occupiers' assessments in respect of the occupancy of a small dwelling-house, if, in respect of any period, rent or other consideration shall not be received by the owner for any small dwelling-house in respect of which such payment has been made, the owner shall, upon lodging, on or before dates to be fixed by the

Nov. 16, 1912. tion put upon the foregoing sections of the above-mentioned Acts of Parliament, and in particular of the said House Letting and Rating (Scotland) Act, by the Local Government Board for Scotland, the first party being an assessing authority within the meaning of section 1 of the said Act have made up a Parish Assessment-roll for the year 1912/13, in which they have entered the yearly rent or value of small dwelling-houses as determined by the Burgh and County Valuation-rolls, and have imposed for the poor and school rates an assessment, one-half on owners as a class and one-half on occupiers. The second parties are owners of certain small dwelling-houses not occupied by them, and entered in the Valuation-roll and in the Parish Assessment-roll for said year as empty. Demand notes for occupiers' assessments for the year from Whitsunday 1912 in respect of these small dwelling-houses have been intimated to each of them. The said Mungo Macdougall Graham has received a demand-note for occupiers' assessments amounting to 9s. 7d. in respect of a small dwelling-house of one room and kitchen entered in the Valuation-roll at £6, 10s., and situated in a property belonging to him at 22 Balmano Street, Glasgow; and the said William Clark Faulds has received a demand-note for occupiers' assessments amounting to 12s. 10d. in respect of a small dwelling-house of one room and kitchen entered in the Valuation-roll at £8, 15s., and situated in a property belonging to him at 9 Glenpark Street, East, Glasgow. The above houses were unlet and unoccupied on 28th May 1912, and were accordingly entered in the Valuation-roll and in the Parish Assessment-roll as empty. The above houses are 'small dwelling-houses' in terms of section 1 of the said House Letting and Rating (Scotland) Act, 1911, to which reference is hereby made.

"11. The said small dwelling-house of one room and kitchen situated in the property 9 Glenpark Street, East, Glasgow, has been let by the said William Clark Faulds to James Cunningham, tenant

respective assessing authorities (one of which dates shall be fixed not earlier than the first or later than the twentieth day of May in each year), with the clerk to any such authority, or with such other officer as such authority may appoint for the purpose, a claim for repayment, which shall set forth the period or periods during which the small dwelling-house was not let, or in respect of which, though the house was let, no payment of rent or other consideration was received by him, and a declaration to the effect that no rent or other consideration has been paid or given for such period or periods, be entitled to repayment without any unnecessary delay from such authority of the proportionate amount of such assessment for the said period or periods without prejudice to the right of the authority to make adjustments with the owner in respect of any such rent or other consideration subsequently recovered by him

- "(6) Every assessing authority shall, in respect of the occupancy of small dwelling-houses, allow to owners from all occupiers' assessments levied on and recovered from them in place of the occupiers (less any repayments in pursuance of a claim under this section) a deduction, to cover cost of collection, on the following scale (that is to say):—

"In the city of Glasgow, two pounds ten shillings per centum. . . ."

there, who now occupies it as from 28th August 1912 on a monthly contract of let at a rent of 17s. 9d., terminable by either party thereto on eleven days' notice. The first party have intimated that, in the event of the first question of this case being answered in the negative, they will hold the said William Clark Faulds liable in payment of occupiers' assessments for poor and school rates in respect of said house, and that for the period of nine months at a rent for that period of £6, 11s., being three-quarters of an annual rent of £8, 15s., calculated on the basis of the monthly rent payable by the said James Cunningham, and that whether the said dwelling-house and the name of the said James Cunningham as occupier be entered in the said Supplementary Roll or not.

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"12. Questions have therefore arisen as to whether, in terms of the Acts above narrated, the first party are entitled to levy on or recover from the second parties occupiers' rates in respect of the said small dwelling-houses belonging to them to which the said House Letting and Rating (Scotland) Act applies, which are entered in the Valuation and Assessment-roll as empty at the commencement of the financial year, and are not included in the said Supplementary Roll.

"13. The first party, in accordance with the interpretation put upon said Act by the Local Government Board, maintain that the effect of section 7 of the House Letting and Rating (Scotland) Act above quoted is to place upon owners of small dwelling-houses the liability to pay all tenants' or occupiers' rates, both in the case where an occupier's or tenant's name appears in the Valuation and Assessment-rolls and where such houses are entered as unlet and unoccupied, subject to subsequent adjustment with the rating authority, in terms of subsection 3 of that section of the Act. In the event of a negative answer to the first question in this case, the first party contend that under the statutory provisions foresaid they are entitled to assess such small dwelling-houses as are entered as unlet and unoccupied in the Valuation and Assessment-rolls and have become let or occupied for periods either prior to the Supplementary Roll, but do not appear therein, or have become occupied after the date of the completion of the said Supplementary Roll, and to demand occupiers' assessments in respect thereof from the proprietors, for the whole financial year, or otherwise for the whole portion of the financial year remaining after the date when said small dwelling-houses become so let or occupied.

"14. The second parties maintain that the first party is not entitled to recover from them occupiers' rates for the year or any proportion thereof in respect of small dwelling-houses which are entered in the Valuation and Assessment-rolls as unlet and unoccupied at the commencement of the year and are not included in the Supplementary Roll.

"15. A further question has arisen, viz., whether in regard to all occupiers' assessments leviable on the second parties, the second parties are entitled to deduct from the amount of said assessments at the time of payment the allowance of 2½ per cent payable to them by the first party in terms of section 7, subsection 6, of the said Act. The second parties claim that such deduction falls properly to be made on payment of the assessments levied on them. The first party, on the other hand, in accordance with the Local Government Board's interpretation of said Act, contend that such allowance is not to be

Nov. 16, 1912. made by way of a deduction from the rates when paid by the second parties, and does not fall to be made till the close of the financial year, when the net amount of the assessments actually in their hands shall have been ascertained.”

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The questions of law were:—“(1) Is the first party entitled to recover from the second parties occupiers' rates for the whole financial year ending Whitsunday 1913 (subject to any right to repayment of any portion thereof under section 7, subsection 3, of said Act), on the said small dwelling-houses entered as unlet and unoccupied in the Valuation and Assessment-rolls? (2) In the event of the first question being answered in the negative, is the first party entitled, in virtue of the provisions of the last-mentioned Act, to recover from the said William Clark Faulds occupiers' rates in respect of the said small dwelling-house situated at 9 Glenpark Street, East, Glasgow (subject to any right of repayment as aforesaid), (a) for the whole financial year, or (b) for the portion of the financial year remaining after the date when said small dwelling-house has become let or occupied, where said small dwelling-house is not entered in the said Supplementary Roll? (3) Are the second parties entitled to deduct from the assessments recoverable from them the allowance of $2\frac{1}{2}$ per cent in terms of section 7, subsection 6, of the said Act at the time of payment; or does such allowance fall to be deducted after the net amount of assessments received from the second parties has been ascertained at the close of the financial year?”

The case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Cullen) on 1st November 1912.

Argued for the first party;—The effect of section 7 of the House Letting Act was that the true state of facts was to be the basis of liability, and the entry in the occupier's column of the Valuation-roll no longer settled the matter. A constructive liability was now imposed on the “occupier or successive occupiers” in proportion to their occupancies, and the proviso that the names need not appear in the Roll applied equally to both original occupier and successive occupiers. The Act contained no machinery by which the Parish Council could recover the assessments from the occupier, but the constructive liability, while not creating the relation of debtor and creditor between the occupier and the Parish Council, was necessary in order that the Parish Council might reach the owner and recover the rates from him. The owner was primarily responsible for occupiers' assessments for the whole year, with right of repayment if the house was in fact unoccupied. Alternatively, if an unlet house came to be occupied, the owner's responsibility would emerge either (1) for the whole year's rates, or (2) for an amount proportionate to the period of occupancy. As to the deduction of the $2\frac{1}{2}$ percentage for cost of collection, that deduction could not properly be made till the end of the year, when alone the sum on which it fell to be calculated could be finally ascertained.

Argued for the second parties;—By its opening words section 7 expressly adopted the existing machinery of assessment, and the effect of these words could not be overridden by implication. The assessment was imposed on occupiers and not upon occupancy,¹ and it was

¹ Adamson v. Clyde Navigation Trustees, (1863) 1 Macph. 974, *per* Lord Neaves, at p. 991; Argyll County Council v. Walker, 1909 S. C. 107, *per* Lord President (Dunedin), at p. 109.

still a condition precedent that an occupier's name should appear in the Valuation and Assessment-rolls. It was only when the occupier's "liability" had been "imposed" by the insertion of his name in the Assessment-roll that the owner became responsible for his rates, and the relation of debtor and creditor between the owner and the assessing authority was established. This was the law as it existed prior to the House Letting Act, 1911, and it was still the law because there was nothing in the Act by which liability was imposed on persons who were not liable before. The only modification introduced by the section in order to meet the case of short lets was that any liability imposed "by law," which meant the existing law, should not extend beyond the period of the occupancy, but should be apportioned between the original occupier and his successors in the tenancy. This had no application to a case where no one had been, or could be, made liable, and where accordingly there was no liability to apportion. As to the deduction of $2\frac{1}{2}$ per cent, the first party, on the terms of the Act, were bound to allow that deduction on whatever sum they demanded payment of as occupiers' assessments.

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At advising on 16th November 1912,—

LORD PRESIDENT.—This is a special case presented by the Parish Council of the parish of Glasgow and two inhabitants of Glasgow who are proprietors of houses, and who as such are liable to be assessed for poor and school rates—the rates which are collected through the medium of the first parties, the Parish Council. The houses belonging to the second parties were unlet at the time when the Valuation-roll was made up.

As your Lordships are aware, the Valuation-roll is begun to be made up in the early portion of the summer, and when finally authenticated it forms the basis of all assessments. The Valuation-roll enters each item of property; in one column it specifies the owner, and in another it specifies the tenant or occupier, if any.

The poor-rate rests initially upon the Poor Law Act of 1845. Your Lordships are quite familiar with the fact that, although under the Act of 1845 there were alternative methods of levying the poor-rate, by subsequent legislation one only of those methods was left, namely, that of raising the sum necessary for the support of the poor by two moieties, one moiety imposed upon owners and the other upon occupiers. The actual assessment depends upon the 40th section of the Act, which provides for the making up of a roll of the persons liable in payment of such assessment. In 1845 that roll was, so to speak, made up directly by the poor-law authorities themselves. But by the subsequent legislation of 1854 which introduced the Valuation-roll, the procedure was altered in so far that, although the Assessment-roll had still to be made up for the poor-rating, the actual entries in it were, and—so far as concerned the yearly rent or value of the subjects—had to be, taken from the Valuation-roll.

Under ordinary practice what happened was that, if a house was unlet and unoccupied at the time when the Valuation-roll was made up, no name could appear in the occupiers' column, and accordingly, for the year to which that Valuation-roll applied, an occupiers' assessment was not payable by anybody, even although an occupier might have made his appearance later in the year. There was some legislation designed to check that

Nov. 16, 1912. result by providing for a Supplementary-roll, which was made to apply to Glasgow by the Glasgow Corporation Tramway Order, 1903, section 21, and Parish Council to burghs generally by the Burgh Police (Scotland) Act, 1903, section 60. v. Graham.

Ld. President. That was one side of the question. There was also the other side of the question that, if an occupier was in occupation on the date at which the Valuation-roll was made up, he was then entered in the Valuation-roll and became liable for the whole of the occupier's assessment even although, as a matter of fact, his tenancy determined within the year to which the Valuation-roll applied.

But in 1911 an Act was passed called the House Letting and Rating (Scotland) Act, 1911, and by it certain changes were made. Section 7, upon which this case turns, is as follows :—[His Lordship read the section].

Acting upon what they conceived to be their right and duty under this section, the first party, the Parish Council, finding these two gentlemen, who are the second parties, upon the Valuation-roll as proprietors of two small dwelling-houses, requested them to pay the occupiers' assessment. In both cases there was no occupier in existence at the date at which the Valuation-roll was made up, and, accordingly, no occupier appears in the Valuation-roll. The second parties object to the demand, and we had a very ingenious argument from Mr Clyde which really all went upon this : "The only liability which is imposed on the owner to pay the occupiers' assessment is the liability under section 7 (2)." That is true. Then Mr Clyde said : "It is not said that the owner is to pay, but that he is to be responsible for all assessments liability to pay which is imposed on the occupier." He argued : "That refers you to the old law, and inasmuch as under the old law no occupier would have been liable to pay unless his name appeared in the Valuation-roll, and as in this case no occupier's name appears in the Roll, there can accordingly be no derivative liability imposed upon the owner."

I think that is ingenious but unsound. It is quite true, as Mr Clyde said, that the primary object of this Act was to deal with short lets—to make it impossible for landlords to insist beforehand that tenants should come under an obligation for a term, and he said that really the rating provisions were merely corollary to that, and were not intended to alter the law at all. To a certain extent that is true, but there are many instances where, although the primary object of an Act of Parliament is to do one thing, it manages in its course to do something else ; moreover, this is entitled the *House Letting and Rating* (Scotland) Act, 1911. In other words, I quite agree that this Act only took up rating because of the alteration it was making as to letting ; but still, having taken up rating, it dealt with it, and if the words are plain, I do not think we have any right to refuse a meaning to those plain words simply because they involve an alteration in rating law.

Now, the reason why I think Mr Clyde's argument is unsound is this : the first subsection which I read does two things. In the first clause it says that "the occupier of a small dwelling-house shall, in no case, be liable to pay occupiers' assessment therefor in respect of any period prior to the commencement or subsequent to the termination of his occupancy," that is to say, it puts an end to the hardship of making the man who was occupier

at the date at which the Valuation-roll is made up, and who, perhaps, went away within the next month, liable for the occupiers' assessments for the whole year. But then the subsection goes on: "But any liability to pay occupiers' assessment, which would by law be imposed on a person occupying the small dwelling-house throughout the year from Whitsunday to Whitsunday"—that means a full year's liability—"shall be imposed on any such occupier." A full year's liability, therefore, shall be imposed on any such occupier. Now, "such occupier" means either the first occupier or—afterwards it goes on to say—"successive occupiers during the year, whether their names appear in the Valuation-roll or not."

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I think that is fatal to Mr Clyde's argument. It seems to me that having taken away the hardship that there was upon the man who was there at the date at which the Valuation-roll was made up and who went away afterwards, the Legislature then said, *per contra*, "We will declare that a full year's liability is to rest upon all occupiers whether they appear in the Valuation-roll or not, but only according to the proportion of their particular times of occupation." I think, therefore, that imposed liability upon an occupier even although he was not upon the Valuation-roll.

Well, if that is so, the words of the second subsection, "liability to pay which is imposed on the occupier thereof," mean liability imposed not only by the old law (without which, of course, you could not proceed at all, because the actual assessing power is under the old law and under the old law alone), but also liability imposed by the old law *plus* this particular provision under the first subsection which I have just read. The result of that is—and I must admit that, to my mind, it is very clear and plain—that the authorities here are quite right in asking for the whole of the occupiers' rates from these two gentlemen.

I would also observe (although this is a mere remark) that although Mr Clyde very naturally and very properly argued on the provisions as to assessment in the Poor Law Act, the Act of 1911 applies not only to poor-law assessments, but to all assessments, and an argument founded on the particular phraseology of the Poor Law Act might not be applicable to other assessments levied under other Acts which were expressed in different terms.

There is one other question that is asked. By subsection (6) of the same section of the statute it is provided that "every assessing authority shall, in respect of the occupancy of small dwelling-houses, allow to owners from all occupiers' assessments levied on and recovered from them in place of the occupiers (less any repayments in pursuance of a claim under this section)" —that is, the claim for repayment that I have already read to your Lordships where the subject is not actually occupied during the whole year—"a deduction, to cover cost of collection," on a certain scale—in Glasgow £2, 10s. per centum and elsewhere a percentage fixed by the Sheriff. The proprietors here say: If you are entitled to take from us the whole of the occupiers' assessment in a case where it is very likely that the tenement is not going to be occupied during the whole year, we are entitled now to make a 2½ per cent deduction. The assessing authorities say: No, what you are to get back is 2½ per cent, not on the full sum, but on the full sum less the repayment in pursuance of a claim under this section; therefore we

Nov. 16, 1912. cannot settle that with you now, and can give you no deduction at all until the end of the year comes and we see how much you are going to get back from us. Accordingly, we are asked the question in the special case *Glasgow Parish Council v. Graham*.

whether the second parties—that is, the proprietors—are “entitled to deduct from the assessments recoverable from them the allowance of $2\frac{1}{2}$ per cent in terms of section 7, subsection (6), of the said Act at the time of payment; or does such allowance fall to be deducted after the net amount of assessments received from the second parties has been ascertained at the close of the financial year?”

I am of opinion that both parties are equally wrong. They both want a little more than they are entitled to. I think it is perfectly clear what the equity of the matter is, and that the equity of the matter is quite in accordance with the statute. I think that, if the assessing authorities ask from the proprietor, as they did here, the whole of the occupiers' assessment, he is entitled at that time to keep back $2\frac{1}{2}$ per cent; but then, at the end of the year, when the proprietor goes to the authorities and says: “Now then, give me back a portion of my assessment because during such and such a period of the year my tenement has not been occupied,” then I think, instead of giving him back absolutely the whole of that portion, the authorities are entitled to make a deduction which reduces the $2\frac{1}{2}$ per cent originally retained to the proper figure. That does justice to both, and does not allow either to get the better of the other by keeping somebody else's money in their own pocket.

Consequently, the first question will be answered in the affirmative; the second question is superseded; and the third question is not answered by either the affirmative or the negative, but by a declaration in terms of what I have said.

His Lordship intimated that LORD JOHNSTON and LORD CULLEN, who were absent at advising, concurred.

LORD KINNEAR and LORD MACKENZIE were present when the case was advised.

THE COURT pronounced the following interlocutor:—“ . . .

Answer the first question of law in the case in the affirmative; find it unnecessary to answer the second question; find in answer to the third question of law that the second parties are entitled at the time of payment to deduct the allowance of $2\frac{1}{2}$ per cent from the total assessment then demanded of them, but that, if subsequently they claim repayment of any portion of such assessment in terms of subsection 3 of section 7 of the House Letting and Rating Act, they must then allow as a counter-deduction $2\frac{1}{2}$ per cent on the sum so claimed to be repaid.”

MACKENZIE, INNES, & LOGAN, W.S.—MORTON, SMART, MACDONALD, & PROSSER, W.S.
—Agents.

MACINTYRE BROTHERS, Pursuers (Respondents).—*Moncrieff, K.C.*— No. 19.
Fenton.

ALEXANDER SMITH, Defender (Reclaimer).—*Macmillan, K.C.*— Oct. 26, 1912.
Macquisten.

Macintyre
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*Arbitration—Arbiter—Right to remuneration—Professional man acting as
 arbiter.*

A professional man undertaking the duties of an arbiter without any stipulation as to payment cannot be presumed to be giving his services gratuitously, and is therefore entitled to remuneration.

MACINTYRE BROTHERS, contractors, Glasgow, and Alexander Smith, Crawfield, by Glengarnock, Ayrshire, submitted a dispute which arose out of a contract between them for the purchase of a quarry in Ayrshire to the arbitration of William Cook, writer, Glasgow. The deed of agreement, which appointed William Cook arbiter, made no reference to, or provision for, the arbiter's remuneration. The arbiter thereafter issued a decree-arbitral in which, *inter alia*, he found Alexander Smith liable to Macintyre Brothers in a sum of expenses which did not include any fee to the arbiter. Thereafter Macintyre Brothers paid the arbiter a sum of £63, the fee fixed by the Auditor of the Faculty of Procurators in Glasgow as suitable remuneration for his services. EXTRA
DIVISION.
Lord Dewar.

Alexander Smith having refused to pay either the expenses awarded against him or his share of the arbiter's fee, Macintyre Brothers brought an action against him in the Court of Session for a sum which included both of these items.

With regard to the arbiter's fee (with which question only this report is concerned), the following averments were made by the parties:—(Cond. 5) "On or about 19th June 1911 the pursuers took up the decree-arbitral and paid . . . the sum of sixty guineas to the arbiter as remuneration. When the arbiter was called upon to take up the arbitration it was contemplated by both parties that the arbiter should be paid a suitable remuneration for the occupation of his time and the trouble involved. The arbiter is a professional man, and it is usual and customary in such circumstances for remuneration to be given. Further, the Auditor had fixed the 8th February 1911 as a diet for the taxation of the pursuers' account of expenses, and the pursuers' agents on 3rd February wrote to the defender intimating that the amount of the fee to be given to the arbiter might be fixed on that day by agreement, and that failing agreement the pursuers would move the Auditor to fix a reasonable sum. At the diet on 8th February the defender did not appear nor was he represented, and the diet of taxation was adjourned until 13th February. The pursuers' agents on 8th February wrote to the defender intimating the adjournment, stating that at the adjourned diet they would move the Auditor to fix the fee to be paid to the arbiter. No objection was intimated by the defender, and on 13th February the Auditor fixed the said sum of sixty guineas. The pursuers thereafter called upon the defender to repay to the pursuers one-half of said sum for which the defender is liable but he has declined to do so. The statements in answer, so far as inconsistent herewith, are denied. In particular, it is denied that the arbiter demanded payment of his fee or that the said fee was paid as a condition of the arbiter giving up the

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said decree-arbitral." (Ans. 5) "Admitted that the pursuers paid the said arbiter a sum of £63. The said payment, as averred by the pursuers in the open record, was demanded by the arbiter as the condition of his giving up the said pretended decree-arbitral. Admitted that the defender was not present at the diet condescended on, and that he has refused to pay the sum demanded. . . . The said arbiter had no right or title to demand the said or any payment as the condition of his handing over the said document, and the pursuers had no right or authority to make any such payment on behalf of the defender. Neither by the terms of the arbitration clause in the said agreement nor by any contract or arrangement with the parties was the arbiter authorised to make any such claim as is condescended on, nor the pursuers to pay the same, and his said demand as a condition of giving up the said pretended decree was a corrupt act within the sense and meaning of the Act of Regulations, 1695, and rendered the said decree invalid and reducible. The pursuers are not entitled to recover from the defender any part of the said payment."

The defender pleaded, *inter alia*;—(4) The said arbiter not being entitled to remuneration the defender is not liable for any part of the payment alleged to have been made to him by the pursuers, and should be assolvied from the conclusion therefor.

On 20th February 1912 the Lord Ordinary (Dewar) granted decree in terms of the conclusions of the summons.*

* "OPINION.—[After dealing with a matter with which this report is not concerned, and stating the circumstances in which the question as to the arbiter's remuneration arose]—The defender does not aver on record, nor did his counsel state in debate, that he expected the arbiter to act gratuitously, or that the fee fixed was unreasonable. I gather both from the defender's pleadings and the argument of his counsel that he understood from the beginning that Mr Cook was to be paid for his services, and that he would have been quite willing to pay half the fee if the decision had been in his favour; but he is so disappointed with the result that he proposes to disregard the understanding regarding payment, and now pleads that, as the office of an arbiter is honorary, there is no legal obligation upon him to pay any fee at all in the absence of express stipulation. I think he is too late in taking that plea.

"No doubt, the general rule is that the arbiter is presumed to act gratuitously, and unless he has stipulated for remuneration he has no legal claim to enforce it. But where the circumstances show that there was an understanding that the arbiter's services should be paid for, and one of the parties has paid a reasonable fee without objection, he may, I think, recover half thereof from the other party. This was decided in the case of *Henderson v. Paul*, 5 Macph. 628. In that case the reference was to an accountant, and although there was no express stipulation that he should be paid, the facts showed that parties understood that he was to be remunerated, and one of them, having paid the fee, was held entitled to recover half thereof from the other party. The Lord Justice-Clerk said (page 632), 'The presumption, no doubt, is that an arbiter acts without any right to remuneration; but the presumption is capable of being redargued, and I find what satisfies me, in the facts of the case, that the presumed condition did not hold in this case.' And the special facts were, I think, exactly what we find here, viz.:—(1) The arbiter was a professional man who rendered services to the parties of a similar kind to those for which he was paid in the exercise of his profession; (2) the payment was made in implement of an understanding which existed when the submission was entered into; and (3) the payment was made without warning or objection by the defender. (See also

The defender reclaimed, and the case was heard before the Extra Division (consisting of Lord Kinnear, Lord Dundas, and Lord Mac-
kenzie) on 26th October 1912.

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Argued for the reclaimer;—The defender was not liable in half of the arbiter's fee, because the fee should never have been paid. The arbiter here was not entitled to a fee. The agreement made no provision for his remuneration, and the rule of law in Scotland, recognised by all the institutional writers, was that, apart from contract, an arbiter acted gratuitously.¹ It was true that there had been a tendency to allow an exception to the general rule in the case of scientific persons specially qualified to deal with arbitrations regarding scientific subjects; but the arbiter here was not such a specially qualified person, he was merely an ordinary man acting in a judicial capacity in an ordinary dispute relating to an ordinary contract. In *Murray v. North British Railway Company*² there was a statutory provision for the remuneration of the arbiter, and in *Henderson v. Paul*³ the arbiter was an accountant adjudicating upon matters connected with accounting.

Counsel for the respondents were not called upon.

LORD KINNEAR.—[After dealing with matters with which this report is not concerned]—I have still, however, to dispose of the question as to whether the defender is liable for half of the arbiter's fee. The pursuers have paid the whole of the sum of £63, the fee fixed by the Auditor of the Faculty of Procurators in Glasgow as a suitable remuneration for Mr William Cook's services as arbiter, and in the conclusions of the present action they include a conclusion for £31, 10s., the half of that sum. The defender resists this conclusion on the ground that an arbiter is not entitled to remuneration for his services unless remuneration has been expressly stipulated for, and that in the present case there was no such stipulation. The Lord Ordinary has held that the pursuers are entitled to the sum for which they sue. He says "the defender does not aver on record, nor did his counsel state in debate, that he expected the arbiter to act gratuitously, or that the fee fixed was unreasonable. I gather both from the defender's pleadings and the argument of his counsel that he understood from the beginning that Mr Cook was to be paid for his services, and that he would have been quite willing to pay half the fee if the decision had been in his favour." The Lord Ordinary has thus based his judgment on the existence of an understanding or agreement between the parties.

I am not prepared to hold that there was any express agreement. But I agree with the Lord Ordinary that there is nothing in the circumstances or in the defender's averments on record to suggest that he expected the

Edinburgh Oil Gas Light Company v. Clyne's Trustees, 13 S. 413, where it was held that a party was barred from objecting to a fee paid to an arbiter on the ground that he had failed to intimate an objection in due time. And the case of *Murray v. North British Railway Company*, 2 F. 460, where it was questioned whether the old rule was now applicable with the same absoluteness as formerly.)

"On the whole matter, I am of opinion that the pursuers are entitled to decree as concluded for, with expenses."

¹ Bell on Arbitration, 2nd ed., p. 312.

² (1900) 2 F. 460.

³ (1867) 5 Macph. 628.

Oct. 26, 1912. arbiter to act gratuitously ; nor do I think that there was reasonable ground for any such expectation.

Macintyre
Brothers v.
Smith.

Lord Kinnear.

I have no doubt that the arbiter was entitled to remuneration and that the defender is liable for the half. It is doubtless true that a rule has been recognised in our law by which an arbiter was debarred from claiming remuneration for which he had not stipulated in terms. I agree, however, with what Lord Trayner said in *Murray v. North British Railway Company*,¹ that that general rule cannot be stated now with the same absolute-ness as formerly. It is indeed stated by the text-writers, but the rule was laid down at a time when arbitrations were not so common as they are now, and when the natural inference from the circumstances generally attending them was supposed to be that an arbiter was invited to undertake a purely friendly office for the settlement of differences between persons who did not desire to litigate. But, now that arbitration as professional work has become so common in the ordinary course of business, there seems to me to be no reason whatever for supposing that, when a professional man is asked to undertake the labour and responsibility of solving a disputed question which requires the exercise of professional skill and experience for its solution, he is invited to act gratuitously. It is an implied term of the contract between an arbiter and the parties either that he shall work for nothing or that he shall be paid for his services. Whether the one or the other is the true implication is a question to be solved by the ordinary custom and understanding of business men ; and I think that, in accordance with general practice, the rule must now be assumed that a professional man undertaking the duties of an arbiter is entitled, in the absence of any agreement to the contrary, to be remunerated for his services as arbiter in the same way as he is entitled to receive remuneration for his services in any other professional employment. The general rule is that a request for professional service implies a promise to pay for it ; and I do not see why this rule should be the less applicable because the particular service is for the benefit of two parties who are at variance with one another.

In the present case the parties referred all differences and disputes in connection with their agreement to a writer in Glasgow. In carrying out the reference the arbiter has, as a professional man, expended time and labour, and no reason has been suggested why he should have agreed to do so gratuitously.

I have accordingly no difficulty in holding that the arbiter was entitled to remuneration, and that the defender as one of the parties to the arbitration is liable for half.

LORD DUNDAS and LORD MACKENZIE concurred.

THE COURT adhered.

SIMPSON & MARWICK, W.S.—R. S. CARMICHAEL, S.S.C.—Agents.

¹ 2 F. 460, at p. 464.

THE NATIONAL BANK OF SCOTLAND, LIMITED, Pursuers (Reclaimers). No. 20.

—*Blackburn, K.C.—Hon. W. Watson.*

JAMES E. SHAW, Defender (Respondent).—*D.-F. Dickson—Pitman.* Nov. 16, 1912.

Crown—Volunteer forces—Liability of commanding officer for bank overdraft—Volunteer Act, 1863 (26 and 27 Vict. cap. 65), sec. 25—Regulations for the Volunteer Force, 1901, Article 407—Contract—Bank—Agent and Principal. National Bank of Scotland, Limited, v. Shaw.

In October 1906, on the instructions of the commanding officer of a volunteer regiment, an account was opened with a bank, headed, "R.S.F. 2nd Volunteer Battalion, Finance Committee. Cheques to be signed by any two members of the Committee." The sums paid to the credit of the account consisted mainly of sums paid directly to the bank by the War Office, while the drafts upon the account were made by cheques stamped "On His Majesty's Service," and signed by two members of the finance committee, one of whom was as a rule, though not in every instance, the commanding officer. On the transference of the corps to the Territorial Force in 1908 there was a large debit balance on the account, for which the War Office and the County Association refused to accept liability.

The bank having brought an action against the commanding officer for the amount of the overdraft, the Court *assolized* the defender, holding (1) that neither sec. 25 of the Volunteer Act, 1863, nor the Volunteer Regulations of 1901 (which vested the property of the regiment in the commanding officer), imposed any liability upon him for such a debt; (2) that it was not proved that he had as an individual entered into any contract with the bank which could infer personal liability against himself.

On 1st June 1909 the National Bank of Scotland, Limited, brought an action against James E. Shaw, solicitor, County Buildings, Ayr, lately Lieutenant-Colonel commanding the Second Volunteer Battalion Royal Scots Fusiliers, for payment of the sum of £775, 2s. 9d. sterling. EXTRA DIVISION. Lord Guthrie. Lord Hunter.

The following statement of facts was made in a joint minute of admissions for the parties:—

"(1) The pursuers are bankers, and have a branch in the town of Ayr, at which branch the banking account in connection with the volunteer corps known prior to 1896 as the 'Second Ayrshire Rifle Volunteers,' and thereafter as the 'Second Volunteer Battalion Royal Scots Fusiliers,' was kept under various titles for a period of over twenty years down to 1st April 1908, when the said volunteer corps was transferred to the Territorial Force by Order in Council in terms of section 29 of the Territorial and Reserve Forces Act, 1907 (7 Edw. VII. cap 9). The said account continued to be operated on down to 16th July 1908, in connection with the winding-up of the affairs of said volunteer corps. (2) The defender was for many years an officer of the said volunteer corps, became commanding officer thereof in April 1904, and continued in the command until his resignation thereof as mentioned in the immediately succeeding article. (3) On or about 14th January 1908, the defender was appointed secretary of the Ayrshire County Association formed under the provisions of the Territorial and Reserve Forces Act, 1907. The said appointment did not become effectual until 10th February 1908, at which date it was confirmed by the War Office. The defender thereupon resigned the command of the said volunteer corps, and his resignation was subse-

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quently gazetted to take place as at 10th February 1908. The *Gazette* notice of the defender's said resignation was published on 12th May 1908. . . . Prior to 28th February 1908, the pursuers had no intimation of the defender's said resignation. (4) Down to July 1896, the said banking account was kept in the pursuers' books in name of the 'Second Ayrshire Rifle Volunteers,' but on 6th July 1896, the pursuers were instructed to open an account in name of the 'Second Volunteer Battalion Royal Scots Fusiliers' (the new name of the said volunteer corps) to which account the balance standing at the credit of the account in the former name was transferred. The pursuers were also instructed with reference to the account so opened that cheques drawn thereon were to be signed by two members of the finance committee of the corps. The defender, though an officer of the corps, was not in 1896, either in the command or a member of the finance committee thereof. In the year 1900, however, the defender became a member of the finance committee of the corps, and was placed in charge of the finances thereof. He thereupon gave instructions to the pursuers that cheques drawn on the said account were to be signed in future by himself alone, and these instructions continued in force, and were acted upon, down to October 1906. (5) In or about October 1906, the defender received instructions from the Chief Accountant, Scottish Command, that a new banking account was to be opened in connection with the said volunteer corps, and the defender thereupon instructed the pursuers to transfer the balance at the credit of the then existing account to a new account, the cheques on which were again to be signed by two members of the finance committee of the corps. At this date the account was at credit £444, 16s. 1d. In accordance with the instructions so received, the pursuers opened a new account in their books, headed, 'R.S.F. 2nd Volunteer Battalion—Finance Committee. Cheques to be signed by any two Members of the Committee,' and to this account the balance at the credit of the former account was transferred. The pursuers also issued a pass-book in the name of the 'Second Volunteer Battalion R.S.F. Finance Committee,' which contains the instruction ('cheques to be signed by two Members'). The names of the members of the finance committee for the time being are not stated in the pass-book, and the membership of the said committee was subject to variation except in the case of the defender who, as commanding officer of the said volunteer corps, was *ex officio* a member of the said committee. The names of the committee, which included that of the defender, were, however, communicated by the defender to the pursuers, and are noted in the pursuers' ledger for the purpose of enabling the pursuers to see upon whose signatures cheques should be cashed. The said instructions were given and the said information communicated to the pursuers by the defender as commanding officer of the said volunteer corps. (6) From October 1906, when the instructions mentioned in the preceding article were given, down to the time when the said account ceased to be operated on, cheques drawn thereon were signed by two members of the finance committee. The defender continued to sign cheques on the said account down to 28th February 1908, and between 10th February and 28th February 1908 the defender signed seven cheques drawn on the said account, and his signature on these cheques is followed by the words or contractions 'Lieut.-Col.' as in all previous cheques drawn on the said account signed by him. (7) The cheques used in

drawing on the said account were as usual supplied by the pursuers, Nov. 16, 1912, and bear lithographed on their face the words 'On His Majesty's Service.' These words were added to the ordinary form of cheques at the request of the defender for the purpose of rendering the cheques free from stamp-duty and commission, which ordinarily fall to be borne by the customer of the bank or the person in whose favour he draws cheques. (8) From the year 1900 the finances of the said corps were managed by the defender in his private office, and all banking transactions with the pursuers with reference thereto were carried through by one of the defender's clerks who had charge of the said finances in the defender's said office. (9) On 10th February 1908, the date from which the defender's resignation was gazetted to take effect, the balance at the debit of the said account was £757, 7s., and on 28th February 1908 the balance at the debit thereof was £800, 3s. 6d. (10) Subsequently to 28th February 1908 there were paid into the credit of the said account (1) the sum of £250 on 27th March 1908, and (2) the sum of £105, 13s. 6d. on 12th June 1908, and there were withdrawn from the said account down to 16th July 1908 sums amounting to £178, 5s. 10d., leaving the sum of £714, 12s. 3d. at the debit of the said account, which, with interest to the date of citation in the present action, amounts to £775, 2s. 9d., being the sum sued for. The said two sums of £250 and £105, 13s. 6d. paid in as above were provided by the War Office. Certain sums had, however, been paid out of the corps' funds for purposes which the War Office did not regard as legitimate, and the War Office declined to recognise the liabilities so arising (which are represented by the debit of the said account), and intimated to the defender that they held him personally responsible for the said balance. The defender denied liability and declined to recognise any authority in the War Office to make him liable as in a question with it for such a debt. The defender thereafter wrote to the pursuers the letter of 21st August 1908. . . . * (11) The Ayrshire County Association has not assumed liability for the balance due to the pursuers on the said account, and the said Association is not liable therefor. (12) Article 407 of the Volunteer Regulations of 1901 was in force during the whole period of the account in question, which was opened in October 1906."†

* "Dear Sir,—I have to inform you that the Chief Accountant has intimated to me that the War Office holds me personally responsible for the balance at debit of this account which stands in your bank in name of myself and certain others as members of the finance committee of the late 2nd V.B.R.S.F. I have of course denied liability, and do not recognise any authority in the War Office to make a private individual liable for such a debt.

"Meantime I have to intimate that I withdraw any personal guarantee of mine for the account, and the Bank will probably take whatever steps they consider proper for recovery of the amount due.

"I expect to be in Edinburgh shortly, and it might be convenient if I were to call and see the manager at your head office on this subject.—I am, yours truly,

JAMES E. SHAW.

James Wilson, Esq.,

National Bank of Scotland, Limited, Ayr."

† The Volunteer Act, 1863 (26 and 27 Vict. cap. 65), enacts, sec. 25:—

"All money subscribed by or to or for the use of a volunteer corps or administrative regiment and all effects belonging to any such corps or

Nov. 16, 1912. The pursuers stated in their record :—(Cond. 4) “. . . The defender was or held himself out to the pursuers as being commanding officer, and a member of the finance committee of the corps, during the whole currency of the overdraft, the balance of which is now sued for, down to the end of February 1908, and the same was incurred by or on his behalf and with his authority for the purposes of the corps.” After referring to section 25 of the Volunteer Act, 1863, and Article 407 of the Regulations of 1901, they continued—(Cond. 7) “The defender, with whom alone the pursuers dealt in connection with the said current account, and on whose credit they made the advances, the balance of which is now in question, is liable to the pursuers for the balance remaining due on the said account.”

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The defender pleaded, *inter alia* ;—(2) The defender, never having been the bank's customer, and not having guaranteed the overdraft, is not liable for the balance due. (5) In any event, the defender is not liable for sums drawn after 14th January 1908 or otherwise after

regiment, or lawfully used by it, not being the property of any individual officer or volunteer or non-commissioned officer of the volunteer permanent staff belonging to the corps or regiment, and the exclusive right to sue for and recover current subscriptions, arrears of subscriptions, and other money due to the corps or regiment, and all lands acquired by the corps or regiment, shall vest in the commanding officer of the corps or regiment for the time being, and his successors in office, with power for him and his successors to sue, to make contracts and conveyances, and to do all other lawful things relating thereto; and any civil or criminal proceeding taken by virtue of the present section by the commanding officer of a corps or regiment shall not be discontinued or abated by his death, resignation, or removal from office, but may be carried on by and in the name of his successor in office.”

The Regulations for the Volunteer Force, 1901, made under sec. 16 of the Volunteer Act, 1863, enact :—“(Article 407) In accordance with section 25 of the Volunteer Act, 1863, and section 9 of the Regulation of the Forces Act, the whole of the property of a volunteer corps is vested in the commanding officer for the time being, and he is solely responsible for the proper administration of all moneys and other property belonging to the corps. The rules and bye-laws of a corps cannot relieve the commanding officer from full responsibility for the custody and administration of the property and moneys of the corps except as regards such portion of the property of ‘a constituent corps’ as was acquired before the date of consolidation, and was reserved to such corps under the Regulation of the Forces Act, 1881; nor can they relieve him from responsibility or liabilities incurred on his behalf by officers commanding detachments. To aid him in the management of the finances of the corps, a finance committee will be appointed consisting of not less than three members besides the commanding officer. All orders to tradesmen on behalf of the corps should be given by the commanding officer alone and not by the finance committee, and the commanding officer alone should be a party to any necessary contracts so that he alone may remain liable for such expenditure. If the finance committee give orders to, or enter into contracts with, tradesmen for supplies, they will become jointly and severally liable for the expenditure arising from such orders or contracts. The finance committee is responsible for limiting the expenditure of the grants made from public funds to such purposes as are sanctioned by the regulations, for presenting annually to the corps a correct statement of the receipts and expenditure of such funds, and for advising the commanding officer from time to time as to the financial position of the corps.”

10th February 1908, and is entitled to be credited with the said sums of £250 and £105, 13s. 6d. Nov. 16, 1912.

On 2nd November 1909 the Lord Ordinary (Guthrie) allowed a proof before answer on a date to be afterwards fixed. No further step was taken in the action until 11th February 1911, when the cause was awakened, and a date fixed for the proof. Thereafter the parties lodged a joint minute of admissions (quoted *supra*), and on 25th April 1911 the Lord Ordinary pronounced the following interlocutor:—
 “The Lord Ordinary, having considered the joint minute of admissions for the parties, and whole process, Finds that the admissions contained in the said joint minute are not sufficient for the disposal of the cause: Therefore—the parties not having renounced probation—of new allows to them a proof of their respective averments. . . .”
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* “OPINION.—On 1st April 1908 the Second Volunteer Battalion Royal Scots Fusiliers was transferred to the Territorial Force. The defender had been commanding officer of the battalion from April 1904, and in the *Gazette* of 12th May 1908 his resignation was gazetted to take place as at 10th February 1908. If, as the pursuers allege, the defender is personally liable for a balance appearing in 1908 in their books against the ‘Second Volunteer Battalion Royal Scots Fusiliers,’ two questions arise—first, as to the date when his liability is to be ascertained, and second, as to the amount of his liability. In the view I take of the case it is not necessary for me meantime to deal with either of these questions.

“In cond. 5 the pursuers base the defender’s liability on the terms of section 25 of the Volunteer Act, 1863, and Article 407 of the Regulations for the Volunteer Force, 1901, and in cond. 4 they allege—‘The defender was or held himself out to the pursuers as being commanding officer, and a member of the finance committee of the corps, during the whole currency of the overdraft, the balance of which is now sued for, down to the end of February 1908, and the same was incurred by or on his behalf and with his authority for the purposes of the corps.’ But in cond. 7 they make the general averment that they dealt with the defender alone in connection with the said current account, and made the advances on his credit, by which, I assume, they mean his credit as an individual. In answer, the defender maintains that the pursuers are not entitled to found on the Volunteer Act of 1863, section 25, or on the Regulations for the Volunteer Force, 1901, Article 407; he avers, in answer 3, that the pursuers’ customer was the battalion, and he pleads—‘2. The defender never having been the bank’s customer, and not having guaranteed the overdraft, is not liable for the balance due.’

“The parties have adjusted a minute of admissions, but they did not renounce probation.

“If the pursuers can found, without inquiry, on section 25 of the Volunteer Act of 1863 and on Article 407 of the Regulations for the Volunteer Force, 1901, the defender’s liability for a certain amount of the balance claimed is admitted. The question really turns on Article 407 of the Regulations.—[His Lordship quoted the Article.]

“The defender maintains that these Regulations, or at least this Article of the Regulations, have no effect except as between the War Office, on the one hand, and the Volunteer corps and its commanding officer and finance committee on the other. In particular, he says that tradesmen supplying the corps are not entitled to found on this article as imposing any obligation on the commanding officer or the finance committee other than arises from the particular contract made between them and the officer or committee, any more than the commanding officer or committee could plead exemption from an express contract of personal liability by founding on a regulation declaring that they should not be personally liable. In any case

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The pursuers reclaimed, and on 9th June 1911 the First Division (consisting of Lord Kinnear, Lord Johnston, and Lord Mackenzie) pronounced an interlocutor refusing the reclaiming note, and remitting the cause to the Lord Ordinary to proceed.

On 6th March 1912 a proof was taken by Lord Hunter (Lord

he maintains that the pursuers as bankers cannot bring themselves within the category of 'tradesmen,' or the account now sued on as within the category of a tradesman's account. I think the defender is right on both points.

"A banker is not a 'tradesman' either popularly or technically. But the pursuers say that the balance sued for represents the sums received from the Bank to pay tradesmen's accounts. To a certain extent this may be so, but a substantial part of the money must have gone to pay capitation, camp, travelling, and other allowances, and in payments to instructors, railway companies, &c.

"As to the Regulations, they are not made to have the force of statute, and they appear to me to be matter of domestic legislation as between the War Office and the Volunteer Force. As appears from Articles 510 to 602, Volunteer funds consisted of Government allowances and funds from private sources. Both had to be accounted for annually to the War Office, and, as I read these Articles, the War Office could disapprove of any part of the expenditure and could refuse to sanction any charge on the funds of the corps, at all events as against Government allowances. If so, it was necessary that they should be able to surcharge some person or persons connected with each corps, and make him or them, as in a question with the War Office, personally liable for what the War Office thought improper expenditure. Thus, if the improper expenditure had been already made and paid for, the person or persons liable to the War Office would be bound to pay into the funds of the corps the amount improperly paid away, leaving him or them without recourse, unless in the case of special bargain with the tradesman. If the improper expenditure had been made but not paid for, the funds of the corps could not be burthened with the cost of the expenditure, and the liability of the person or persons connected with the corps to pay the tradesmen would depend on whether the tradesmen had contracted with him or them on the footing of personal liability, or on the footing of being paid for whatever the corps got the benefit of, or on the footing of being paid only out of available corps funds.

"A case is conceivable where a commanding officer and a bank, misreading Article 407 of the Regulations, contracted mutually in express view of personal obligation arising as between them under the Article. But no such case is made here. It is not said that the pursuers knew of the existence of the Act or the Articles, or that they transacted in view of or in reliance on them.

"If the pursuers cannot found on Article 407, the question arises—What was the contract between them and the defender? In the case of *Samuel Brothers v. Whetherley*, [1907] 1 K. B. 709, [1908] 1 K. B. 184, although Mr Justice Walton may have expressed views on the application of the Act and Regulations different from those above stated, the case was decided by him on the facts. He said (p. 716)—'I think that the plaintiffs are entitled to succeed, because the goods were in fact ordered by the commanding officer or on his behalf. He was, in fact, the principal in the transaction, and the plaintiffs are entitled to look to him for payment.' The question then is—Was the defender, as an individual, the pursuers' customer, or was the corps their only customer, the defender, as commanding officer and a member of the finance committee, acting as the known agent of the corps? I cannot decide that question in the pursuers' favour on the documents and the minute of admissions. But these do not necessarily exhaust the whole competent and relevant evidence, and I therefore allow a proof."

Guthrie having by that time taken his seat in the Second Division), Nov. 16, 1912. the import of which will be found in his opinion *infra*. On 15th March he pronounced the following interlocutor:—"Sustains the second plea in law for the defender, and accordingly assoilizes the defender from the conclusion of the summons, and decerns." * National Bank of Scotland, Limited, v. Shaw.

* "OPINION.—[After narrating the procedure in the action]—In allowing a proof, after hearing parties on the joint minute, Lord Guthrie wrote an opinion dealing with the pursuers' case so far as it is founded upon the Volunteer Act, 1863, and the Regulations for the Volunteer Force, 1901. He expressed the opinion that the pursuers were not entitled to succeed upon the Act and Regulations; but allowed a proof of the question whether the defender as an individual was the pursuers' customer, or whether the corps was their only customer, the defender as commanding officer and a member of the finance committee acting as the known agent of the corps. Taking the case up at the stage at which I do, I think that I am bound by Lord Guthrie's opinion and that what I have to consider is the answer to the question of fact upon which evidence was allowed.

"As appears from No. 11 of process, the pursuers in 1906 opened an account in name of R.S.F. Second Volunteer Battalion Finance Committee. There is a note at the head of the account that cheques are to be signed by any two members of the committee, and the six members of the committee—one of them being the defender—are named. The pursuers also issued a pass-book in the name of the 'Second Volunteer Battalion R.S.F. Finance Committee,' which contains the instruction 'Cheques to be signed by two members.' Specimen signatures of the various members of the finance committee were provided for the pursuers. The account so opened was allowed to be overdrawn, and it is for the overdraft that the defender is sought to be made personally responsible.

"All the cheques upon this account were drawn for battalion purposes, and each bears the stamp 'On His Majesty's Service.' Many of these cheques are signed by the defender and one of the other members of the finance committee; but some are not signed by the defender at all. No claim has been made against the finance committee, or against any member thereof other than the defender.

"The liabilities of a corps to a bank are in ordinary circumstances met by Government grants, but in the present case the War Office, as fully explained in the joint minute and by the defender in his evidence, held him, as commanding officer, personally responsible for certain expenditure which they refused to sanction. In a letter written by the general manager of the pursuers to the Secretary of State for War, dated 23rd September 1908, the following statement is made:—"The balance due to the bank amounts to £714, exclusive of interest, overdrafts having been allowed to that extent in expectation that Government grants would be forthcoming as hitherto."

"Mr Wilson, the pursuers' agent at Ayr, says that in allowing the overdraft he relied upon the personal credit of the defender. From what he frankly admitted in cross-examination this belief was not founded upon any statement or admission made by the defender. He does not appear to have been aware of the terms of the Volunteer Act or Regulations, although, if the view already expressed by Lord Guthrie is sound, that would have been immaterial. Belief on the part of the pursuers' agent as to the defender's being personally liable, if not well founded, cannot, in my opinion, exclude the defence that the bank's customer was the battalion or the finance committee, and not the defender. It was open to the pursuers to disallow an overdraft, or in the event of their honouring cheques in excess of the amount standing at the credit of the account, to insist upon the personal guarantee of the defender or others. This they did not do.

"So far as the defender personally is concerned — on the assumption

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The pursuers reclaimed, and the case was heard before the Extra Division (consisting of Lord Kinnear, Lord Dundas, and Lord Mackenzie) on 1st and 2nd November 1912.

Argued for the reclaimers;—The defender was liable for the sum sued for (1) under the Volunteer Act of 1863, and the Regulations of 1901, as commanding officer; (2) at common law as an individual. As regarded (1) the Act and Regulations vested the property of the regiment in the defender as commanding officer. Accordingly, in all matters financial he was, under the Regulations, the regiment. Therefore the bank's contract was a personal contract with the defender and not a contract with the regiment, he being the principal party and not a mere agent acting for the regiment. Under the Regulations the committee were merely a body called into being to advise the colonel, and they incurred no financial liability to third parties except in the particular case of supplies ordered by them from tradesmen. The liability of a commanding officer in similar circumstances had been recognised in *Samuel Brothers, Limited, v. Whetherley*,¹ which ruled the present case. The fact that the Bank might have been ignorant of the effect of the Regulations was immaterial, because *ignorantia juris neminem excusat*. As regarded (2) the defender was clearly liable at common law as an individual. He was the person who instructed the opening of the account and with whom the pursuers dealt. It was out of the question to suggest that the pursuers contracted or dealt either with the individual members of the regiment or the individual members of the finance committee. The contract accordingly having been made with the defender it was immaterial in what name he instructed the account to be opened.² The account having thereafter become overdrawn, he was in the same position as any other ordinary customer of the Bank. The defender

that as commanding officer he is not liable for the overdraft from the bank on the battalion's account—I do not think he did anything to indicate that he assumed personal responsibility. He had, no doubt, for a considerable time taken an active interest in the finances of the corps. Before the 1906 account was opened he had, for a period from 1904, alone signed cheques drawn on the battalion's bank account. Further, on the difficulty arising as to the present account owing to the views taken by the War Office as to improper expenditure, he wrote to the pursuers' Ayr branch a letter in which, *inter alia*, he said: 'I have to intimate that I withdraw any personal guarantee of mine for the account.' He explains, however, in his evidence, and I see no reason to reject his explanation, that what he meant by this expression was: 'If you are looking to me to keep you right, or anything of that sort, I withdraw any guarantee there is, but there was no guarantee in fact.' He also adds that he called at the head office of the bank and saw the manager, when he took up the position which he had taken up all along of no personal liability.

"As a result of the evidence the pursuers have failed to satisfy me that they, as they allege, dealt with the defender alone in connection with the current account of the battalion, or that they made the advances which they did upon his credit. In view therefore of the opinion expressed by Lord Guthrie in his note, dated 25th April 1911, I think that the second plea in law of the defender falls to be sustained, and the defender, as commanding officer of the Second Volunteer Battalion R.S.F., in which capacity he is sued, assolizied."

¹ [1907] 1 K. B. 709, [1908] 1 K. B. 184.

² *Struthers Patent Diamond Rock Pulveriser Co., Limited, v. Clydesdale Bank, Limited*, (1886) 13 R. 434.

argued that at anyrate he was not liable for overdrafts made after his resignation, which he dated 14th January or, at latest, 10th February 1908. But the resignation was not gazetted and made known to the public until 12th May 1908, and even after that date the defender operated on the account and held himself out as colonel. As to the two sums of £250 and £105, 13s. 6d., they at anyrate could not be credited to the defender. The ordinary principle of the appropriation of payments in order of time, the principle of *Clayton's case*,¹ was inapplicable, because from the correspondence between the defender and the War Office it was perfectly clear that these payments were made with the intention of discharging only those items of expenditure which the War Office had recognised as having been legitimately incurred.²

Argued for the defender and respondent;—The pursuers had stated no relevant ground of liability against the defender. (1) He was not liable under the Volunteer Act or the Regulations. Neither the Act nor the Regulations imposed this liability on a commanding officer, but, on the contrary, the Act expressly recognised that a volunteer corps was itself capable of undertaking obligations and acquiring property.³ The word "vest" in section 25 was obviously used in the sense of vesting for the purposes of management and not of ownership, and the vesting was in the commanding officer in his official capacity, not as an individual. Article 407 of the Regulations had no effect as between a member of the public and a member of the Volunteer force, but regulated the domestic matters of the corps and the relations between the War Office and the latter. In no event could the Bank be regarded as a "tradesman." (2) The defender was not liable at common law. There was no rule of common law which made a commanding officer liable for regimental debts. There was no contract between the Bank and the defender. The account expressly bore to be an account with the corps; the cheques were signed by two members of its finance committee, and had upon their face the mark, "On His Majesty's Service"; the credit payments were payments by the War Office; and there was not a single fact in the case to suggest that the account was a private account of the defender. Further, there was no "holding out" by the defender, and nothing to indicate that he had pledged his credit as guarantor, or even that the pursuers had so regarded him. The undernoted cases were in favour of the defender.⁴ A loan and an overdraft were not *in pari casu*.⁵ In any event, the defender could not be liable for the period after his resignation, and was, under the rule in *Clayton's case*,¹ entitled to be credited with the two payments of £250 and £105, 13s. 6d. in the ordinary way.

At advising on 16th November 1912,—

LORD MACKENZIE.—This is an action at the instance of The National Bank of Scotland, Limited, against James E. Shaw, solicitor, County Buildings, Ayr, lately Lieutenant-Colonel commanding the Second Volunteer

¹ (1816) 1 Mer. 585.

² The "Mecca," [1897] A. C. 286.

³ Volunteer Act, 1863, sec. 31.

⁴ *Overton v. Hewett*, (1886) 3 T. L. R. 246; *Jones v. Hope*, (1880) reported 3 T. L. R., note p. 247.

⁵ *In re Cefn Cilcen Mining Co.*, (1868) L. R., 7 Eq. 88; *Waterlow v. Sharp*, (1869) L. R., 8 Eq. 501.

Nov. 16, 1912. *Battalion Royal Scots Fusiliers*, in which the pursuers seek to make the defender individually liable for an overdraft at their branch in Ayr amounting, with interest, to £775, 2s. 9d.

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The account in question is headed "Royal Scots Fusiliers 2nd Volunteer Battalion—Finance Committee. Cheques to be signed by any two members of the Committee." From the pass-book produced it appears that the account commences on 25th October 1906. On 29th May 1908 there was a debit balance of £714, 12s. 3d., the amount sued for being this sum with interest. The defender's resignation as commanding officer was in the *Gazette* of 12th May 1908. The Volunteer Corps was transferred on 1st April 1908 to the Territorial Force, and the defender became secretary of the County Association.

The ground upon which the pursuers say liability attaches to the defender is thus stated in condescendence 7 :—"The defender, with whom alone the pursuers dealt in connection with the said current account, and on whose credit they made the advances, the balance of which is now in question, is liable to the pursuers for the balance remaining due on the said account." The argument of the pursuers in support of their case is that the defender is liable either (1) under the terms of the Volunteer Act, 1863, sections 16 and 25, and Article 407 of the Regulations made under the powers of the Act; or (2) because he was the person who as an individual contracted with the Bank.

An opinion upon the first of these points was expressed by the Lord Ordinary (Guthrie) before whom the case first depended, and I arrive at the same conclusion. Section 25 vests the property of the corps in the commanding officer for the time being, with power to him to sue and make contracts. This, however, does not conclude the question what the nature of any contract is that the commanding officer has made. Article 407 of the Regulations provides that "all orders to tradesmen on behalf of the corps should be given by the commanding officer alone, and not by the finance committee, and the commanding officer alone should be a party to any necessary contracts, so that he alone may remain liable for such expenditure." In the case cited to us of *Samuel Brothers v. Whetherley*,¹ where it had been established that the goods had been ordered from tradesmen for the use of the corps by or on behalf of the commanding officer, the consequence followed from the Act and Regulations that his executors were personally liable. The only question of fact which required to be cleared up in that case was whether the orders were given with the colonel's knowledge and approval. The case of *Whetherley*,¹ however, does not help the pursuers here. As the Lord Ordinary points out, a bank cannot be regarded as a tradesman in the sense of the Regulations, which, therefore, do not apply to the present case. Nor is the question one of ordering goods, but relates to the nature of the contract made with the Bank, and the extent of the obligations undertaken by the defender.

The question here is one of fact, and the opinion of the Lord Ordinary (Hunter) who has sustained the defender's second plea, proceeds upon the facts, accepting Lord Guthrie's view of the Act and Regulations. The second

¹ [1907] 1 K. B. 709, *aff.* [1908] 1 K. B. 184.

plea is: "The defender never having been the Bank's customer, and not having guaranteed the overdraft, is not liable for the balance due." It is for the pursuers to show how the defender comes to be individually liable for the sum sued for. When the account in question was opened, a previous account with the Bank kept in name of the 2nd Volunteer Battalion Royal Scots Fusiliers was closed, and the balance at credit of that account, £444, 16s. 1d., was transferred to the new account. This was done by Mr Douglas, a clerk in the employment of the defender, acting on his instructions. The pay-in slip was in these terms:—"Paid to the National Bank of Scotland, Limited, the sum of £444, 16s. 1d. to the credit of the finance committee, 2nd Volunteer Battalion Royal Scots Fusiliers, cheques to be drawn by any two members of the committee." Attached to the slip was an envelope containing the names of the finance committee, who were—Lieut.-Col. James E. Shaw; Major Dunlop, Girvan; Major Craig, Sanquhar; Major Smith, Maybole; Captain Ker, Troon; and Captain and Quartermaster Hyalop. Specimens of their signatures were furnished to the Bank.

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It is proved that after this date no moneys were drawn from the account except under the authority of the finance committee, who had control of the account. Meetings of that committee were held periodically, accounts were submitted, and cheques were signed by two members. The cheques were made out by William Douglas on the instructions of the finance committee. The signature of the defender is upon most of the cheques, together with that of one of the other members of committee, but any two members of the committee could sign cheques. An examination of the pass-book, No. 7 of process, shows that the account was practically square in the middle of October 1907; that then it began to be overdrawn; and that the amount of the overdraft steadily increased down to 29th May 1908, by which time it had reached the figure already mentioned of £714, 12s. 3d. It is common ground between the parties that it is not relevant to the present case to inquire how the moneys drawn out between October 1907 and May 1908 were spent. They were drawn out by means of cheques supplied by the Bank, all stamped "On His Majesty's Service," duly signed by two members of the finance committee, in accordance with the instructions of that committee. All the documents in connection with this account bore on their face that it was a trust account. No case is made on record of any other ground of liability against the defender than that which the pursuers say rests on the contract he made with them.

The credit entries in the account to a great extent consisted of Government grants. These, as explained in the proof, were not according to the practice paid to any individual, but were paid by the Accountant's Department of the War Office direct to the Bank. As the agent for the pursuers' branch at Ayr admits, he knew what the source was from which the sums paid into the account to square it were derived, viz., Government grants. When the present dispute arose the head office of the Bank wrote to the War Office on 23rd September 1908 that the balance due was £714, "overdrafts having been allowed to that extent in expectation that Government grants would be forthcoming as hitherto."

It is in these circumstances that the Bank seeks to make the defender individually liable. Mr Wilson, their agent at Ayr, says that he had the

Nov. 16, 1912. understanding that the colonel was responsible for the debts of the regiment, and that the Bank certainly looked to the defender to make good any ultimate loss, should such arise. The pursuers were not the defender's own bankers. It is not suggested that the defender gave any personal undertaking, or that he made any representation upon which Mr Wilson relied. No personal guarantee was ever given by the defender to the Bank, and the terms of the letter written by the defender to the pursuers' Ayr branch, dated 21st August 1908, withdrawing any personal guarantee of his for the account, cannot be construed as an admission that he ever gave such a guarantee.

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In my opinion, the correct view of the facts is that the Bank allowed the overdraft in question on the faith of the Government grants, and that they have failed to establish a contract with the defender under which he is personally liable. There is in the proof and correspondence an indication of the difference which had arisen between the defender and the War Office in regard to certain expenditure in past years. It is, in my opinion, beside the present question to go into these matters at all. They are not founded upon as inferring liability on the part of the defender to the Bank. Throughout the record the case made against the defender is a totally different one, that the defender pledged his credit.

For the reasons given I am of opinion the pursuers have failed to prove the case they seek to make. The result is that, in my opinion, the interlocutor of the Lord Ordinary should be affirmed.

LORD DUNDAS.—I have found this case a somewhat difficult and anxious one, but I have come to the conclusion that the Lord Ordinary is right. I have had an opportunity of reading the opinion just delivered by Lord Mackenzie, and I entirely concur therein.

LORD KINNEAR.—I also concur in Lord Mackenzie's opinion.

THE COURT adhered.

MACKENZIE, INNES, & LOGAN, W.S.—J. & F. ANDERSON, W.S.—Agents.

No. 21. MRS ELIZA KATHARINE SHEPHERD AND OTHERS (J. A. Shepherd's Executors), Petitioners and Pursuers (Reclaimers).—*Macphail, K.C.*
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SIR ROBERT SMYTH MUIR MACKENZIE, BARONET, Respondent.—
Blackburn, K.C.—*J. G. Jameson.*

Entail—Improvement expenditure—Obligation by heir in possession to repay improvement expenditure undertaken by tenant of entailed subjects—Action by tenant's executors against succeeding heir in possession for repayment—Title to sue—Extent of liability of succeeding heir—Interest—Entail Amendment (Scotland) Act, 1878 (41 and 42 Vict. cap. 28), sec. 1.

Sir A. M., an heir of entail in possession, granted a lease of the mansion-house and policies on the entailed estate, and entered into agreements with his tenant in terms of which the latter undertook to execute certain improvements upon the subjects let, Sir A. binding himself and the heirs of entail succeeding him (and *subsidiaries* his heirs, executors, and representatives whomsoever) to repay to the

tenant, at the date of Sir A.'s death, a proportion of the certified cost of these improvements, the amount payable not to exceed a certain fixed sum. The tenant executed improvements, the certified cost of which exceeded the fixed sum, and predeceased Sir A. After the death of the latter the tenant's executors brought an action against the heir succeeding Sir A. in possession of the entailed estate in which, founding on sec. 1 of the Entail Amendment (Scotland) Act, 1878, they claimed payment from him of the whole of the fixed sum.

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Held (1) that the agreements in question created obligations to which sec. 1 of the Entail Amendment Act of 1878 applied, and which were accordingly, under that section, binding on the succeeding heir of entail to the extent to which Sir A., if he had himself made the improvements and had survived, could have charged them upon the estate; (2) that the pursuers had a good title to sue the defender directly and to recover from him a sum equal to that which Sir A. could have charged upon the estate; (3) that that sum was one representing three-fourths of the value, as at Sir A.'s death, of such of the improvements as were chargeable on the estate under the Entail Amendment (Scotland) Act, 1875.

Earl of Kinnoull v. Haldane, 1911 S. C. 1279, *followed*.

Held further that, as the defender was not in delay in paying until the sum due by him had been proved, interest on the sum decerned for should run only from the date of decree.

Entail—Improvement expenditure—Petition to charge—Competency—Obligation by heir in possession to repay improvement expenditure incurred by tenant—Competency of petition to charge at instance of tenant's executors—Entail Amendment (Scotland) Act, 1875 (38 and 39 Vict. cap. 61), sec. 11—Entail Amendment (Scotland) Act, 1878 (41 and 42 Vict. cap. 28), sec. 1.

An heir of entail in possession granted a lease of the mansion-house and policies on the entailed estate, and entered into agreements with his tenant in terms of which he bound himself and the heirs of entail in succession to him (and *subsidiarie* his heirs, executors, and representatives whomsoever) to repay, at the date of his death, certain expenditure which the tenant undertook to incur on improvements of the subjects let. In security of this obligation, and "to ensure the fulfilment of the same by the heirs of entail succeeding him," he bequeathed and assigned to the tenant and the tenant's executors the amount which was stipulated to be repaid. After the heir and the tenant were both dead the executors of the latter presented a petition, under sec. 11 of the Entail Amendment (Scotland) Act, 1875, for authority to charge upon the estate the improvement expenditure which the tenant had incurred.

Held that, as the petitioners did not represent an heir of entail who had executed or paid for the improvements, the petition was incompetent.

By lease, dated 7th January 1901, Sir Alexander Muir Mackenzie, 1st Division, Baronet, heir of entail in possession of the lands of Delvine and Lord Cullen. others, in the county of Perth, let the mansion-house and policies of Delvine, with certain rights and other subjects, to Mr Joseph Augustus Shepherd, for the period from 15th January 1901 until, in the event which happened, the death of Sir Alexander, which occurred on 25th June 1909.

On the same date Sir Alexander and Mr Shepherd entered into an agreement which proceeded upon a narrative of sections 7, 8, and

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11 * of the Entail Amendment (Scotland) Act, 1875; sections 1 and 2 of the Entail Amendment (Scotland) Act, 1878;† section 6 (1) of the Entail (Scotland) Act, 1882; and section 3 of the Entail Amendment

* The Entail Amendment (Scotland) Act, 1875 (38 and 39 Vict. cap. 61), enacts:—Sec. 11. "Where any heir of entail in possession of an estate in Scotland . . . shall have executed improvements on such estate, of the nature contemplated by this or any other Entail Act, as the case may be, and shall have died after the passing of this Act without having charged the estate with the amount which he is entitled to charge of the sums expended on such improvements, it shall be lawful for any person to whom such heir of entail may have expressly bequeathed, conveyed, or assigned such sums, or any part thereof, to make application by summary petition to the Court, praying the Court, after such inquiry as to the Court shall seem proper, to find and declare that the sums specified in the petition, or any part thereof, have been expended on improvements on the said estate by the deceased heir of entail; and that the petitioner is in right thereof; and to decern and ordain the heir in possession of such entailed estate to execute in favour of the petitioner, or of any other person such petitioner may think fit, a bond and disposition in security over the said estate, other than the mansion-house, offices, and policies thereof, or over some sufficient portion of the said estate other than as aforesaid, for the amount with which the deceased heir of entail himself might, under the provisions of this Act, have charged the estate . . . provided always that the said sums shall only be deemed to be a debt against the entailed estate and the heirs of entail therein, and shall only bear interest from and after the date of the decree of the Court pronounced in such petition."

† The Entail Amendment (Scotland) Act, 1878 (41 and 42 Vict. cap. 28), enacts:—Sec. 1. "All obligations undertaken, whether prior or subsequent to the passing of this Act, by an institute or heir in possession of an entailed estate in Scotland, in any lease granted by him as proprietor of such estate, or in any agreement with reference to such lease, for the execution by the proprietor, or with reference to the execution by the tenant, of any improvements of the description contained in the third section of the Entail Amendment (Scotland) Act, 1875, shall, in case of his death after the passing of this Act, and before complete fulfilment of such obligations, and to the extent to which, if he had himself made and paid for said improvements and had survived till payment is actually made, he would have been entitled to charge them upon the estate (if the estate had been an entailed estate under the said Act), devolve upon the heirs succeeding to the estate after him, who shall in their order be bound to relieve his executors, or other personal representatives, of such obligations, so far as unfulfilled, and to repay to such executors, or other personal representatives, any sums of money which they may be called upon to pay, and may have paid in virtue of such obligations: Provided that this enactment shall not apply to any case in which the granter of the obligation has in express terms, either in the obligation itself or in any separate writing, declared his intention to impose the obligation upon his executors to the relief of his heirs of entail."

Sec. 2. "The heir succeeding to such institute or heir in possession as aforesaid, shall, in like manner as above provided, be bound, unless otherwise expressly directed by him, to relieve to the extent aforesaid his executors, or other personal representatives, of all liabilities which he may have undertaken in any contracts or agreements for or with reference to the execution of improvements of the description aforesaid on the mansion-house and offices of the entailed estate, or any other parts of the estate not under lease, and to repay to the extent aforesaid to such executors or other personal representatives any sums of money which they may be called upon to pay and may have paid in virtue of such contracts or agreements."

(Scotland) Act, 1875; and provided, *inter alia*, as follows :—“(1) Mr Nov. 16, 1912.
Shepherd undertakes to execute the following improvements, that is to say: In the first place, such improvements of and additions to the drains, cesspools, and watercourses, and the sanitary matters . . . as shall be approved of by George Mackay, chief sanitary inspector of the county of Perth, and that in accordance with plans and specifications approved of by him, and at his sight and to his satisfaction. In the second place, such improvements of and additions to the means and appliances for conducting and supplying water to the said mansion-house and offices . . . as shall be approved of by the said George Mackay, and that in accordance with plans and specifications approved of by him, and at his sight and to his satisfaction. In the third place, such means and appliances and installation for lighting the said mansion-house and offices and outbuildings, including as aforesaid, with electric light, and such engine-houses, shafts, and fixed machinery appertaining thereto as shall be approved of by a man of skill appointed by Sir Alexander, and that in accordance with plans and specifications approved of by that man of skill, and at his sight and to his satisfaction. In the fourth place, such other improvements of and additions to the said mansion-house and offices and outbuildings, including as aforesaid, as shall be sanctioned by Sir Alexander, and that in accordance with plans and specifications approved of by a man of skill appointed by Sir Alexander, and at the sight of that man of skill and to his satisfaction. (2) As the foregoing improvements shall from time to time be executed by Mr Shepherd to the satisfaction of the said George Mackay, or of the man of skill appointed by Sir Alexander, as the case may be, the cost of the execution thereof shall be certified by the said George Mackay or the said man of skill, as the case may be, and such certificate (which shall be conclusive evidence of the cost therein certified) shall be delivered to Mr Shepherd, and at same time the plans and specifications and vouchers and receipts substantiating such certificate shall be delivered to Sir Alexander, with a duplicate of such certificate. (3) Sir Alexander binds himself and the heirs of entail succeeding to him in the said entailed estate of Delvine, and *subsidiarie* his heirs, executors, and representatives whomsoever, to repay to Mr Shepherd, and his executors and assignees whomsoever, but only to the extent aftermentioned, the cost of execution of the said improvements to be executed by Mr Shepherd, as such cost shall be certified as aforesaid, and that at the date of Sir Alexander's death, if he shall die before the expiry of ten years from and after the 15th day of January 1901, and at the expiry of the said ten years, if he shall survive such ten years, but only to the following extent,—That is to say, if Sir Alexander shall die before the expiry of five years from and after the 15th day of January 1901, then to the full extent of the cost certified as aforesaid, and if Sir Alexander shall die between the expiry of such five years and the expiry of ten years from and after the 15th day of January 1901, then to the extent of three-fourths of the cost certified as aforesaid, and if Sir Alexander shall survive the said ten years, then to the extent of one-half of the cost certified as aforesaid. (4) Without prejudice to the foregoing obligation, but in corroboration and security thereof, and to ensure fulfilment of the same by the heirs of entail succeeding to him in the said entailed estate of Delvine, Sir Alexander expressly bequeaths, conveys, and assigns to Mr

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On 8th and 12th November 1901 the same parties entered into a further agreement by a minute which was in these terms:—"It is hereby mutually agreed with reference to lease between Sir Alexander and Mr Shepherd of Delvine mansion-house, shootings, fishings, and others, dated 7th January 1901, and agreement between them of same date regarding improvements to be executed by Mr Shepherd on the entailed estate of Delvine, both recorded in the Books of Council and Session on 19th March 1901, that notwithstanding the estimated cost of the said improvements according to plans and specifications submitted by Mr Lake Falconer, architect, Blairgowrie, is shown to be £7393, 0s. 6d., the total amount of the expenditure on the said improvements for which Sir Alexander and his heirs and representatives or his estate shall have any responsibility under the said agreement and lease, including such repairs as may be necessary to put the premises in proper tenantable condition at Mr Shepherd's entry, shall be £6700, which sum shall be held to be the limit of expenditure for the improvements thereunder, and shall include the alterations to windows already carried out, compensation to tenants in connection with said works, architect's fee, fee to clerk of works, and any extras arising on the contracts, and that any expenditure on improvements beyond said limit, which Mr Shepherd may deem expedient, shall be borne by him without any claim upon Sir Alexander or his estate in respect thereof: Declaring, however, that nothing in the agreement shall relieve the landlord of his obligations under the lease to maintain the subjects wind and water tight during the tenancy or of any other obligations incumbent on him: And on this agreement being signed by both parties Sir Alexander hereby agrees to sanction the plans, specifications, and estimates prepared by Mr Falconer as aforesaid, and that Mr Mackay, Mr Townsend, and Mr Butter shall be asked to grant the certificate required under article 2 of the said agreement, so that the works may be proceeded with without delay."

Mr Shepherd proceeded to execute certain improvements and repairs upon the subjects let. He died in 1908, and thus predeceased Sir Alexander, who died in 1909.

On 13th February 1910 Mr Shepherd's executors presented a petition which purported to proceed under section 11 of the Entail Amendment (Scotland) Act, 1875, in which they sought to obtain a charge upon the entailed estates for the sum of £5025. This sum was three-fourths of the sum of £6700 to which the liability of Sir Alexander's representatives in respect of the stipulated repairs was limited by the minute of agreement of November 1901, three-quarters of that sum being the amount payable, in terms of the agreement of January 1901, in the event which had occurred, viz., the death of Sir Alexander between the expiry of five years and the expiry of ten years from 15th January 1901.

Answers to this petition were lodged by Sir Robert Smyth Muir Mackenzie (hereinafter called "Sir Robert"), the heir of entail who had succeeded Sir Alexander in possession of the estate of Delvine, in which it was stated, *inter alia*;—" (6) The respondent submits that the petition is incompetent and irrelevant, and ought to be dismissed. He submits that neither the late Mr Shepherd nor his

executors have any title or right to present such an application, and that the application is not warranted by the Acts founded on. He further submits that the alleged improvements are not improvements in the sense of the Acts founded upon, and that the procedure required by the Entail Acts to make improvement expenditure chargeable has not been followed.”

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On 19th March 1910 the Lord Ordinary (Cullen) dismissed this petition.*

The petitioners reclaimed against this interlocutor, and counsel were heard before the First Division on 24th May 1910, when the Court sisted the petition in order that the parties might bring an action of declarator for the decision of the question at issue between them.

On 28th May 1910 Mr Shepherd's executors brought an action against Sir Robert, and also called Sir Alexander's executors for any interest they might have. The summons in this action concluded for declarator (first) that Sir Robert, as heir of entail in succession to Sir Alexander, was bound to fulfil the obligations, so far as not already fulfilled, undertaken by Sir Alexander in the two agreements above referred to, and (second) that Mr Shepherd had, under the said agreements, executed improvements to at least the value of £6700, being the maximum limit of the amount which Sir Alexander was under the said agreements bound to pay Mr Shepherd in respect of the improvements, “and that under and in terms of said agreement and minute of agreement the sum of £5025, being three-fourths of said sum of £6700, is the extent to which the said Sir Alexander Muir Mackenzie, if he had himself made and paid for said improvements and had survived till payment was actually made, would have been entitled to charge them upon the estate,” and proceeded—“and further, it having been so found and declared, or whether it be so found and declared or not, the defender, the said Sir Robert Smyth Muir Mackenzie, ought and should be decerned and ordained, by decree foreshaid, to make payment to the pursuers, as executors foreshaid, of the said sum of £5025 sterling, with interest at the rate of

* “OPINION.—[After a narrative of the circumstances]—I am of opinion that the respondent's contention is well founded. Sir Alexander never executed or expended money on improvements. What he did was to enter into a bargain with his tenant that the latter should execute improvements, and should, on the expiry of the lease at Sir Alexander's death, have right to repayment of a certain proportion of the cost primarily from the succeeding heirs of entail and *subsidiarie* from Sir Alexander's executors. The obligation for repayment is not yet fulfilled, and so far as the improvements made were of the kind contemplated by the Entail Acts, and such as could have been charged by Sir Alexander had he himself made them, the obligation would appear to have devolved on the respondent by virtue of the Act of 1878. The petitioners' argument seems to involve that they have two concurrent rights—(1) to enforce the unfulfilled obligation against the respondent as having devolved on him under the 1878 Act; and (2) to treat the expenditure made by Mr Shepherd as if it had been actually made by Sir Alexander, and to obtain a charge for it on that footing by virtue of the eleventh section of the Act of 1875. These alleged rights seem to me to be contradictory. I am unable to see that the petitioners are entitled to a charge for the cost of improvements which Sir Alexander did not make and never paid for, and the liability for which has now devolved on the respondent. I am accordingly of opinion that the petition falls to be dismissed.”

Nov. 16, 1912. five per centum per annum from the 25th day of June 1909, being the date of the death of the said Sir Alexander Muir Mackenzie, or from such other date as the said Lords may determine, until payment. . . ."

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It was stated in the condescendence in this action that the sum spent upon improvements by Mr Shepherd had been £9564 or thereby, of which £1227 was applicable to the electric light installation, that Mr Townsend, the man of skill appointed by Sir Alexander, had withheld his certificate with regard to this installation, but that the cost of the other works had been certified, in terms of the agreements.

The action was defended by Sir Robert only, who pleaded;—(1) The action, so far as directed against this defender, is incompetent. (2) The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action ought to be dismissed, with expenses. (3) On a sound construction of the Entail (Scotland) Act of 1878, the pursuers have no right of action against this defender and the succeeding heirs of entail for the sums sued for. (4) The alterations executed by the late Mr Shepherd not being such improvements as Sir Alexander Mackenzie would under any circumstances have been entitled to charge on the entailed estates, no liability therefor can transmit to this defender or the succeeding heirs of entail. (5) The defender is not liable in the sum sued for, in respect that the pursuers could not have maintained an action therefor against Sir Alexander Mackenzie, if he had survived. (6) In respect that Sir Alexander Mackenzie could never have been liable to the pursuers in a greater sum than £3350, this defender's liability cannot in any event exceed £2512, 10s.

By interlocutor dated 3rd January 1911, the Lord Ordinary (Cullen) repelled the first, third, and fifth pleas in law for the compearing defender, sustained his second plea in law in so far as it related to the first declaratory conclusion of the summons, dismissed the said conclusion, and continued the cause.*

* "OPINION.—[The Lord Ordinary narrated the circumstances of the action, and, after referring to sections 1, 2, and 4 of the Entail Amendment (Scotland) Act, 1878, proceeded]—The first conclusion of the summons is for declarator that the defender, Sir Robert S. Muir Mackenzie, as heir of entail foresaid, is 'bound to fulfil the obligations so far as not already fulfilled,' undertaken by Sir Alexander under the two agreements already mentioned, 'in so far as said obligations refer to the execution of improvements on the said entailed estate of the description contained in the third section of the Entail Amendment (Scotland) Act, 1875, and the cost thereof.' This is a faulty conclusion. Sir Robert is not bound by the agreement *per se* to fulfil Sir Alexander's obligation. The Act of 1878 does not, in any view, subject him to liability to fulfil Sir Alexander's obligation under the agreement *in toto*. On the pursuers' view the Act throws on him liability to a limited extent defined in the Act. But this conclusion does not import the statutory limit.

"The second conclusion is for declarator that Mr Shepherd spent, at least, £6700 on the contemplated improvements, and that 'under and in terms of said agreement and minute of agreement the sum of £5025, being three-fourths of said sum of £6700, is the extent to which the said Sir Alexander Muir Mackenzie, if he had himself made and paid for said improvements and had survived till payment was actually made, would have been entitled to charge them upon the estate. A criticism directed

On 18th January 1911 the Lord Ordinary pronounced the following Nov. 16, 1912.
interlocutor:—"Of consent of parties, remits to Mr Andrew A. Ralston, Philipstoun House, Winchburgh, to inspect the improve-
ments on the estate of Delvine, referred to in the summons, and to report—(1) whether, and to what extent, these improvements are of the description contemplated by the Entail Amendment (Scotland) Act, 1875; (2) whether, and to what extent, these are of a substantial nature and beneficial to the estate; and (3) whether the sum of £6700, or what part thereof, was *bona fide* and properly expended by the late Joseph Augustus Shepherd in said improvements." Shepherd's
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On 14th March 1911 Mr Ralston made a detailed report which contained the following passage:—

"After fully considering the whole matter the reporter is of opinion:—

"(1) That the improvements are of the description contemplated by the Entail Amendment (Scotland) Act, 1875, if they had been necessary, and had been carried out on a reasonable and moderate scale.

by the defender, Sir Robert S. Muir Mackenzie, to this conclusion is that, on a proper construction of the second agreement, the amount which Sir Alexander was bound to pay to Mr Shepherd in the event which happened was three-fourths of £6700, viz., £5025, and that the amount with which he could have charged the estate on the hypothesis stated in the conclusion would have been three-fourths of £5025, viz., £3768, 15s. This criticism, for the reasons already stated, appears to me to be sound. It goes, however, only to the *quantum* of the conclusion, and does not entirely displace it.

"The third conclusion is that the defender, Sir Robert S. Muir Mackenzie, should be ordained to pay to the pursuers the said sum of £5025, with interest. Assuming the pursuers' case to be otherwise well founded, the defender's criticism on the second conclusion applies here also to the effect of reducing the amount claimable from Sir Robert to £3768, 15s.

"The main question, however, arising at the present stage of the case is whether, assuming the truth of the pursuers' averments, the Act of 1878 gives the pursuers a ground of action against Sir Robert for the £3768, 15s., or £5025, as the case may be. The pursuers' debtors under the agreements are Sir Alexander's executors. Sir Alexander, under the agreements, professed to bind conventionally the heirs of entail succeeding him; but it is conceded that he had no power to do so, and that, in the result, his obligation is, apart from the Act, one binding himself and his representatives only. This being so, the pursuers appeal to section 1 of the 1878 Act, and say that, to the extent permitted by the Act (not correctly reflected in their conclusions according to my view), Sir Alexander's obligation under the agreements has 'devolved upon' Sir Robert.

"*Prima facie* the Act would seem to apply, this being a case of an obligation undertaken by an heir of entail in possession in an agreement with reference to a lease granted by him with reference to the execution by the tenant of improvements alleged to be of the description contained in the third section of the 1875 Act, and where the heir in possession so undertaking has died before 'complete fulfilment of such obligation.' The words of section 1 are perfectly general, and the obligation undertaken by Sir Alexander seems *prima facie* to answer to them. The defender, however, advances a variety of grounds for displacing the application of section 1. He also contends that, *esto* section 1 otherwise applies to the case, it does not give the pursuers the direct right of action against him in which they now insist.

"In the first place, the defender says that section 1 does not apply because the subject-matter of the agreements between Sir Alexander and

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"(2-3) The reporter is also of opinion that the expenditure was of a substantial nature and beneficial to the estate, and properly made by the late Mr Joseph Augustus Shepherd in said improvements, but only to the extent, as at February 1911, as follows:—

(1) Sanitary improvements, ...	£1200	0	0
(2) Water supply, ...	855	0	0
(3) Stables, &c., ...	650	0	0
(4) Gardens and kennels, ...	550	0	0
(5) Electric light, ...	800	0	0
	£4055 0 0		

and that an heir of entail who had himself made and paid for said improvements would have been entitled to charge that amount as for improvements, to the extent of three-fourths thereof, under the Entail Acts, being £3041, 5s.

Mr Shepherd was the executing of improvements on the mansion-house. He points to section 2, which specially mentions the mansion-house. Now, the scheme of section 1 is to deal with obligations undertaken to tenants under leases or agreements relative to leases, while the scheme of section 2 is to deal with liabilities for improvements undertaken with regard to subjects not leased. The mansion-house is, under section 2, specifically mentioned as a case falling under it. The reason of this probably was to make it quite clear, in view of certain decisions, that section 2 applied to an unlet mansion-house as well as to 'any other parts of the estate not under lease.' I cannot see anything in section 2 sufficient to limit the general terms of section 1 by importing into it an exception of the case of a leased mansion-house and an obligation undertaken by the heir in possession granting the lease with reference to improvements which the tenant under the lease has undertaken. Improvements on a mansion-house are one of the kinds of improvements described in the 3rd section of the Act of 1875 referred to as a standard in the 1st section of the Act of 1878.

"In the second place, the defender says that inasmuch as the obligation undertaken by Sir Alexander was, in the event which happened, an obligation prestable only at his death, it was not an obligation of the kind referred to in section 1 of the 1878 Act. I have difficulty in appreciating the ratio of this objection. The obligation undertaken by Sir Alexander, taken as a whole, was one which might or might not become prestable during his life. The object of the Act is to throw on the succeeding heirs of entail liability for the same amount as the preceding heir undertaking the obligation contemplated by the Act could have charged on the estate if, instead of undertaking the obligation, he had himself made and paid for the improvements to which the obligation applies. Now this object and the generality of the terms of section 1 seem to include the case of an obligation prestable at the death of the granter just as much as that of an obligation prestable during his life. In either case the succeeding heir has to bear only the proportion of the improvement expenditure falling under the obligation which the preceding heir could have charged if he had made and paid for it himself.

"In the third place, the defender says that section 1 only applies to obligations undertaken in, or given with reference to, leases of which the currency extends beyond the life of the granter, so that, after his death, the tenant and the succeeding heir are related to one another under a continuing contract. He thus excludes the case of an ordinary agricultural lease the term of which is contemporaneous with the death of the granter or at any time prior thereto. I am, however, unable to find this qualification in the Act.

"In the fourth place, the defender says that section 1 does not refer to

"The great bulk of the work carried out at Delvine was unnecessary and extravagant, and outwith the powers of an heir of entail. Nov. 16, 1912.

"The reporter also begs to state that as at the date when the works were carried out, so far as the heir of entail could charge the estate, the improvements would probably be represented by a sum of about £5282, as follows :—

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(1) Sanitary improvements, ...	£1400	0	0
(2) Water supply, ...	1282	0	0
(3) Stables, &c., ...	650	0	0
(4) Gardens and kennels, ...	550	0	0
(5) Electric light, ...	1400	0	0
	£5282	0	0

three-fourths of which, under the Entail Acts, would be £3961, 10s.

obligations to pay money to a tenant, as distinguished from obligations *ad facta præstanda*, such as obligations to erect buildings or fencing. Now section 1 includes (1) the case of an obligation for the execution by the proprietor of improvements, and (2) the case of an obligation by the proprietor 'with reference to the execution by the tenant' of improvements. In the latter case the normal form of the proprietor's obligation would be to reimburse the tenant for the improvements executed by him. It does not, therefore, seem to me that this objection is well founded. If the proprietor agrees so to reimburse the tenant, his obligation, under the conditions and limitations prescribed by the Act, seems to be one which it is in consonance with the object of the Act to devolve on the succeeding heir who is thereby only burdened with such part of the improvement expenditure, to which the obligation applies, as the preceding heir could have charged on the estate had he made and paid for it himself.

"The defender further contends that, *esto* Sir Alexander's obligation is one of the class contemplated by section 1, the pursuers are nevertheless not entitled to the direct right of action against him on which they here insist. What the Act says is that the obligations of the heir in possession shall to the statutory effect 'devolve upon the heirs succeeding to the estate after him, who shall in their order be bound to relieve his executors, or other personal representatives, of such obligations, so far as unfulfilled,' &c. The defender does not say that the statutory devolution imports only an obligation of relief towards the executors in all cases to which the Act refers, without giving the tenant a right of action against the succeeding heir. He concedes that in cases where the devolved obligation is an obligation *ad factum præstandum* under a continuing lease, such as an obligation to erect farm buildings, the meaning of the Act in devolving the obligation on the succeeding heir is that the tenant shall have a direct right to demand fulfilment from him, instead of being confined to an action against the executors of the preceding heir who have no relation to the lands and no power to enter on them. The defender, however, says that when it is a question of paying money to the tenant, the obligation to pay does not 'devolve' on the succeeding heir in the same way as an obligation *ad factum præstandum*, and that in such a case the succeeding heir is not placed by the statute under any relation of liability towards the tenant, but only towards the executors of the deceased heir, whom he is bound to relieve. I am unable to find that this distinction is made by the terms of the Act. In all the cases to which it refers the obligation 'devolves upon' the succeeding heir. If, as the defender concedes, the devolution makes the succeeding heir the direct debtor of the tenant in one case—the obligation *ad factum præstandum*—I do not see how he avoids a similar liability in the other case—that of money payment. As already pointed out, obligation to pay

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"With reference to head 3 of the agreement between Sir Alexander Muir Mackenzie and Mr Joseph Augustus Shepherd, dated 7th January 1901, the reporter begs to state that at the date of the death of Sir Alexander Muir Mackenzie on 25th June 1909 the improvements would probably be represented by a sum of £4367 as follows :—

(1) Sanitary improvements, ...	£1250	0	0
(2) Water supply, ...	962	0	0
(3) Stables, &c., ...	650	0	0
(4) Gardens and kennels, ...	550	0	0
(5) Electric light, ...	955	0	0

£4367 0 0

three-fourths of which would be £3275, 5s.

"A statement of the improvements at the respective dates is appended in tabular form."*

money to the tenant seems to be the normal form of obligation by the proprietor in the cases (expressly contemplated in section 1) of an agreement with reference to improvements executed by the tenant. The object of section 1 of the Act in all the cases within its scope is the same, that is to say to burden the succeeding heir with improvement expenditure, for which the preceding heir obliged himself to a tenant to the same extent as if the preceding heir had made and paid for the improvements himself. The object being the same I do not think that the Act expresses a distinction in the form of the succeeding heir's liability as between the case of an obligation *ad factum præstandum* and the case of an obligation to pay money to the tenant for improvements executed by him.

"Following these views I shall repel the first, third, and fifth pleas in law for the defender. I shall sustain his second plea in law so far as it is directed to the first declaratory conclusion of the summons. This second plea is also directed *inter alia* to the *pluris petitio* under the other conclusions, but as the facts relating to the making of the alleged expenditure and the nature of it have yet to be ascertained, it will be more convenient not to deal with this aspect of the plea at the present stage."

* Appended to the report was the following table :—

"Table showing the expenditure at Delvine, and, in Mr Ralston's opinion, the amounts of improvements at various dates.

	Expenditure.	Improvements when works carried out.	Improvements at 25th June 1909, when Sir Alexr. Mackenzie died.	Improvements as at February 1911.
1. Sanitary improvements, &c., at Delvine House,	£3,076 10 4	£1,400 0 0	£1,250 0 0	£1,200 0 0
2. Delvine water supply, ...	1,282 4 0	1,282 0 0	962 0 0	855 0 0
3. Partial rebuilding and modernising of Delvine stables, ...	2,522 0 3	650 0 0	650 0 0	650 0 0
4. Renewals and improvements at gardens and kennels, ...	1,456 10 0	550 0 0	550 0 0	550 0 0
5. Electric lighting installation, ...	1,709 5 2	1,400 0 0	955 0 0	800 0 0
	£10,046 9 9	£5,282 0 0	£4,867 0 0	£4,065 0 0
Amount agreed to be the limit of Expenditure	£8,700 0 0			
Three-fourths thereof,	£5,025 0 0	£3,961 10 0	£3,275 5 0	£3,041 5 0"

The total improvement expenditure was stated in the report at Nov. 16, 1912. £10,046, 9s. 9d.

On 12th September 1912, after hearing parties, the Lord Ordinary (Cullen) pronounced the following interlocutor:—"Finds it unnecessary to deal with the second conclusion of the summons and dismisses the same, and decerns; and under the last conclusion decerns and ordains the defender, Sir Robert Smyth Muir Mackenzie, to make payment to the pursuers of the sum of £1542 sterling, with interest thereon at the rate of five per centum per annum from the date of citation until payment."*

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* "OPINION.—Mr Ralston, the reporter to whom, of consent of parties, I remitted by my interlocutor of 18th January 1911, has now returned his report, and various questions as to the rights and obligations of parties on the basis of it formed the subject of a recent discussion.

"[His Lordship here dealt with the cost of the electric light installation, and held that, as this part of the expenditure had not been certified by the man of skill appointed by Sir Alexander, in terms of article 2 of the agreement of 7th January 1901, it fell to be deducted from the certified cost of Mr Shepherd's improvements]—On this footing, the total of the certified cost of Mr Shepherd's operations was £8337. Sir Alexander's obligation, in the event which happened, was to pay three-fourths of £6700 of this, viz., £5025, as at the date of his death.

"Sir Alexander's obligation was not conditioned on the improvements being of such a nature as to found a right to charge the estate under the Entail Acts had he made them himself. The pursuers are suing upon a statutory devolution of Sir Alexander's obligation on the succeeding heir, not *simpliciter*, but only so far as the obligation relates to 'any improvements of the description contained in the 3rd section of the Entail Amendment (Scotland) Act, 1875,' and only 'to the extent to which, if he had himself made and paid for said improvements and had survived till payment is actually made, he would have been entitled to charge them upon the estate.' According to Mr Ralston's report, the expenditure by Mr Shepherd (excluding the electric light) was of the class falling within the 3rd section of the 1875 Act to the value of £3882. The difference between this sum and the foreshaid total of £8337 (£4455) was for expenditure of a kind outwith that section, and the succeeding heir incurs no liability in relation to it. But Sir Alexander's obligation for payment related to it in part. It was to pay £6700—or three-fourths or one-half thereof—of the cost of the whole work generally, whether of the kind falling within that section or not. In order, therefore, to ascertain how far his obligation related to expenditure on improvements of the statutory class, it seems to me that the £6700 (wholly or partly) must be regarded as having been payable in respect of both classes of improvements, and divided proportionally between the £3882 of statutory improvements and the £4455 of non-statutory improvements. This brings out £3120 as the part of the £6700 ascribable to the statutory improvements, three-fourths of which is £2340. Liability for this amount has devolved on the defender to the extent to which Sir Alexander, 'if he had himself made and paid for said improvements and had survived till payment is actually made, would have been entitled to charge them on the estate.' Two questions arise here. The first relates to the period which is to be taken as that of the hypothetical charge by Sir Alexander, for in the case of an actual application to charge improvement expenditure the amount of the charge depends on the value of the improvements when the application is made. The alternative periods contended for by the parties respectively were (1) the time when Mr Shepherd's improvements were executed; and (2) the date of Sir Alexander's death, when his obligation for payment became prestable. It appears to me that

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The pursuers reclaimed, and the case was heard before the First Division (without Lord Johnston) on 11th, 18th, and 19th July 1912.

Argued for the reclaimers;—The Lord Ordinary was wrong in calculating the sum due by a proportional division of £6700 as between statutory and non-statutory improvements. The intention and effect of the agreements was to bind Sir Alexander's successor to repay the whole amount of improvement expenditure, in so far as Sir Alexander could legally effect this result. The initial fault in the Lord Ordinary's reasoning was in the distinction he drew between statutory and non-statutory improvements. As a matter of fact the whole of the improvements were of the nature contemplated by section 3 of the Entail Amendment Act, 1875, as properly chargeable upon the estate. Sir Alexander might have charged the whole of that expenditure upon the entailed estate, and his heir was therefore liable therefor, subject to the limitation, in the event which had occurred, to £5025. But assuming that the pursuers were only entitled to recover in respect of that portion of the expenditure which had been reported as falling within the 3rd section of the Act of 1875, they were entitled to decree for the full value of such improvements calculated at the date at which they were executed. The effect of section 1 of the Act of 1878 was that the obligation to repay undertaken by Sir Alexander devolved upon the defender to the extent to which Sir Alexander, if he had made the improvements himself and had survived till payment was made, "would have been entitled to charge them upon the estate." The final test was the amount which Sir Alexander could have charged. Both under the Act of 1875, and that of 1878, he could have charged the estate with this expenditure, either by way of bond of annualrent, or by way of bond and disposition in security; it was only in the latter case that the amount for which he could charge was limited to three-quarters of the sum expended. Neither the case of *Kinnoull v. Haldane*,¹ nor that of *Leith v. Leith*,² on the reasoning of which *Kinnoull's* case¹ proceeded, was an authority against the pursuers on this point. In *Leith's* case,² it was decided that under section 11 of the Act of 1875 an heir of entail in possession might not charge the whole amount of his expenditure by way of bond and disposition in security. In *Kinnoull's* case¹ it was decided that a bond of annualrent was not a "charge affecting the fee of an estate" in the sense of section 9 of the Entail Amendment Act, 1868. On the question of interest, there was no reason why interest should

the latter is the proper period. According to Mr Ralston's report, the statutory improvements (excluding the electric light), which originally were of the value of £3882, were, at Sir Alexander's death, of the value of £3412, and the proportion of this effeiring to the sum of £2340 already mentioned is £2056.

"The next question arises on the words of section 1 of the 1878 Act: 'to the extent to which he would have been entitled to charge them upon the estate.' The pursuers say that this means the whole sum in question, in respect that Sir Alexander might have obtained authority to charge the whole by way of bond of annualrent. The defender says it means only three-fourths as the proportion chargeable by way of bond and disposition in security. I was referred to the recent decision of the First Division in the case of *Earl of Kinnoull*, petitioner, which, it seems to me, is affirmative of the defender's contention. On this footing the amount payable by the defender under the devolved obligation is three-fourths of £2056 or £1542."

¹ 1911 S. C. 1279.² (1888) 15 R. 944.

not run on the sum decerned for from the date when it really became due, viz., Sir Alexander's death. The Lord Ordinary was also wrong in dismissing the petition. By virtue of the assignation from Sir Alexander the petitioners had a title to present it.

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Argued for the respondent;—The action was incompetent. Mr Shepherd's executors were not entitled to bring into Court this defender, with whom they had no contractual relation. It was admitted that Sir Alexander's representatives might have a good claim against the defender arising out of these agreements, but such a claim was not open to the pursuers. Further, the provisions of section 1 of the Act of 1878 were not applicable to the present case, which concerned repairs to the mansion-house. Such a case was dealt with in section 2, which expressly provided that the expense of such repairs was to be recovered from the succeeding heir by the executors of his predecessor. Assuming, however, the competency of the action, the Lord Ordinary had decided rightly (1) as to the proportion of the expense to be borne by the defender; (2) as to the date at which the valuation of improvements should be taken; and (3) in decerning only for three-fourths of their value as at that date. The latter decision followed of necessity from the reasoning in *Leith v. Leith*,¹ and *Kinnoull v. Haldane*.² In any case, interest should only run from the date of decree in the action; it was only then that the obligation of the defender could be ascertained. The Lord Ordinary had rightly dismissed the petition. The petitioners in no way represented an heir of entail who had executed improvements.

At advising on 16th November 1912,—

LORD PRESIDENT.—[After narrating the facts and referring to the agreements between Sir Alexander and Mr Shepherd]—The present action is raised by the executors of Mr Shepherd against the present heir of entail in possession for this expenditure. The Lord Ordinary before whom the case depended, by his interlocutor of the 3rd January 1911, disposed of certain preliminary and prejudicial pleas stated by the defender, and he also disposed of the first declaratory conclusion of the pursuers, which he considered too wide. The preliminary pleas of the defender, three in number, which were disposed of, although rather varying in phraseology, really all go practically to the competency of the action. Having disposed of those pleas, the Lord Ordinary granted leave to reclaim. Leave to reclaim was not taken advantage of, and the Lord Ordinary then remitted to a reporter, Mr Ralston, to examine the improvements and to report as to the extent to which they could have been charged upon the estate if they had been made by an heir in possession himself. Thereafter, upon receiving a report from that reporter, the Lord Ordinary found that it was unnecessary to dispose of the second declaratory conclusion; but under the petitory conclusion he has granted decree for £1542 sterling, with interest thereon at the rate of 5 per cent per annum from the date of citation till payment.

In arriving at this figure his Lordship thought that the pactional amount of £8700 should be held as effeiring partly to the statutory and partly to the non-statutory improvements. I am of opinion that his Lordship was in error in so doing, and for this very simple reason: Sir Alexander, by his

¹ (1888) 15 R. 944.

² 1911 S. C. 1279.

Nov. 16, 1912. original agreement, undoubtedly meant to impose all that he could legally impose upon the heir of entail to the relief of his executor. When he made
 Shepherd's the subsequent agreement with Mr Shepherd—that in no case should his
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 Mackenzie. think, wish for one moment to alter what he had expressed his *eniza voluntas* to be, namely, to free his executor so far as he could at the expense of the heir of entail. Accordingly, the heir of entail in possession has to pay all that he can legally be made to pay, and the executors have to pay the rest; but, taking the whole estate as represented by both executors and heir of entail in possession, it can never be subjected to a demand for more than £6700.

In the next place I would call your Lordships' attention to this, that inasmuch as this action is at the instance of Mr Shepherd's executors against the heir of entail in possession, with whom, of course, directly Mr Shepherd never had any contract whatsoever, it is quite clear—and it is common ground between the parties—that the action is really based upon the provisions of the Entail Act of 1878, which provides by the first section that all obligations (I am leaving out some words) in any lease granted by an heir of entail in possession as proprietor of an estate, "or in any agreement with reference to such lease, for the execution by the proprietor, or with reference to the execution by the tenant, of any improvements of the description contained in the third section of the Entail Amendment (Scotland) Act, 1875, shall in case of his death"—that is, the death of the heir of entail in possession—"after the passing of this Act, and before complete fulfilment of such obligations, and to the extent to which if he had himself made and paid for said improvements, and had survived till payment is actually made, he would have been entitled to charge them upon the estate, . . . devolve upon the heirs succeeding to the estate after him, who shall in their order be bound to relieve his executors. . . ."

Now, I may say at once, that so far as the Lord Ordinary's dealing with the prejudicial pleas in the interlocutor of 3rd January is in question, I am entirely of the same opinion as the Lord Ordinary, and I have really nothing to add to what his Lordship has said in his very careful note upon the subject. I think this is a case where clearly the Act applies. This is a case where an heir of entail in possession bound himself—and, of course, his whole estate—for repayment to a tenant in respect of improvements executed by that tenant; and I think that, in terms of that Act, the tenant gets thereby a good action against the heir of entail in possession, but, of course, only to the extent to which the granter of the lease, if he had made the improvements himself and had lived to charge them, could have charged them.

Now we have a very clear and able report from Mr Ralston, with a very convenient table of how the improvements stand. The table gives, in the first column, the original expenditure. The original expenditure was altogether £10,000 odd, but, as I have already said, that is pactionally reduced to £6700. Three-fourths of the original £6700 would be £5025, and accordingly it is quite clear that Mr Shepherd's claim—and now his executors' claim—against the massed estates of Sir Alexander is £5025, and that, so far as Sir Alexander could, he, by the obligation expressed,

imposed that payment upon the heir of entail in possession. But, of Nov. 16, 1912. course, he could not impose the whole payment upon the heir of entail in possession, because his power to do so is cut down by the condition in the statute which says that the criterion is to be the extent to which, if he had himself made the improvements, and had survived until payment was actually made, he would have been entitled to charge them on the estate. Shepherd's
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The first question, therefore, that arises upon that is, What is the date at which we are to see what the improvements are which he could have charged? I think, with the Lord Ordinary, that it is quite clear that the date is when the payment fell to be made, namely, at Sir Alexander's death. Therefore I turn to the column where Mr Ralston gives what the improvements were worth at the time of Sir Alexander's death. I need hardly say that Mr Ralston only puts down what you may call proper entail improvements—that is to say, things that could be charged as being an improvement to the estate in an ordinary petition. That column of Mr Ralston's gives a sum total, as on 25th June 1909, of £4367. But from that there must be struck off a sum of £955, being the cost of the "electric lighting installation," and for this reason, that by another clause in the agreement (which I do not read at length), nothing was to be paid for except upon the production of certain certificates, and no certificate for electric lighting has been produced. Accordingly, I do not think that Mr Shepherd can ever succeed in claiming from any portion of Sir Alexander's estate anything for the electric light. That, however, does not interfere with Mr Shepherd's right to recover £5025, for this very simple reason that, if you strike off the original cost of the electric lighting installation, namely, £1709, from the total of £10,000, you still have a sum that is greater than the pactional sum of £6700. Accordingly, I am of opinion that Mr Shepherd's executors are entitled to recover, as against the heir of entail in possession, that proportion which they can recover of the third column after deduction of £955. Now, the third column is £4367, and if you deduct £955 from that, it leaves £3412. But according to our decision in the case of the *Earl of Kinnoull v. Haldane*,¹ an heir of entail cannot charge the whole of that, he can only charge three-fourths, and therefore the outcome of the whole matter is that the executors are entitled to recover as against the heir of entail in possession three-fourths of £3412, which, as a matter of fact, is £2559, and for that sum I am of opinion that they should have decree.

The other question that remains is the question of interest. The Lord Ordinary has given interest at the rate of 5 per cent from the date of citation till payment. I do not think this is a case where interest can be given from the date of citation, because the heir of entail in possession is due only what can be, so to speak, proved against him in terms of the Act of Parliament, and until that is settled he cannot be considered in *mora* in not paying. Accordingly I think that this sum of £2559 for which we propose to give decree should bear interest only from the date of the decree and not from the date of citation.

I am therefore of opinion that we should recall the Lord Ordinary's

¹ 1911 S. C. 1279.

Nov. 16, 1912. interlocutor in so far as it ordains Sir Robert Mackenzie to pay £1542, and in lieu thereof decern and ordain him to make payment to the pursuers of the sum of £2559, with interest at 5 per cent from the date of this decree, and that *quoad ultra* we should adhere to the Lord Ordinary's Ld. President. interlocutor.

As regards the petition, I concur with Lord Mackenzie. I think the petition was incompetent. The Lord Ordinary so decided it, and upon the reclaiming note I think we should adhere. I am afraid the pursuers here mistook their remedy, and I think that Sir Robert is entitled to his expenses in the petition in both the Inner and the Outer House.

LORD KINNEAR.—I agree with your Lordship, and for the reasons which your Lordship has given.

LORD MACKENZIE.—The Lord Ordinary has dismissed the petition presented by the executors of the late Mr Shepherd for authority to charge the entailed estate of Delvine with a proportion of the sums expended on improvements thereon by him. I agree with the view taken by the Lord Ordinary, and that upon the short ground that the petitioners are not, and do not represent, an heir of entail who executed or paid for the improvements.

The action at the instance of the executors is in a different position. The agreements which the late Sir Alexander Muir Mackenzie made with Mr Shepherd profess to bind the heirs of entail. No doubt Sir Alexander was not liable during his lifetime, but, in my opinion, the terms of section 1 of the 1878 Act are sufficient to make the obligations contained in these agreements devolve upon the heirs of entail. Its terms are general, and are not limited by the phraseology of section 2. It is a different question, and one with which we are not concerned in the present proceedings, whether the lease granted by Sir Alexander Mackenzie would be struck at by the principles laid down in such cases as those relating to the Queensberry leases. The pursuers, therefore, have a title to sue the defender, Sir Robert Mackenzie, who is called as heir of entail in possession of Delvine. It is not necessary for them to sue Sir Alexander's executors, who in their turn would have to go against the heir of entail. So far, therefore, I take the same view as the Lord Ordinary.

Upon the question of the amount which the pursuers are entitled to recover, it appears to me that the figure £6700, the amount specified in the second agreement, is to be read into the third article of the first agreement, and is to be held as a limitation of the amount therein contracted to be paid. The amount to be paid must be regulated by the 1878 Act, section 1, and the Entail Amendment (Scotland) Act, 1875, section 3. The cost of the execution of the improvements must further be certified by the man or men of skill appointed in terms of article 2 of the first agreement. An argument was submitted on the concluding words of the second agreement. I think the effect of this clause was merely that Sir Alexander agreed to sanction the plans, specifications, and estimates so that the works might be proceeded with without delay, but that still left it necessary to obtain the certificates required under article 2 of the first agreement as and when the

improvements were executed. It is admitted that the cost of the electric lighting was not certified, and therefore this cannot form a charge against the defender. We have a report from Mr Agnew Ralston as to the value at various dates of the improvements so far as falling under the third section of the 1875 Act. In my opinion, the date at which their value should be taken is the date of Sir Alexander's death, when the obligations became prestatable. This is the view of the Lord Ordinary. I am, however, unable to agree with the way in which the Lord Ordinary has divided proportionally the £6700 between different classes of improvements. I think there should be taken first of all the figure at which Mr Ralston brings out the amount of the improvements on 25th June 1909, the date of Sir Alexander's death, viz., £4367. From this there must be deducted the amount of the electric lighting installation, £955. This leaves £3412. Sir Alexander bound himself and the heirs of entail succeeding to him to make payment under the agreement, in the event which has happened, of three-fourths of the £6700, or £5025. The actual amount is therefore less than that sum. Then arises the further question what the extent was to which Sir Alexander might have charged the entailed estate with this sum of £3412. This point is, I think, settled by the case of the *Earl of Kinnoull*,¹ referred to by the Lord Ordinary, at three-fourths. The obligation therefore devolves upon the defender, under section 1 of the 1878 Act, to the extent of three-fourths of £3412, viz., £2559.

The Lord Ordinary has held that interest should run from the date of citation. This is, however, different from an ordinary litigation. Looking to the terms of the eleventh section of the 1875 Act, I think interest should only run from the date of decree.

THE COURT pronounced the following interlocutors:—

(*In the action of declarator, &c.*)—"The Lords having considered the reclaiming note for the pursuers against the interlocutor of Lord Cullen, dated 12th September 1911, . . . recall said interlocutor, but only in so far as it decerns and ordains the defender, Sir Robert Smyth Muir Mackenzie, to make payment to the pursuers of the sum of £1542 sterling, with interest thereon at the rate of 5 per cent per annum from the date of citation till payment; in lieu thereof decern and ordain the said defender to make payment to the pursuers of the sum of £2559, with interest thereon at the rate of 5 per cent per annum from the date hereof until payment: *Quoad ultra* adhere to said interlocutor, and decern . . ."

(*In the petition*)—"The Lords having considered the reclaiming note for the petitioners against the interlocutor of Lord Cullen, dated 19th March 1910, . . . adhere to said interlocutor, refuse the reclaiming note, and decern . . ."

TODD, MURRAY, & JAMIESON, W.S.—CARMICHAEL & MILLER, W.S.—Agents.

¹ 1911 S. C. 1279.

- No. 22. WILLIAM ROUGHEAD, Pursuer (Reclaimer).—*Murray, K.C.*—
Hon. W. Watson.
 Nov. 16, 1912. ALEXANDER WHITE AND OTHERS, Defenders (Respondents).—
Macmillan, K.C.—*Gentles.*
 Roughead v. White. *Partnership—Retirement of partner—Bonds and dispositions in security granted by partners—Duration of liability of retired partner—Bond of relief—Cautioner—Liberation.*

An association, formed for the purpose of acquiring heritable properties as investments, in the course of their business borrowed sums of money on the security of certain of their properties, for which the partners in the association granted bonds and dispositions in security as trustees for the association, and also as individuals. One of the members thereafter withdrew from the association, under an article of the partnership agreement which permitted any member to retire on finding a satisfactory substitute, and the remaining members granted a bond of relief undertaking to relieve him of any claim made against him by any creditor in respect of the bonds. Neither the partnership agreement nor the bond of relief made any provision for the termination of obligations undertaken during his membership.

Ten years after his withdrawal he brought an action against the members of the association to compel them, by paying up the amounts of the bonds or by obtaining discharges of his liability from the bondholders, to relieve him of all liabilities undertaken by him under the bonds. He founded his claim upon the long lapse of time, changes in the partnership, extension of the loans for further periods and their assignation to new creditors, and, *separatim*, upon the right which he contended he had as a mere cautioner at any time to withdraw his cautionary obligation as regarded future liability.

Held that he was a principal debtor and not a cautioner, and had, in the circumstances, no right of relief against the defenders except that given by the bond of relief; and action *dismissed* as irrelevant.

EXTRA
 DIVISION.
 Lord Cullen.

WILLIAM ROUGHEAD, Writer to the Signet, Edinburgh, brought an action against Alexander White, George Reid, and others, in which he sought that "it ought and should be found and declared, by decree of the Lords of our Council and Session, that the defenders are bound, conjunctly and severally, to free and relieve the pursuer of all liability undertaken by him under and in virtue of the following bonds and dispositions in security executed by the pursuer as trustee for the Association formed under the name of 'The City of Edinburgh Property Association,' and as an individual, and others, *videlicet* :—[Here followed a list of a number of bonds and dispositions in security]—And the defenders ought and should be decerned and ordained, by decree of our said Lords, to free and relieve the pursuer accordingly by making payment to the creditors in said bonds and dispositions in security of all sums, principal, interest, and penalties due under said bonds and dispositions in security, or otherwise, by producing discharges by said creditors of all personal obligations undertaken by the pursuer by said bonds and dispositions in security, as trustee foresaid, or as an individual; or otherwise the defenders ought and should be decerned and ordained, by decree of our said Lords, conjunctly and severally, to make payment to the pursuer of the sum of £20,000 sterling, or of such other sum as may be ascertained to be the full amount of the sums due, under said bonds and dispositions in security, to the creditors therein, and of

the expenses of obtaining and recording discharges of said bonds and dispositions in security in order that the pursuer may pay up said bonds and dispositions in security, and obtain and record discharges thereof." Nov. 16, 1912.
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The pursuer averred:—(Cond. 1) "In 1895 an Association was formed under the name of 'The City of Edinburgh Property Association,' by the pursuer, the defenders Alexander White, John Watson, Mrs Williamina Kay or Watson, Knight Watson, John MacNab, and James Ross junior, the now deceased James Ross, rope manufacturer, 23 Bath Street, Leith, and William Tait, S.S.C., conform to articles of agreement dated 12th, 13th, 18th, and 22nd February 1895, and recorded in the Books of Council and Session 25th February 1895. The object of said Association was the acquisition or purchase of heritable as well as personal property in any part of Scotland, and as a first investment the heritable property detailed in schedule 1 to said articles of agreement. The respective partners undertook to subscribe the various sums of capital set opposite their names in the second schedule to said articles of agreement amounting in all to £8250, whereof the pursuer's contribution was £500. The agreement provided (article 4) that the affairs of the Association should be managed by the defenders Alexander White, John Watson, the said James Ross, and the pursuer, and the survivors and survivor of them, who were thereby appointed trustees for the Association. The agreement further provided that the various parties should participate in the profits and losses of the Association in proportion to the sums respectively subscribed by them. It also contained provision for any member being entitled to withdraw from the Association at any time, on finding a substitute member to the satisfaction of the Association. The various members of the Association duly paid up the sums of capital which they respectively undertook to subscribe." (Cond. 2) "The Association thereafter proceeded to purchase the heritable properties in the schedule to the agreement, and in connection with said purchase borrowed various sums of money on the security of said properties. In particular the pursuer and the other trustees for the Association, by the authority and on behalf of the Association, along with the members of the Association, granted the various bonds and dispositions in security specified in the summons for sums amounting in all to £15,950. Said bonds and dispositions in security were executed by the pursuer and the other trustees as trustees and individuals." (Cond. 3) "In the year 1901 the pursuer desired to retire from the Association, and with the approval of the Association the defender George Reid was substituted as a member in his place. The £500 subscribed by the pursuer to the funds of the Association was thereupon repaid to him through Mr Tait, one of the secretaries of the Association; and the remaining members of the Association executed in pursuer's favour a bond of relief, dated 26th March, 2nd, 4th, and 20th April 1901, and recorded in the Books of Council and Session 1st July 1908. By said bond of relief they bound and obliged themselves, jointly and severally, and their respective heirs, executors, and representatives whomsoever, also jointly and severally, to warrant, free, relieve, and harmless and scathless keep the pursuer and his heirs, executors, and representatives whomsoever free of all claims and demands which might be made on him or his foressaids by any creditor or creditors under any bond, bill, or note signed by him,

Nov. 16, 1912. **Roughhead v. White.** whether as trustee or as an individual, on behalf of said Association, in connection with the properties of said Association, or any of them, or the affairs of said Association, and of any claim of relief which they as members of said Association, or any of them, might have against him, and bound and obliged themselves, conjunctly and severally, and their respective foresaids jointly and severally, should any demand or claim be made against the pursuer or his foresaids by any creditor of said Association or any member or trustee thereof, without any proceedings other than a demand by the pursuer or his foresaids, to intervene between him and them and such demand or claim, and take upon themselves, jointly and severally, all objections or defence to such demand, and relieve him and his foresaids of all questions in relation to such demand, or otherwise to make payment of the amount of such demand or claim, with any interest thereon and expenses to the pursuer or his foresaids in order that he or they might satisfy such demand or claim." (Cond. 4) "Although ten years have elapsed since the pursuer ceased to be a member or trustee for said Association, the defenders have taken no steps to terminate his liability under the said bonds and dispositions in security. On the contrary, instead of paying off said bonds and dispositions in security or obtaining a discharge of the pursuer's liability thereunder at the periods when under agreement with the lenders they became payable, they have from time to time renewed said loans for a period of years. Further, since the date of the said bond of relief the said bonds and dispositions in security have, by the desire of the granters of said bond of relief, including the individual defenders and the defenders James Ross's trustees, or the said James Ross, been assigned by the creditors therein as follows:—[Here followed a list of the assignments]—The defenders thus, after granting said bond of relief borrowed said loans from new lenders, to whom the pursuer's personal obligations were transferred, instead of paying off said loans, or, at all events, obtaining a discharge of the pursuer's personal obligations, and thus extended the pursuer's personal obligations, contrary to the intention of said bond of relief and to their duty to the pursuer. Further, during said period the said James Ross has died, and his estate is about to be distributed, and the said William Tait has been sequestered under the Bankruptcy Acts. The pursuer has lodged a claim in his sequestration." (Cond. 5) "The pursuer has repeatedly applied to the defenders to obtain a discharge of his liability under the said bonds and dispositions in security, but they refuse to procure the same."

The pursuer pleaded, *inter alia*;—(1) The pursuer having signed said bonds and dispositions in security on behalf of and as a trustee for the defenders' Association, he is entitled to be relieved by the defenders of the obligations so undertaken by him, with expenses. (2) The defenders having unduly delayed to obtain a discharge of the pursuer's liability under the bonds and dispositions in security libelled, and having extended the period of his liability under said bonds by obtaining renewal of the loans therein contained, and by re-borrowing said loans from new lenders in breach of their obligation and duty to the pursuer, the pursuer is entitled to decree as concluded for, with expenses.

The defenders pleaded, *inter alia*;—(2) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (3) No claim or demand having been made upon the pursuer in respect of any of the said

bonds and dispositions in security mentioned in the summons, the Nov. 16, 1912:
action is premature and ought to be dismissed.

On 10th April 1912 the Lord Ordinary (Cullen) pronounced an interlocutor sustaining the defenders' second plea in law, and dismissing the action.*

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* "OPINION.—I am of opinion that the pursuer is not entitled to the decree for which he concludes.

"Under the articles of the Association the pursuer was not (without forfeiture) in a position to withdraw from membership except on his finding a substitute approved by the other members. The articles make no provision for withdrawing members being relieved of obligations undertaken by them on behalf of the Association during their membership. Accordingly this was a matter open for arrangement among the parties when the pursuer withdrew in 1901 with the consent of his fellow members. The bond of relief then granted to him represents the arrangement which was made on the subject. It imports that the pursuer was to withdraw without obtaining himself then discharged of the obligations which he had undertaken in the bonds in question; that these obligations were to continue for the benefit of the Association; and that the pursuer had agreed to rest content with the obligation to relieve him which he obtained from the granters of the bond of relief. The bond of relief, however, is silent as to the period of time during which the pursuer's said personal obligations were to continue undischarged. The pursuer does not maintain that he was entitled to call upon the granters to procure him discharged so soon as he received the bond. He concedes that he was bound to wait. The only express stipulation in the bond as to the granters procuring him discharged is limited to the case of his being called on by a creditor to pay, an event which has not happened. It appears to me that the parties must have had in their minds some period other than that of the whole endurance of the Association—which is indefinite—as being that during which the pursuer's said personal obligations were to lie undischarged. Now, the business of the Association under its articles was the purchasing or acquiring of heritable property by way of investment, and the articles contemplate the granting of heritable bonds for the purpose of providing purchase money. It was in this way that the bonds here in question came to be granted. If and when any property came to be resold by the Association in pursuance of its objects the bond would no longer be required and could be paid off, but until such a resale the bond would continue in ordinary course. It seems to me that the fair and reasonable implication of the arrangement embodied in the bond of relief *quoad* the period of endurance of the pursuer's personal obligations with which it does not expressly deal, is that, failing the intervention of a demand by a creditor on the pursuer, he was content to allow these obligations to lie until a resale of the subjects by the Association, in pursuance of its business, enabled the bonds to be dispensed with, and put the Association in a position to have them discharged. It is not suggested that the Association is conducting its business otherwise than in a *bona fide* manner, or that, in still continuing to hold the properties subject to the bonds in question, it is not acting in due accordance with its objects as assented to by the pursuer himself when he joined it as one of its original members. It may be an unsatisfactory position for the pursuer to continue undischarged of these personal obligations, and perhaps when he withdrew from membership he may have assumed that the Association would not require to utilise the bonds to which he had been a party for so long a time as has happened, which may be due to the present state of the property market. But if he desired more prompt terms of release he should have stipulated for them.

"The pursuer founds on the fact that the agreements for the duration of

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The pursuer reclaimed, and the case was heard before the Extra Division (consisting of Lord Kinnear, Lord Dundas, and Lord Macenzie) on 8th November 1912.

Argued for the reclaimer;—The pursuer was entitled to obtain the declarator he craved. He did not maintain that he would have been entitled to such a declarator immediately after he had retired from the Association, but he did maintain that it was an implied term of the contract between him and the defenders that his liability should only endure for a reasonable period and not, as the Lord Ordinary seemed to hold, indefinitely, *i.e.*, until a re-sale of the subjects by the Association in pursuance of its business enabled the bonds to be dispensed with and discharged. As to what was a reasonable period there might be some difference of opinion, but the pursuer maintained that a reasonable period would have been until the original loans expired. The renewal of the loans and the assignation of the bonds was really equivalent to a subjection of the pursuer to new liabilities. Accordingly, the pursuer was entitled to succeed on the terms of the articles of association and the bond of relief. Even, however, if he were not entitled to succeed on the terms of these deeds, that fact did not deprive him of such common law remedies as he might be possessed of. After the dissolution of the partnership the position of the pursuer was that of a cautioner merely, and he was entitled to all the rights and remedies of a cautioner at common law. One of these rights or "equities" was the right at any time to recall the obligation¹ as regarded future liabilities, except, indeed, in the almost inconceivable case in which a cautioner had contracted to remain bound for ever. Further, *qua* cautioner, the pursuer had been freed by the changes in the partnership which had taken place at the death of Ross and the bankruptcy of Tait.²

Argued for the respondents;—The pursuer was not a cautioner but a principal debtor, whose obligations were contractual and regulated by

the loans under the bonds current when he withdrew have expired, having been replaced from time to time by further agreements; and that four out of the five bonds have, in consequence of the original creditors requiring their money, been assigned to other lenders. When, however, the nature of the business of the Association, and the purposes for which, in pursuance of its objects, the bonds came to be granted are duly considered, these transactions in the handling of the bonds, so as to enable them to remain a fund of credit without incurring the wasteful expense of providing new bonds whenever an existing loan was called up, represent the normal method of dealing such as I think the pursuer must have contemplated that the Association would follow.

"The pursuer further founds on the fact that one of the granters of the bond of relief has died, and that another has been sequestrated. He does not, however, allege that the Association is not at present duly constituted in terms of its articles, or that it is not carrying on its business in terms of these articles in a *bona fide* manner. If I am right in the view which I have taken as to the implied understanding regarding the subsistence of the bonds, I do not find in the facts any sufficient ground for holding that they give the pursuer right to an immediate release. No authority was cited in support of the pursuer's proposition.

"Following these views I shall sustain the defenders' second plea in law and dismiss the action."

¹ Doig v. Lawrie, (1903) 5 F. 295.

² Mercantile Law (Scotland) Amendment Act, 1856 (19 and 20 Vict. cap. 60), sec. 9.

the articles of the Association and by the bond of relief. Under the Nov. 16, 1912.
 articles every member became liable under the bonds, and no provision was made for the termination of that liability so long as the bonds subsisted: under the bond of relief the only remedy given to the pursuer was a right of relief against the defenders in the event of a creditor under the bonds making a claim against him. No claim had been made here by any creditor, and accordingly the pursuer had no right to demand the relief he craved. The theory of the bond of relief obviously was that the pursuer remained a principal debtor and had not become a mere cautioner.

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At advising on 16th November 1912,—

LORD KINNEAR.—The pursuer in this case seeks to have it declared, in the first place, that the defenders are bound, conjunctly and severally, to free and relieve him of all liability undertaken by him under and in virtue of five specified bonds and dispositions in security. The defenders do not dispute their liability to relieve the pursuer in the event of any demand or claim being made against him by the creditors in these bonds, and the declarator sought does not in terms appear to go beyond the declaration of that right.

But then the pursuer goes on to formulate operative conclusions for the purpose of giving practical effect to his right of relief. He asks that the defenders should be decerned and ordained to free and relieve him by making payment, that is, immediate payment, to the creditors in the bonds of all sums, principal, interest, and penalties due under them, or otherwise by producing discharges by the creditors of all personal obligations undertaken by the pursuer; or otherwise that they should be decerned and ordained to make payment to him of the sum of £20,000, so that he may pay up the bonds and obtain discharges for himself.

I am of opinion with the Lord Ordinary that the pursuer has made no relevant averments to support either of these conclusions. The facts are quite simple. I do not know that they are materially disputed; at all events, I take them, for the purposes of the question of relevancy, from the pursuer's own statements. He says that in 1895 he became a member of an association, which appears to have been a trading company, called the Edinburgh Property Association, the object of which was to acquire or purchase heritable and personal property in any part of Scotland. He entered into this Association along with certain other parties, to wit, the defenders personally called and another deceased member, whose representatives are called as defenders. The partners subscribed various sums of capital, the pursuer's contribution being £500. He not only became a member of the Association, but also became one of the managers along with certain of the defenders, and was appointed with them a trustee for the Association. The business of the Association was carried on until the year 1901, when the pursuer retired, withdrawing from the membership upon an agreement with the other members, which was entirely within the conception of the original contract of copartnery, by which another person was substituted as a member in his place. The effect of his withdrawal under agreement with his copartners was obviously to free him from any obligation that might be undertaken by the copartnery after he had ceased

Nov. 16, 1912, to be a member. He ceased to be a member of the copartnery in 1901, and had no liability or concern with anything that was done by it since that date.

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But then at the time of his withdrawal there were existing liabilities to the creditors in the bonds specified in the summons, and he was undoubtedly liable as one of the borrowers, jointly and severally, with the other members of the Association to the creditors in these bonds. The money was borrowed while he was still a member, a manager, and a trustee for the company. He undoubtedly became liable to the creditors in the bonds, and also to his copartners, as joint debtor with them, to pay his proportion of any liability which might ultimately be made good against them all. That was a subsisting liability of which he could not be relieved by merely withdrawing from the company while it was still subsisting. It would have been perfectly easy, so far as legal methods are concerned, for him to have obtained a discharge from that existing liability just as effectual as his discharge from future liabilities. But that could only have been done by, in the first place, an agreement between the pursuer and the defenders, and, in the second place, an agreement between the pursuer and the defenders on the one side and the creditors in the bonds on the other. That it was legally possible there can be no question; but, for whatever reasons, the agreement was not made, and there may have been good reasons for the parties declining to enter into such an agreement. At all events, it was matter for agreement if it was to be done at all; but as to the agreement that was made, its effect was, in my opinion, to leave this gentleman's liability in the bonds just as it was before he retired from the company.

But then he says that, having retired in the year 1901, he now finds that although ten years have elapsed the defenders have taken no steps to terminate his liability in the bonds and dispositions in security. "On the contrary," he goes on to aver, "instead of paying off said bonds and dispositions in security or obtaining a discharge of the pursuer's liability thereunder at the periods when under agreement with the lenders they became payable, they have from time to time renewed said loans for a period of years. Further, since the date of said bond of relief the said bonds and dispositions in security have, by the desire" of the defenders, been assigned by the original creditors to new creditors who take their place as creditors in the bonds. His case is accordingly two-fold; in the first place he contends that by the mere lapse of time he is entitled to say, "I should have been relieved by this time and you must relieve me now"; in the second place he contends that the defenders have entered into a new transaction, to which he was not a party, and by so doing have already relieved him.

As to the first of these grounds I am of opinion, with the Lord Ordinary, that there is no foundation for the plea so maintained by the pursuer. He became a party to the bonds as a principal debtor: he remained a principal debtor along with his copartners after he had ceased to be a member of the Association. We must presume that he knew that in the ordinary course of business the company could either pay up the bonds or leave them standing according to the convenience of the business for which the loans were originally contracted. He retained no kind of control over his former partners in the management of the business, and he acquired by agreement

no new right which would enable him to intervene and say the time has now come when these bonds must be paid. He was under a subsisting liability as to which he made no sort of stipulation that it should be diminished, or that it should be treated by the company otherwise than might be convenient for them in the ordinary course of business, or that anything should be done by the company to expedite a settlement with the creditors, or that he should obtain relief otherwise than in ordinary form in the event of a claim being made against him.

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I omitted to say, what I ought to have said before coming to the legal aspect of the case, that on his withdrawal from the company he obtained from the continuing members a bond of relief by which they undertook to relieve him and keep him harmless and scathless and free of all claims and demands which might be made on him by any creditor or creditors under any bond, bill, or note signed by him, whether as trustee or as an individual, on behalf of the Association; and bound themselves that, should any demand or claim be made against the pursuer by any creditor of the Association or any member or trustee thereof, they, without any proceedings other than a demand by the pursuer, would take upon themselves the defence to such a demand, and relieve him of all questions in relation to it. He had, therefore, a bond of relief by which, in the event of the creditors in any of these bonds making a demand against him, he should be relieved by the remaining members of the company; and that, in my opinion, was the sole obligation undertaken by the surviving members in his favour when he left the company.

It was maintained, however, on behalf of the pursuer that by reason of his having ceased to be a member of the company, or ceased to have any personal interest in the moneys borrowed under these bonds and dispositions, he had become a cautioner merely and was entitled to be relieved of his cautionary obligation by virtue of what were said to be the equities of a cautioner. One of the equities of a cautioner is, it was contended, that he may at any time withdraw from any future liability imposed upon him by his cautionary obligation. I think the argument baseless in both its branches. In the first place, I know of no general equity that will enable a cautioner to withdraw from future liabilities irrespective of the terms of the obligation by which he is bound. He may withdraw or may not withdraw according as his cautionary obligation allows him to do so; but his right to withdraw must always depend upon what it was he undertook to guarantee, and what the terms of the guarantee were. We were referred as authority for the pursuer's proposition to the case of *Doig v. Laurie*.¹ I think the opinion of Lord Low in that case brings out very clearly indeed the distinction between the conditions upon which a cautioner may put an end to his cautionary liability and the conditions of the present case. In that case the pursuer had given a guarantee to a bank by which he guaranteed all sums for which the defender might become liable up to a certain amount, the amount being £6500. Lord Low said:—"It must, therefore, be taken that the obligation undertaken by the pursuer was gratuitous, and its duration was indefinite and unlimited. I do not think that the pursuer

¹ 5 F. 295.

Nov. 16, 1912. is in such circumstances bound to continue his obligation longer than it is convenient for him to do so." That is to say, a person had gratuitously undertaken a cautionary obligation to the bank for indefinite sums for an indefinite period, guaranteeing the transactions of the bank's debtor so long as that obligation should subsist. Certain debts had been incurred for which the cautioner was undoubtedly liable, and he then said :—"I must withdraw. The guarantee is good up to this date ; but I do not propose to continue it any longer for indefinite future liability, of which I know nothing" ; and he was found quite entitled to do so. But that is a totally different position from the pursuer's, which is that of a person who, as a principal debtor, became bound by a fixed obligation, which was indefinite only in respect of its duration, but which, according to its own terms and legal effect, would subsist until the creditor should call up his money or the debtor should pay. I can see no reason in equity by which he should be entitled to relief from that undertaking irrespective of the terms to which it binds him. But if there were any such general or universal equity in favour of cautioners it would not apply here, because, for the reasons I have already given, the pursuer is not a mere cautioner. He is a principal debtor as in a question with the principal creditors, and he remains liable, as long as he remains a principal debtor, to pay his proportional contribution as in a question with his co-debtors.

The second ground of the pursuer's argument was quite different. He said that by obtaining from the creditors assignments of the bonds to new creditors the defenders had entered into new transactions, after he had ceased to be a member of the company, by which he was in no way bound ; he was bound, he argued, only to the creditors with whom he had personally contracted, and the defenders had made new obligations for him with persons of whom he knew nothing. If he had maintained upon that state of the facts that the new bonds were, so far as he was concerned, invalid and ineffectual, and that he was under no obligation as debtor in these bonds to the assignees of his original creditors, I think there might be some very obvious answers in law to that contention. But whether that would be well founded or not I do not think it necessary to determine, because that would raise a question which it would be impossible to decide in the absence of the creditors in the bonds. That is not the foundation of the pursuer's case, even if the contention were well founded in law. The plea that the transactions are new transactions, by which he is not bound, does not support the conclusions of the summons, and is not a reason for compelling the debtors in the bonds to pay their debts immediately or alternatively to make payment to the pursuer of a sum to enable him to pay the debts for them. There is no logical connection between the contention and the conclusions of the summons whatever, and his remedy would be totally different.

But, although the argument to which I have just referred was pressed, the action is based on the hypothesis, not that there is no liability, but that there is liability ; it is only on the hypothesis that the pursuer is liable in the bonds libelled in his summons that he can claim that the defenders should relieve him of that liability. I think the hypothesis upon which the whole case proceeds is plainly and obviously that there is a good liability

against him. Whether that be so or not there is no relevant ground to my mind for compelling the defenders to relieve him of such liability ; if it be good, because it is a liability still attaching to him ; and if it be bad, because his remedy in that case would be to get rid of the bonds altogether.

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Lord Kinnear.

I come, therefore, to the conclusion upon the whole matter that the Lord Ordinary was right in sustaining the second plea in law for the defenders, which is that the pursuer's averments are irrelevant, and that the summons should, therefore, be dismissed.

LORD DUNDAS.—I agree in thinking that the interlocutor reclaimed against is right. Mr Murray, for the pursuer, complained that the Lord Ordinary had gone wrong because he proceeded wholly upon the bond of relief as finally regulating the pursuer's rights in the matter, and ignored what counsel described as the pursuer's position at common law as a cautioner for the principal debtors, his former copartners in the Association. It was to this latter aspect of the case that Mr Murray directed his able argument. The distinction suggested by counsel seems to me to be one rather of words than of substance. It is probably sufficient to point out that it is not accurate to describe the pursuer as a cautioner. He is not, and never was, a proper cautioner. He was a partner, and he retired from the partnership concern. By the terms of the articles of agreement the pursuer was entitled to withdraw from the Association without finding a substitute member to its satisfaction, in which case he would have forfeited all sums of money contributed by him to the funds of the Association, and in addition would have been bound to pay, when called upon by the Association, his proportion of any loss which it might sustain. Alternatively he might find a substitute to the satisfaction of the Association. The pursuer chose the latter of these courses. The terms upon which he should withdraw became, therefore, a matter for arrangement and consent between him and his copartners. In the bond of relief prepared by the pursuer and granted by his partners at his request, one finds what appear to be the terms upon which he and they agreed that he should retire. It cannot be said that, since the bond was granted, the defenders have acted otherwise than in a lawful and normal course of carrying on their business, a course that was within their powers and must be taken to have been within the contemplation of all parties when the articles of agreement were entered into. In these circumstances I am unable to see how the pursuer can now, after an interval of years, appeal to the rights open by law to a partner who is entitled to retire from his business *simpliciter* without consents asked or given ; still less to any right that may be available to a proper cautioner, which, as already pointed out, the pursuer is not, and never was. I have some sympathy with him in his anxiety to be finally quit of all concern or possible liability in connection with the Association ; but I cannot see any sufficient ground upon which we could grant the decree sought for by the summons. I think we must adhere to the Lord Ordinary's interlocutor.

LORD MACKENZIE.—I am of the same opinion. I would only add that I think that what your Lordships have already said disposes of another

Nov. 16, 1912. point that Mr Murray argued, namely, that the pursuer was free in consequence of the death of James Ross, and the sequestration of the estate of William Tait. This point seems to me to depend on his establishing that the rights which he has are those of a cautioner at common law. If they are regulated by the terms of the bond of relief, then this point, depending as it does on his success in establishing that his position was that of a cautioner, fails. What the Lord Ordinary has said upon this question is perfectly sound, viz, that there is no allegation that the Association is not at present duly constituted in terms of its articles, or that it is not carrying on its business in terms of these articles in a *bona fide* manner. Therefore, when one fully apprehends that the bonds which are libelled in the summons in this case are the original bonds upon which the pursuer became a co-debtor, I think there is nothing in this point.

Roughhead v.
White.

Lord Mac-
kenzie.

I confess I share with my brother, Lord Dundas, his sympathy for the pursuer in the position in which he is placed; but after careful consideration I think it necessarily follows from the whole facts of the case that his rights must be regulated by the bond of relief, and that he cannot succeed upon the very skilful argument presented by Mr Murray to the effect that his rights were not to be regulated by that bond, but emerged independently of the bond when once it was shown that he had taken the necessary steps to withdraw from the Association and to have another member substituted in his place. It would have been possible had he been able to get the consent of the Association to make a bargain in different terms; but looking to the terms of the bargain upon which he went out I think the conclusion at which your Lordships have arrived is inevitable.

THE COURT adhered.

ALLAN M'NEIL, S.S.C.—SOMERVILLE & WATSON, S.S.C.—Agents.

No. 23.

ROBERT HENRY ELLIOT AND ANOTHER (Pringle's Marriage-contract Trustees), Petitioners.—*Hon. W. Watson—Hendry.*

Nov. 19, 1912.

COUNT CARLO BASTA, Compearer.—*Chree, K.C.—*

W. H. Stevenson.

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WILLIAM CHARLES ROWCLIFFE (Claude Mark Elliot Pringle's Guardian *ad litem*), Compearer.—*R. C. Henderson.*

WILLIAM CHARLES ROWCLIFFE (Guardian *ad litem* to Florenza Basta and Others), Compearer.—*A. M. Mackay.*

Succession—Faculties and Powers—Validity of exercise of power—Power to apportion fund among children—Appointment of liferent of part of the fund to one object of the power, and whole fee to the other object.

By a contract of marriage it was provided that the trustees should hold the capital of the trust funds "as a provision for behoof of the child or children" of the marriage, divisible "in such shares and proportions" as the spouses jointly or the survivor might appoint, and failing appointment, then equally. The husband died survived by his wife and by a son and a daughter.

Held that a deed executed by the surviving wife, whereby she appointed a liferent interest only in part of the trust fund to her son, and the fee of the whole fund to her daughter or the daughter's heirs, was a valid exercise of the power.

THIS was a case remitted by the Honourable Mr Justice Joyce, one Nov. 19, 1912. of the Judges of the Chancery Division of His Majesty's High Court of Justice in England, in terms of the British Law Ascertainment Act, 1859 (22 and 23 Vict. cap. 63), for the opinion of the First Division of the Court of Session. Pringle's Trustees v. Basta.

The questions at issue related to the marriage-contract in Scottish form entered into between Chetwode Drummond Pringle and Mrs Ellen Eliza Elliot or Pringle, his wife, and had arisen in a suit in which the plaintiffs were the trustees acting under the marriage-contract, and the defendants were (1) Claude Mark Elliot Pringle, the only son of the marriage, who was represented by a guardian *ad litem*; (2) Count Carlo Basta, husband of the deceased Violet Pringle, the only daughter of the marriage; (3) the children of Count and Countess Basta, who were represented by a guardian *ad litem*; and (4) certain assignees of Count Basta, who did not compare in the Court of Session. 1ST DIVISION.

The facts as set forth in the case were:—

"1. The above-named Chetwode Drummond Pringle (hereinafter called Chetwode Pringle) married the above-named Ellen Eliza Pringle (then Ellen Eliza Elliot, and hereinafter referred to as Mrs Pringle) at Cheltenham, on 29th March 1871.

"2. After the said marriage two postnuptial settlements were entered into by the spouses, viz.:—(1) a settlement (in English form, and hereinafter referred to as the English settlement), dated 23rd December 1871, and made between Chetwode Pringle, of the first part, Mrs Pringle, of the second part, and [certain trustees], of the third part; and (2) a postnuptial contract of marriage (in Scottish form, and hereinafter referred to as the Scottish settlement), dated 23rd December 1871 and 2nd January 1872, and registered in the Books of Council and Session on 20th January 1872, made between Chetwode Pringle, of the one part, Mrs Pringle, of the second part, and the said Robert Kerr Elliot (father of Mrs Pringle), of the third part.

"3. By the English settlement a sum of £3000, to which Chetwode Pringle was entitled expectant upon the death of the survivor of his parents, was assigned by him to the parties thereto of the third part as trustees, and settled upon trust to pay the income to Chetwode Pringle for his life, and after his death to Mrs Pringle for her life, and after the death of the survivor of them, as to both capital and income, upon trust for" the children of the marriage.

"4. By the Scottish settlement, and for the consideration therein mentioned, the said Robert Kerr Elliot (now deceased) bound himself during his life to pay to his daughter Mrs Pringle an alimentary annuity of £100 sterling during the joint lives of himself and Mrs Pringle, and he further bound and obliged himself and his heirs, executors, and successors, to pay to [certain persons] as trustees for the purposes thereafter mentioned the sum of £3000, at the first term of Whitsunday or Martinmas after his death"; and Mrs Pringle granted a disposition of *acquisita et acquirenda* in favour of the trustees.

"5. By the Scottish settlement it was declared that the said sum of £3000, and the estate, means, and effects thereby conveyed should be held by the trustees thereof for the following purposes, viz.:—(First) to pay the yearly interest, dividends, and produce, after deduction of the trust expenses, to Mrs Pringle during her lifetime exclu-

Nov. 19, 1912. *sive* of the *jus mariti* or right of administration or other right of Chetwode Pringle or any other husband she might marry, as an alimentary income; (Second) in the event of Mrs Pringle predeceasing Chetwode Pringle, to pay the same to Chetwode Pringle as an alimentary income during his lifetime; (Third) that the trustees 'may and shall hold the capital of the said trust funds and estate as a provision for behoof of the child or children to be procreated of the marriage . . . divisible if there shall be more than one child in such shares and proportions, and to vest at such age or time ages or times within the limits allowed by law, as the said Chetwode Drummond Pringle and Ellen Eliza Elliot, now Pringle, may during their joint lives appoint by any joint writing under their hands, and failing such joint appointment, then in such shares and proportions as the survivor of them may appoint by a writing under such survivor's hand, and failing any such appointment, then equally among them share and share alike, declaring that the said child or children should not under the above gift in default of appointment have a vested right in his, her, or their provision until the decease of the longest liver of the said Chetwode Drummond Pringle and Ellen Eliza Elliot, now Pringle; but in case any such child shall die before having obtained a vested right in his or her provision leaving lawful issue, such issue shall be entitled to the share which would have fallen to the parent had he or she survived, which provisions shall be payable or the investments thereof transferable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said Chetwode Drummond Pringle and Ellen Eliza Elliot now Pringle'; (Fourth) dealt with the event, which did not happen, of there being no issue, or of issue failing to take a vested right.

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"6. The trustees now acting under both settlements are the said Robert Henry Elliot and James Moffat, who are the plaintiffs in the present action. The capital of the trust funds held under the English settlement consists of:—(1) £2961, 6s. 7d. India 3 per cent Stock; and (2) £146, 10s. 0d. Consols. The capital of the trust funds held under the Scottish settlement is now represented by heritable bonds to the amount of £4666, 13s. 4d. over certain estates in Scotland.

"7. Chetwode Pringle died at Arcachon, Gironde, France, on 30th December 1878, survived by Mrs Pringle and two children only, viz., (1) Claude Mark Elliot Pringle (hereinafter called Claude Pringle), who was born in the Azores on 20th October 1874; and (2) Adelaide Eleanor Violet Pringle (afterwards Countess Basta), who was born at Biarritz, France, on 17th February 1878.

"8. Mrs Pringle died at Rome on 20th January 1911, having resided in Italy for many years prior to her death. Claude Pringle, who is a defendant in the present action, is incapable of managing his own affairs, and has been for many years, and is now, resident in Italy. The said Adelaide Eleanor Violet Pringle was married to the defendant Count Carlo Basta at Rome on 2nd December 1897, and died at Rome on 10th March 1910, survived by three children only, the infant defendants in the present action. The defendant Count Basta was at the time of his marriage, and still is, a domiciled Italian. By an order in the present action, dated 26th October 1911, the Official Solicitor of the High Court of Justice in England was appointed to be guardian *ad litem* of the defendant Claude Pringle, and also of the three infant defendants for the purposes of this action.

"9. No joint appointment was made by Chetwode Pringle and Mrs Pringle under either the English or the Scottish settlement during the life of Chetwode Pringle, but on 25th October 1897 an agreement was entered into between Mrs Pringle, the said Adelaide Eleanor Violet Pringle (therein designated as Violet Chetwode Pringle), and the said Count Basta, which, *inter alia*, provides as follows, viz. . . .

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"In consideration of the intended marriage between said Miss Violet Chetwode Pringle and said Count Basta the above mentioned parties in order to establish the conditions of the marriage agree on what follows:—

"I. This present deed is intended to be subject to English and Scotch laws especially in regard to third parties so that nobody may raise any objection as to its form in order to prevent its full execution about the rights and obligations involved in this Contract which must then be considered as if it had been drawn, agreed upon, and signed in England and Scotland. . . .

"VII. Mrs Ellen Elliot Pringle in consideration of this marriage and in conformity with the previous paragraphs gives to her daughter irrevocably the following goods. This donation is at the same time the constitution of the following goods as dowry to the said daughter Miss Violet Chetwode Pringle. The sum of £7666, 13s. 4d. This amount is represented by £4666, 13s. 4d. in bonds over the estate of Clifton belonging to Mr Robert Henry Elliot of which are trustees Messrs Robert Henry Elliot James Moffat Thomas Elliot Boag Charles Stuart Pringle Patrick John James Grant Ord as by the marriage-contract made by her father the late Mr Robert Kerr Elliot on the 20th January 1872 at Edinburgh and by £3000 as portion left to her by her husband the late Mr Chetwode Drummond Pringle as by postnuptial contract 23rd December 1871. Said sums or any greater sum that may appear due will be kept in trust during the life of said Mrs Ellen Elliot Pringle who will use the income. At her death the sum of £4300 will remain in trust or in any other way bound in favour of her son Mr Claude Chetwode Pringle to whom the income will be unconditionally paid during his life. The other sum that will result from this deduction of £4300 will be paid at once to the daughter Miss Violet or her heirs. On the death of Mr Claude C. Pringle also the principal of the £4300 shall be paid to Miss Violet then Countess Basta or her heirs as by paragraph III. of this contract.* Having thus provided for the existence of her son Mrs Ellen Chetwode Pringle intends that this disposal of the whole capital of these £7666, 13s. 4d. be respected by her son and confirms

* Paragraph III. was as follows:—"The husband and wife will live under the Italian law of the dowry Miss Violet C. Pringle constitutes for herself as dowry all goods and moneys that she is entitled to or will be entitled to by the present Contract and all that she may in future time acquire by inheritance donations or any other form whatsoever. Such goods and monies forming the dowry will be administered by the husband and invested by him to the best advantage of the family: he will protect all rights of the wife without need of any further authorisation or limitation. He will be responsible to his wife alone of said administration and he declares himself to be debtor towards her of all sums that he will receive and he guarantees these obligations with all that he owns or will own in the future as it is disposed by the Italian law. Only the wife can pretend from time to time that any determined sum may be cashed and invested under the dowry lien."

Nov. 19, 1912. her will by giving irrevocably to her daughter all that capital. Should Mr Claude C. Pringle raise objections to these dispositions Mrs Ellen C. Pringle will deprive him of the income of the £4300 as above said and will give him only one shilling.

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" 12. A question has arisen in the present action as to whether the agreement of 25th October 1897 constitutes a proper and effectual exercise by Mrs Pringle of the power of appointment conferred on her by the Scottish settlement, and, if so, as to how far it extends.

" 14. The defendant William Charles Rowcliffe, as the administrator of the Countess Basta, and the defendant Count Basta contend that the agreement of the 25th October 1897 operated as a good and valid appointment in favour of Countess Basta of £366, 13s. 4d., part of the said £4666, 13s. 4d. heritable bonds to take effect in possession immediately upon her mother's death, and was a good and valid appointment in favour of the Countess Basta of the residue of the said heritable bonds to take effect in possession forthwith on the death of her brother, Claude Pringle, and alternatively, if the said agreement of the 25th October 1897 is held not to be a good and valid appointment as aforesaid, then, that the said heritable bonds were wholly unappointed and vested absolutely in Countess Basta and her brother, Claude Pringle, in equal shares. The defendant Claude Mark Elliot Pringle contends that the agreement of the 25th October 1897 operated as a good and valid appointment in his favour of a life interest in £4300, part of the said £4666, 13s. 4d. heritable bonds to take effect in possession immediately on his mother's death, and that subject thereto the said heritable bonds were wholly unappointed, and that he is entitled to one moiety thereof, and alternatively, if the said agreement of the 25th October 1897 is held not to be a good and valid appointment as aforesaid, then, that the said heritable bonds were wholly unappointed, and vested absolutely as to one moiety thereof in him; and the defendants Florenza Elena Adelaide Basta, Tecla Violetta Amalia Basta, and Dimitrio Leonardo Carmine Basta [the children of Count and Countess Basta] contend that the agreement of the 25th October 1897 did not operate as a good or valid appointment in any respect, and that the said heritable bonds were wholly unappointed and vested absolutely as to one moiety thereof in them in equal shares."

The following questions of law, *inter alia*, were submitted for the opinion of the Court:—" (1) Is the agreement of 25th October 1897 a proper exercise by Mrs Pringle to any extent of the power of appointment conferred on her by the Scottish settlement? (2) If the foregoing question is answered in the affirmative—(a) Is the appointment of a life interest in £4300 to Claude Pringle good and valid? and (b) Is the appointment of the principal of the £4300 (subject to the life interest of Claude Pringle) to Countess Basta good and valid? and (c) Is the appointment of the residue of the funds in excess of the £4300 to Countess Basta good and valid?"

The case was heard before the First Division on 12th and 13th November 1912.

Argued for Claude Pringle's guardian *ad litem* and for Count Basta;—Since the Powers of Appointment Act, 1874¹ an appointment was not invalid on the ground that an object of the power had been altogether excluded. *A fortiori* it was competent to give a liferent to an

¹ 37 and 38 Vict. cap. 37.

object of the power, provided that the fee, as here, was not appointed Nov. 19, 1912. to anyone outside the power.¹ That principle had been long recognised in England.² It was unnecessary for the power of appointment to contain words expressly authorising the imposition of conditions, restrictions, or limitations.³ The trustees were directed by the marriage-contract "to hold the fund," an expression which was quite consistent with the continuing trust which would result from a gift of lifeferent and fee. In any event, conditions which were *ultra vires* should be ignored, and the appointment in other respects should stand.⁴

Argued for the guardian *ad litem* to Florenza Basta and others;—The law distinguished between a strict power of apportionment and a general power to appoint or test upon a fund.⁵ The marriage-contract here entitled the appointer merely to apportion the capital and not to impose restrictions and limitations. It was therefore not a good exercise of the power to give a lifeferent to one person and the fee to another, even though both were among the objects of the power, and accordingly the appointment was wholly bad.⁶ The effect of giving a lifeferent to one person and the fee to another person "or his heirs" would be to suspend payment and create a continuing trust (for which there was no authority in the deed), and, as vesting was also suspended till the expiry of the lifeferent, the result in the present case was that the fee would go to the daughter's heirs, who were not objects of the power.

ON 19th November 1912 the Court, without delivering opinions, answered the first question and all three branches of the second question in the affirmative.

J. & J. TURNBULL, W.S.—MURRAY, BEITH, & MURRAY, W.S.—
JOHN C. BRODIE & SONS, W.S.—Agents.

¹ Stirling, (1732) reported in a footnote at 11 R. 1019; Neill's Trustees v. Neill, (1902) 4 F. 636, *per* Lord M'Laren, at p. 640; Dalziel v. Dalziel's Trustees, (1905) 7 F. 545; Ewing's Trustees v. Ewing, 1909 S. C. 409, *per* Lord Low, at p. 417; Lennock's Trustees v. Lennock, (1880) 8 R. 14; Wallace's Trustees v. Wallace, (1891) 18 R. 921; Wright's Trustees v. Wright, (1894) 21 R. 568; Darling's Trustees v. Darling, 1909 S. C. 445; Watt's Trustees v. Jamieson, 1912 S. C. 1320; M'Laren on Wills, 3rd ed. vol. ii., sec. 2044. Reference was also made to Macdonald v. Hall, (1893) 20 R. (H. L.) 88.

² Alloway v. Alloway, (1843) 4 Dru. & War. 380; Alexander v. Alexander, (1755) 2 Ves. senr. 640; Carver v. Bowles, (1831) 2 Rus. & My. 301; Crompe v. Barrow, (1799) 4 Ves. junr. 641; Sugden on Powers (8th ed.), pp. 681, 682; Farwell on Powers (2nd ed.), p. 322.

³ Wilson v. Wilson, (1855) 21 Beav. 25.

⁴ Middleton's Trustees v. Middleton, (1906) 8 F. 1037, *per* Lord Kylachy, at p. 1042; M'Donald v. M'Donald's Trustees, (1875) 2 R. (H. L.) 125, *per* Lord Cairns, L.C., at p. 132.

⁵ Kennion v. Buchan's Trustees, (1880) 7 R. 570; Gillon's Trustees v. Gillon, (1890) 17 R. 435, *per* Lord Rutherford Clark, at p. 441; Matthews Duncan's Trustees v. Matthews Duncan, (1901) 3 F. 533; Watt's Trustees v. Jamieson, 1912 S. C. 1320; Caulfield v. Maguire, (1845) 2 Jo. & Lat. 141; *In re Crawshaw*, (1890) 43 Ch. D. 615.

⁶ Neill's Trustees v. Neill, 4 F. 636; Warrand's Trustees v. Warrand, (1901) 3 F. 369; Lennock's Trustees v. Lennock, 8 R. 14; Baikie's Trustees v. Oxley, (1862) 24 D. 589; *In re Porter*, (1890) 45 Ch. D. 179; Bristow v. Warde, (1794) 2 Ves. junr. 336; Bell's Prin. sec. 1988.

No. 24.

Nov. 5, 1912.

Sinclair's
Trustees v.
Sinclair.

JAMES SMITH AND ANOTHER (James Sinclair's Testamentary Trustees), First Parties.—*Chree, K.C.—D. Anderson.*
CHARLES WEMYSS SINCLAIR, Second Party.—*Constable, K.C.—Ingram.*

Trust—Termination of trust—Discretionary power to trustees to continue trust till estate cleared of debt—No reasonable prospect of debt being paid—Right of fiar to terminate trust—Succession—Testament—Construction.

A truster declared it to be his wish and intention that the trust should continue for ten years after his death and such further period as his trustees might consider necessary and expedient for carrying out the "ultimate object" of the trust (viz., the freeing of the heritable estate from debt) "in so far as this may reasonably be attained." Thirty-five years after the truster's death the estate had not been freed from debt, and the person who, if the period for distribution had arrived, was entitled to the fee demanded that the trustees should denude in his favour. Certain annuities charged on the estate were still current, and, as the fiar was alleged to be financially embarrassed, it was suggested that, if the trustees denuded in his favour, payment of the annuities might be endangered.

Circumstances in which held that, as the trustees admitted that there was no prospect that the estate could be freed of debt within any time that could be specified, they were bound to denude in favour of the fiar.

EXTRA
DIVISION.

JAMES SINCLAIR of Forss, by a trust-disposition and settlement dated 6th March 1874, conveyed his whole estate, heritable and moveable, to trustees. The purposes were, *inter alia*:—" (First) that my trustees shall from the produce of my means and estate pay all my just and lawful debts and funeral expenses, and the expense of executing this trust; (Second) that they shall make payment to my son, George William Sinclair, or failing him, to the heirs of his body during the subsistence of this trust of the annual sum of Five hundred pounds, or such smaller sum as my trustees consider the rental of my estate, after payment of the interest of the debts thereon and the provisions and annuities provided or to be provided by any deed granted by me, will, having regard to my ultimate object of freeing the estate of debt, afford and admit of, and that quarterly during the subsistence of this trust; [(Third) (Fourth) and (Fifth) Payment of various liferents and annuities, including a liferent to his daughter Johanna]; (Sixth) I declare that it is my wish and intention that this trust shall subsist for ten years after my death, and such further period as having in view my ultimate object before mentioned, in so far as this may reasonably be attained, my trustees may consider it necessary and expedient to keep up the same, but in the event of the death of my said heir leaving a child before the expiry of the said ten years, or such further period as aforesaid, then this trust shall subsist until the said child succeeding shall attain majority; (Lastly) on the purposes of this trust being fulfilled, and my trustees judging it expedient for them to denude thereof, I hereby direct and appoint them to dispoise, convey, and make over, my whole heritable and moveable estate above mentioned and described, except such portions thereof as may have been sold as above directed, but under burden always of the liferent to my said daughter, Johanna Sinclair, as before particularly mentioned, to

and in favour of my eldest surviving son, George William Sinclair, a Nov. 5, 1912. settler in Australia, and the heirs of his body, whom failing [to various substitutes] but under burden always of the heritable debts ^{Sinclair's} affecting my said estates, and such provisions and annuities as I may ^{Trustees v.} have provided to my children." Sinclair.

By deed of apportionment and provision, also dated 6th March 1874, the testator, after apportioning a sum of £4000 among his younger children, directed his trustees to pay annuities, amounting in all to £440, to six of these children, and the annuities were declared to be strictly alimentary and not liable to their debts or deeds or to the diligence of creditors.

James Sinclair, the testator, died upon 1st March 1876, survived by his eldest son, George William Sinclair, who died on 23rd July of the same year, survived by two sons and five daughters, the elder of the sons being Charles Wemyss Sinclair, who attained majority on 17th April 1883. All the testator's children to whom he left annuities survived him, but in December 1911 the annuities payable were by deaths reduced in number to three, and in amount to £190.

In 1911 Charles Wemyss Sinclair called upon the trustees to denude in his favour, and make over the estate to him subject to the heritable debts and the annuities, and in December of that year a special case was presented for the opinion of the Court, to which the trustees acting under the trust-disposition and settlement of the deceased James Sinclair were the *first parties*, and Charles Wemyss Sinclair the *second party*.

The case set forth, *inter alia* :—" 8. When the said James Sinclair, the testator, died on 1st March 1876 his heritable estates were burdened with heritably secured debt to the extent of £62,600, with terminable rent charges amounting to £420 per annum, and with annuities created by his predecessor in the estate amounting to £200 per annum. The annual rental of the heritable estate amounted in 1876 to about £6100, and the annual income from the moveable estate to about £100, together £6200. From this there fell to be deducted approximately [interest, rent charges, and other charges amounting to] £5662, leaving a balance of £538 available to meet the expense of carrying on the trust and providing an allowance to the heir. As the moveable estate of the testator was insufficient to pay his moveable debts, funeral expenses, and provisions to younger children and others, his trustees, to meet these obligations, borrowed on the security of the heritable estates in 1877 £3760, and in 1879 £2500. Further, on the expiry of the lease to the Forss Caithness Pavement Company of Achscrabster Quarries in 1883 the trustees in terms of the lease took over the tenants' plant and machinery at valuation, and to meet the price thereof borrowed a further sum of £3000 on the security of the estates. Further, in order to meet expenditure for improvements on the estates and claims by tenants for meliorations, &c., the trustees in 1886 borrowed a further sum of £4300. The trustees thus borrowed a total sum of £13,560 during the first ten years of the trust, and this added to £62,600 of debt affecting the estates at the time of the testator's death, brought the amount of heritable debt in 1886 up to £76,160, apart from rent charges and annuities. The trustees have since repaid out of income heritable debt to the amount of £7300, and the amount now affecting the estates is therefore £68,860. All the before-mentioned rent charges had expired by 1st October 1892, and the annuities now payable are only £190. 9. Owing to the

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agricultural depression which set in soon after the commencement of the trust the rents of agricultural subjects have been considerably reduced, and there has also been a considerable diminution of rental through the decay of the pavement industry which has led to the Achscrabster Quarries on the estate of Forss being unlet since the year 1907. On the other hand, the rents of shootings and fishings have increased to some extent. The average gross rental of the estates for the five years ending 31st December 1910 amounted to approximately £4903, and the average gross income of the trust-estate from combined sources for the same period was £5018. The average outgoings for the same period were [interest and other charges amounting to] £4584, leaving a balance of £434 available to meet payments during the period in question for compensation to farm tenants, &c., and for carrying on the trust. It is not anticipated that for some time to come the revenue will appreciably exceed the average sums above stated, but the free revenue will be increased as the annuities (which now amount to £190 per annum) lapse on the death of the annuitants."

The case further stated that from the date of his father's death until July 1885 the trustees paid the second party a sum of £500 per annum, but that thereafter they paid him nothing, in consequence of the receipt by them of a notarial intimation of a bond and disposition and assignation in security granted by the second party for the principal sum of £14,595, which purported to convey the whole heritable estates which had belonged to the truster in security of the debt. The case also set forth a number of other bonds and dispositions in security over the estate of Forss granted by the second party and intimated to the trustees. The case then stated:—"12. In view of the amount of heritable debt affecting the trust-estates, and of the fall of the rental of the said estates since the testator's death, combined with increased taxation, the trustees do not see any prospect of clearing the estate of the debt existing at the testator's death within any period that they can specify."

The first parties maintained "that they are not bound or vested with any discretion entitling them to denude themselves of the trust-estate for the following reasons:—(1) That the whole trust purposes, and especially the primary purpose of the trust, to free the estate of debt, have not been fulfilled. (2) That if the trust is brought to an end by their denuding the payment of the annuities created by the trust-disposition and settlement and still subsisting will be endangered. (3) That their denuding in favour of the second party would, under existing circumstances, entirely defeat the main intention of the testator."

The second party maintained:—" (1) That the trustees have no discretion further to continue the trust on any ground whatsoever, and that he, or those in his right, are entitled to an immediate conveyance of the estate. He submits that on a sound construction of the settlement the only object for which the trustees could competently continue the trust was that of freeing the estate of the debt which existed at the truster's death, and that the power of the trustees to continue the trust has now ceased in respect that the course of the trust administration and the admission of the trustees show that that object cannot, within the meaning of the sixth purpose of the trust, be reasonably attained. He maintains that the additional considerations adduced by the trustees to the effect that he has incurred debt, and

that it is doubtful whether, if the trustees denude, the remaining annuities can be effectually secured, are both entirely irrelevant in answer to his claim. The trust-deed contains no prohibition against his incurring debt, and it expressly directs a conveyance to be made under burden of any subsisting annuities. Moreover, the suggestion that the annuities may be prejudiced is unfounded in law. His creditors' rights cannot be higher than his, and if the directions to the trustees to convey under burden of the annuities is sufficient to secure the annuities in a question with the second party, it will equally secure them in a question with his creditors. If the annuities cannot be secured either against the second party or his creditors that will not warrant the trustees in refusing to convey in terms of the trust deed. (2) On the assumption that the trustees have a discretion to continue the trust the second party maintains that they have equally a discretion to end it, and are accordingly, in any case, entitled to denude in favour of him or those in his right. (3) He further maintains that in exercising such discretion the trustees are only entitled to have regard to the object of postponement expressed by the truster, viz., the clearing the estate of the original debt, and that for the reasons above stated they are not entitled to have regard to the other considerations adduced by them."

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The following question of law (as amended) was, *inter alia*, submitted for the opinion of the Court:—"1. Are the first parties bound to denude themselves of the trust-estate in favour of the second party, provided he discharges the debts and obligations incurred by him, of which intimation has been made to the first parties, or which stand upon record?"

The case was heard before the Extra Division (consisting of Lord Kinnear, Lord Dundas, and Lord Mackenzie) on 30th October 1912.¹

At advising on 5th November 1912,—

LORD MACKENZIE.—The question in this case is whether the trustees are now bound to denude in favour of Mr Charles Wemyss Sinclair, provided he discharges the debts and obligations incurred by him of which intimation has been made to the trustees or which stand upon record. I am of opinion that the answer should be in the affirmative.

The trust was created by Mr James Sinclair of Foras who died so long ago as 1876. Mr Charles Wemyss Sinclair came of age in 1883. A consideration of the second and sixth purposes of the trust makes it plain what the ultimate purpose was that the truster had in his mind. It was not to create a trust that should subsist until the estate was cleared of all debt affecting it, but a trust which should subsist for the purpose of freeing the estate of debt in so far as this might reasonably be attained. The wish of the testator was that the trust should subsist for ten years, or until the heir should attain majority. Any further direction as to keeping up the trust is subordinate to what he called his ultimate purpose. On the purposes of the trust being fulfilled, the trustees were directed to convey the

¹ The following authorities were cited:—White's Trustees v. Whyte, (1877) 4 R. 786; Williamson v. Begg, (1887) 14 R. 720; Cowie v. Muirden, (1893) 20 R. (H. L.) 81; Tempest v. Lord Camoys, (1882) 21 Ch. D. 571; *In re Courtier*, (1886) 34 Ch. D. 136; Buchanan v. Eaton, 1911 S. C. (H. L.) 40.

Nov. 5, 1912. whole heritable and moveable estate to the heir specified. Mr Charles Sinclair's Trustees v. Sinclair.
Lord Mackenzie.

Wemyss Sinclair is the person now entitled, if the time has arrived at which the conveyance ought to be made. Whether the conveyance ought now to be made depends upon whether the purposes of the trust have been fulfilled, because on a consideration of the last purpose I think the truster did not empower the trustees to delay granting the conveyance after the purposes had been fulfilled. The question therefore is, Have the purposes of the trust been fulfilled? Now, no word has been said against the way in which the trust has been administered, and [from the explanation given by Mr Chree it appears that the condition of the estate has materially improved. The trustees, however, make the frank admission that they "do not see any prospect of clearing the estate of the debt existing at the testator's death within any period they can specify." In these circumstances, is the trust to be kept up or not? It has been in existence for thirty-six years, and from what the trustees say there is no prospect of even another thirty-six years clearing the estate of the debt existing at the testator's death. In these circumstances, I think that the trustees have done all that may reasonably be required of them to attain the testator's ultimate object of freeing the estate of debt, and that accordingly they now have a duty to denude.

There is one clause in the settlement which shows that the testator did not mean that the trust should continue until the whole burdens affecting the estate had been cleared off. The direction to convey is "under burden always of the heritable debts affecting my said estate and such provisions and annuities as I may have provided to my children." The difficulty which was urged upon us by the trustees is in regard to the outstanding annuities of £190 per annum. I think that the clause I have just quoted justifies the trustees in conveying the estate under burden of the annuities even though they are declared to be alimentary. It was pointed out that if the trust administration is withdrawn the security of the alimentary annuities will not be so good, as prior creditors may force a sale of the estate, or enter into possession under their bonds. This, however, is the position in which matters were left by the testator himself and does not warrant the trustees in refusing to convey. Further considerations were dwelt upon of a character personal to the beneficiary himself. These matters do not in my opinion affect the present question. For the reasons stated I am of opinion that the second party is now entitled to a conveyance on the conditions already stated. It is unnecessary to answer the second and third queries.

LORD DUNDAS.—I am of the same opinion, and shall add but little to what your Lordship has said. Counsel for the second party suggested, rather than maintained, that the concluding sentence of the sixth purpose of the settlement should be read as a direction that the trust is to subsist until the occurrence of the event contemplated, and is then to cease. This view is, I think, plainly wrong; the direction is merely that, in the event postulated, the trust should not terminate before the grandson of the testator attained majority. The real point, however, of the case turns upon the proper effect to be given, in the circumstances which have arisen, to the

declaration in the said sixth purpose of the trustor's intention that the Nov. 5, 1912.
trust should subsist for ten years after his death "and such further period
as, having in view my ultimate object"—viz., freeing the estate of debt—
"in so far as this may reasonably be attained, my trustees may consider it
necessary and expedient to keep up the same." About thirty-five years
have elapsed since the testator's death, during which the estate has admit-
tedly been administered in a most prudent and careful fashion; but it is
stated in the case that "the trustees do not see any prospect of clearing the
estate of the debt existing at the testator's death within any period that
they can specify." In these circumstances, it seems to me that, upon the
trustees' own showing, the testator's "ultimate object" cannot now "reason-
ably be attained" within the meaning of the said sixth purpose, and that
the trust must therefore end. It was argued that, by the last purpose of
the trust, denuding was to take place only "on the purposes of this trust
being fulfilled"; that this could not be said to have happened while there
are subsisting annuities, created by the settlement; and that, if the trustees
were to denude, these annuities might be endangered. I hope that the
annuities may not be endangered; but I do not think that the fact of their
subsistence can be regarded as a sufficient reason for continuing the trust,
looking to the express direction in the settlement that the conveyance of
the estate by the trustees should be under burden of, *inter alia*, these
annuities. Nor do I consider that we can give effect to the trustees' argu-
ment against denuding based on the indebtedness of the second party to
creditors, which seems to be considerable. The second party undertakes,
prior to any conveyance of the estate to him, to discharge the debts and
obligations incurred by him of which intimation has been made to the
trustees or which stand upon the record. On this being done, I do not
think the trustees or the Court have any concern with the pecuniary affairs
or liabilities of the second party.

On the whole matter I have come, not without a feeling of regret, to the
conclusion that we must answer in the affirmative the first question put to
us by the case (as amended). If this is done, the other questions do not
require to be answered.

LORD KINFEAR concurred.

THE COURT answered the first question of law in the affirmative.

JOHN C. BRODIE & SONS, W.S.—J. GEORGE REID, Solicitor—Agents.

WILLIAM HENDERSON MAIR, Pursuer (Reclaiming).—*D.-F. Dickson*— No. 25.
Sandeman, K.C.—J. A. Christie.

THE RIO GRANDE RUBBER ESTATES, LIMITED, Defendants (Respondents). Nov. 21, 1912.
—*Macmillan, K.C.—Gentles.*

Company—Agreement to take shares—Rectification of register—Removal of
shareholder's name on ground that shares had been taken through misrep-
resentation in prospectus—Quotation in prospectus of report by one "ac-
quainted with" the property—Fraud and Misrepresentation—Contract.

A company, formed for the purpose of acquiring a rubber estate in the
Philippines, issued a prospectus in which was quoted a report on the
natural advantages of the estate by one of the directors, who was stated

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to be acquainted with the locality. The prospectus also bore that no portion of the price of the estate would be paid until the directors had received an independent report confirming the statements of the director.

A shareholder, who had received the prospectus and had applied for and been allotted shares, brought an action against the company for removal of his name from the register of shareholders and for repayment of the price of the shares, on the ground that he had been induced to apply for them by the statements in the report quoted in the prospectus, which statements he averred were false.

The Court *dismissed* the action as irrelevant, in respect (1) that the statements in the report were not put forward as the statements of the company or any of its agents, and (2) that there was no averment that the company, in accepting the pursuer's application for shares, were aware that he had made it relying on the statements in the report.

Lynde v. Anglo-Italian Hemp-Spinning Co., [1896] 1 Ch. 178, approved and followed; *In re Metropolitan Coal Consumers' Association (Karberg's case)*, [1892] 3 Ch. 1, distinguished.

1ST DIVISION. ON 15th February 1912 William Henderson Mair brought an action against the Rio Grande Rubber Estates, Limited, for reduction of a letter of application by him for 200 shares in that Company, and of a relative letter of allotment, and a share certificate issued in his favour and an entry of his name in the register of shareholders. The summons also concluded for repayment of sums subscribed by the pursuer in respect of the shares allotted to him.

The pursuer averred;—" (Cond. 2) In or about the beginning of the month of March 1910 there was sent to the pursuer, by or on behalf of the defenders, a prospectus which stated that the Company was incorporated under the Companies Acts, with a capital of £70,000, divided into 70,000 shares of £1 each, and that the Company was formed for the purpose of acquiring a concession to be obtained by the vendors from the Government of the Philippine Islands, giving the exclusive right for twenty years to collect, work, and sell or export the rubber, gutta-percha, and other forest products in a territory estimated to contain about 100 square miles (about 60,000 acres) in the Rio Grande Valley, situated in Mindanao, Southern Philippines. Said prospectus further set forth that Mr C. A. Littler, late commercial agent in the East for the Government of Tasmania, was acquainted with the locality from long residence in the Philippines, and reported in the following terms:—'Glasgow, 9th February 1910.—To the Directors of Rio Grande Rubber Estates, Limited.—I have pleasure in submitting the following brief particulars of the rubber estates situated in the Rio Grande Valley, Cotobato, in the island of Mindanao, Southern Philippines. The territory is very extensive, and is estimated to contain about 60,000 acres. It is well drained and watered, has a warm and equable climate, with ample and well-spread rainfall (about 80 inches per annum), all necessary for the successful cultivation of rubber. Being just south of 7° north latitude, it is well within the rubber zone and out of the typhoon area. Shipping facilities are excellent, while labour is cheap. The area was a great centre for the collection of wild rubber until five years ago, when the Government cancelled all licences, owing to damage done to rubber trees and vines. Since then the area has been reserved with a view to the formation of a responsible organisation, which would undertake a scheme of collecting and re-planting. Even with the crude methods of extrac-

tion which then prevailed as much as 40,000 lbs. of rubber per month has paid royalty (only a little over one penny per lb.). In consequence of the Government not having allowed the rubber trees and vines to be tapped, they are now ripe for tapping on a large scale. Under an organised system of collection it should be easy to maintain an average annual output of wild rubber for the next seven years of at least 120,000 lbs., which, with rubber at only 4s. per lb., should give a net profit of not less than £12,000 per annum, thereby providing an excellent return while the Para trees to be planted are maturing. After the fifth year the combined revenues from wild and planted rubber will increase enormously, and at the end of ten years, with 2500 acres bearing, the net profit, taking rubber at only 3s. per lb., should be about £64,000 per annum. The estates are unique in my experience in respect that, in addition to the enormous possibilities of such a large territory if systematically developed, they contain wild rubber trees and vines in such quantities that immediate profits are assured. Under efficient and energetic management they cannot fail to yield large profits to the shareholders. I have made up the following detailed estimate of profits:—[Here followed a detailed estimate bringing out the figures given above]—Said Mr Littler was one of the directors of the Company. He was also the promoter, or one of the promoters, of the Company.” (Cond. 3) “Said prospectus further sets forth, ‘From the above report by Mr Littler, it will be seen that an immediate profit of not less than £12,000 per annum may be expected, out of which the directors propose to set aside each year a sum of £5000 for the further development of the property and the general purposes of the Company. This would leave a sum of £7000, equal to a dividend of 10 per cent on the total capital, which it is expected will be paid at the end of the first year after the Company has commenced operations on the property, and also in each of the five subsequent years, by which time the planted rubber trees should be producing. During this period a sum of £25,000 would thus be provided for additional working capital, which on the subscription of the present issue would give a total working capital of £65,000. This, the directors are advised, is considered sufficient to plant and bring to bearing about 2500 acres’; and further, ‘The statements in this prospectus are based mainly on Mr Littler’s report, on information furnished by him and the publications * above referred to. . . .’” (Cond. 4) “On or about the 1st day of March 1910 pursuer made application for the allotment of 200 shares of said Company. On or about the 7th day of March 1910 he received a letter of allotment informing him that the directors had allotted him 200 shares of the Company. Thereafter pursuer’s name was entered in the register of shareholders as the holder of 200 shares, and a share certificate in respect of his holding was duly issued to him. . . .” (Cond. 6) “The pursuer applied for the said shares, allowed his name to be put on the register, accepted the said certificate, and made said payments in reliance on the statements contained in the said prospectus and report therein incorporated, and in the belief that they were true. He has recently learned that the said statements were false and fraudulent. In particular in the said prospectus it is, *inter*

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* The prospectus contained quotations from Philippine Government official publications on the subject of the suitability of the territory for the cultivation of rubber.

Nov. 21, 1912. *alia*, stated that up till 1905, 40,000 lbs. of wild rubber every month was got from the property which the Company was acquiring, and that from 1910 (the year of the Company's incorporation) onward there would be got from this property 120,000 lbs. of rubber annually. In point of fact there was no wild rubber or any rubber on said territory, or at all events such an insignificant quantity that it would not pay the cost of collection, and consequently there could be no income from this source from the property. The pursuer was induced to apply for shares in the Company because of these false and fraudulent statements."

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The pursuer further averred that the prospectus, as a further inducement to the public to subscribe for shares, set forth:—"No portion of the price will be paid until the directors have received an independent report from their manager, or other expert acting for them, substantially confirming the statements in Mr Littler's report, and until the title to the subjects purchased has been delivered"; and that the directors, in direct breach of these representations, had paid over the whole of, or at least a great proportion of, the price before obtaining either such a report or a good or any title to the property.

The pursuer pleaded, *inter alia*;—1. The pursuer having been induced to become a shareholder in the said Company by false and fraudulent statements contained in the prospectus of the Company, decree of reduction should be pronounced as craved. 2. The pursuer having entered into the said contract to take shares under essential error induced by the misrepresentations made in the prospectus, is entitled to rescind the said contract, and to decree of reduction as craved.

The defenders pleaded, *inter alia*;—1. (a) The pursuer's averments are irrelevant to support the conclusions of the summons, and *separatim*, they are insufficient in specification. 1. (b) The pursuer's averments in article 6 of the condescendence are irrelevant and ought not to be remitted to probation.

On 2nd July 1912 the Lord Ordinary (Hunter) sustained the defenders' first plea in law and dismissed the action.*

* "OPINION.—[After narrating the averments of the pursuer]—He [the pursuer] now asks a proof of the falsity of the averments to which I have referred. I should perhaps notice that although the statements are said to be fraudulent no averments are made imputing fraud to the Company. This, however, is not material as one who has been induced to enter into a contract by the false statements of the party with whom he has contracted is entitled to have the contract set aside whether the statements were made innocently or fraudulently.

"The difficulty, however, which the pursuer has to face at this stage is whether on a sound construction of the prospectus the statements which he complains of as false are really statements of the Company, *i.e.*, made by the directors on behalf of the Company, or are merely statements contained in a report which is accurately set out in the prospectus. In the case of *Reese River Silver Mining Company*, (1867) L. R., 2 Ch. 604, Lord Justice Turner, at p. 611, said:—"If a company will take upon itself to assume the authenticity of, and give credit to, the reports which are made to it, and represent as facts the matters stated in those reports, it must take the consequences. If the company had confined themselves to saying 'We have received reports from which we believe, and have reason to believe, that these mines are in full operation, and are making daily large returns,'"

The pursuer reclaimed, and the case was heard before the First Nov. 21, 1912. Division (without Lord Johnston) on 20th November 1912.

Argued for the reclaimer;—(1) The only inference to be drawn from the inclusion of Mr Littler's report in the prospectus—especially as he was a promoter and director of the Company—was that the Company held out that report to the public as a report on which the public were entitled to rely. The statements which it contained were false, and accordingly the Company could not avoid responsibility for the issuing of these false representations. (2) Even if the Company had not assumed responsibility for the accuracy of the report and were unaware that it was inaccurate, the reclaimer was still entitled to succeed on the ground that the Company had accepted his offer to take shares in the knowledge that the offer had been made in reliance on the statements in the report.¹ The Company could not deny that knowledge, for it was obvious that applica-

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it might, and no doubt would, have been very difficult for Mr Smith to be relieved from the contract, but the company, instead of thus referring to the information received, stated the circumstances as facts.' Lord Cairns, at p. 615 of the same report, says:—'If they had been content to say, "We ourselves know nothing about the state of the mine, but we have been told it is a very valuable mine largely worked at present"; and if they had, in point of fact, been so told, no person could have complained of the prospectus as calculated to mislead; but in place of repeating as hearsay what they had been told, they affirm it as a positive fact, and apparently, according to the terms of the prospectus, as a fact within their own knowledge.' The decisions of Mr Justice Kay in *Re British Burmah Lead Company, Limited*, (1887) 56 L. T. 815, and *Smith's case (In re British Burmah Land Company, Limited)*, (1888) 4 T. L. R. 631, illustrate the distinction thus drawn.

"I do not think that the directors, in issuing the present prospectus, adopted and put forward as their own, the statements contained in Mr Littler's report. It is expressly stated that 'The statements in this prospectus are based mainly on Mr Littler's report, on information furnished by him and the publications above referred to.' There is also a provision in these terms: 'No portion of the price will be paid until the directors have received an independent report from their manager, or other expert acting for them, substantially confirming the statements in Mr Littler's report.' The pursuer alleges that the Company did not carry out this undertaking. Even if this be established I do not think it would assist the pursuer in setting aside the contract on the ground of misrepresentation although it might found an action of damages for breach of the undertaking. The obligation, however, seems inconsistent with the view that the Company adopted as their own Mr Littler's statements.

"The pursuer also submitted to me that, on the principle upon which the case of *Karberg*, [1892] 3 Ch. 1, was decided, he is entitled to succeed upon establishing the falsity of the statements in the report referred to in the prospectus even although, on a sound construction of that document, the statements do not fall to be imputed to the Company. In *Karberg's* case a shareholder had taken shares upon the faith of a false statement which had appeared in a prospectus issued by the promoters of the com-

¹ *Lynde v. Anglo-Italian Hemp-Spinning Co.*, [1896] 1 Ch. 178, *Romer, J.*, at pp. 182, 183; *In re Metropolitan Coal Consumers' Association (Karberg's case)*, [1892] 3 Ch. 1; *In re Russian (Vyksounsky) Ironworks Co. (Stewart's case)*, (1866) L. R., 1 Ch. 574, *Turner, L.J.*, at pp. 586-7; *Palmer's Company Law*, 9th ed. p. 128; *Buckley on the Companies Acts*, 9th ed. pp. 90, 91.

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tions for shares were made on the faith of the prospectus, and the main information that the prospectus conveyed to the public was the information contained in Mr Littler's report.

Counsel for the respondents were not called upon.

At advising on 21st November 1912,—

LORD PRESIDENT.—A limited Company, the Rio Grande Rubber Estates, Limited, issued a prospectus. The pursuer is a gentleman who applied for shares in the Company and was allotted certain shares. He avers—and we must, therefore, upon a question of relevancy, take it to be true—that he applied for those shares upon the faith of the prospectus. He raises this present action to have the contract, which he entered into by taking shares, rescinded, and his name taken off the register of shareholders, on the ground that the statements in the prospectus were untrue, and that it was in respect of those statements that he took his shares. [His Lordship quoted the statements in the prospectus, printed *supra*.]

Upon these averments the Lord Ordinary has dismissed the action as irrelevant, and his Lordship's ground is this—that there is no statement

pany to the effect that certain gentlemen had expressed their willingness to become members of the council of administration. It was held that although the prospectus was issued before the formation of the company, yet as it formed the basis of his contract to take shares the shareholder was entitled to be relieved of the contract. In the subsequent case of *Lynde*, [1896] 1 Ch. 178, Mr Justice Romer explains that generally speaking to make a company liable for misrepresentations inducing a contract to take shares from it, the shareholder must bring his case within one or other of four heads. The fourth head he describes in these terms:—'Where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that some of those representations were material and untrue—as for example, if the directors of a company know when allotting that an application for shares is based on the statements contained in a prospectus, even though that prospectus was issued without authority or even before the company was formed, and even if its contents are not known to the directors.' It is under this head that he puts the case of *Karberg*. Lord Lindley in his work on Companies (6th edition vol. i. p. 96), dealing with the same case says:—'It is to be observed that the judgments of the Court contain no finding that the directors, when making the allotment to *Karberg*, knew that his application was based upon the prospectus issued by the promoters. It is, however, apprehended that such knowledge is essential to the decision, and was tacitly assumed by the Court.' The present case is, I think, quite different from *Karberg's* case. The prospectus was no doubt the basis of the contract; but if my interpretation of that document is sound, there was no misstatement therein of which the pursuer complains. I do not think that the report of Mr Littler can be said to be the basis of the contract; and, in any event, the terms of the prospectus appear to me to be inconsistent with the view that knowledge that the application was based upon the report must be imputed to the directors.

"As therefore, the only statements complained of as false are contained in the report which is accurately set forth in the prospectus, and as these statements do not appear to me to be adopted and stated as facts by the directors, I shall sustain the defenders' first plea and dismiss the action as irrelevant."

made in the prospectus as a statement of the directors which can be said to Nov. 21, 1912. be untrue. In other words, that the Company does not say through its directors in the prospectus that there is this large rubber field. It only says —what is admitted to be the fact—that Mr Littler has reported that there is a large amount of rubber in this field. And his Lordship quotes from the judgments in the well-known case of *Reese River Silver Mining Company*,¹ and holds accordingly that there is no averment here of a false statement made by the Company.

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 Ld. President.

Upon a construction of the prospectus I agree with the Lord Ordinary. I do not think you can read this prospectus fairly as showing anything except that the Company itself has been told these various things about the property by Littler, who is a man acquainted with the spot. They back that up by saying that official publications say that the soil is well suited for the cultivation of rubber. I need scarcely point out that what was meant to be engaged in was rubber plantation, and the eventual future of the Company would depend, not upon the wild rubber that was originally there, but upon the success of the rubber cultivation which would be initiated by the Company. But I do not for one moment doubt that the statement that the territory had so much wild rubber in it that the Company would pay its way for the years during which it is always necessary to wait before planted rubber trees come into bearing is a very material statement in itself; but then, as I have already said, that statement is not made by the directors in the prospectus as from themselves. All they say—and they say truly—is that a man who has been there reports it to them. And I think they make that very clear by the paragraph in the report that I have already quoted, in which they particularly call attention to the fact that the statements in the prospectus are based upon Littler's report. And I think they make it inferentially clear by the other paragraph which I quoted, in which they announce their policy of not paying the price until they have had a report from their manager or other expert substantially confirming the statements in Mr Littler's report. That seems to me to show clearly that they themselves cannot vouch the truth of what Mr Littler has said, and that they propose not to pay the price until they have somebody else who vouches for the truth of these statements. Accordingly, to the question, Is this a misrepresentation as it stands in the prospectus? I answer that there is no misrepresentation to anyone who reads the prospectus fairly, and that the pursuer cannot be relieved upon that ground, and therefore has not made a relevant case.

We had, however, a very ingenious argument from Mr Sandeman in which, upon the assumption—because, of course, if he had won upon the meaning of the prospectus, he would not have needed to go any further—but upon the assumption that what I have said so far is right, he still said the pursuer was entitled to be relieved, and he put his argument upon the case known as *Karberg's case*.² Now, *Karberg's case* is a peculiar case, I think it is, if I may say so, unique; indeed the very eminent Judges who decided it confessed that it was so. Lord Justice Lindley, who gave the leading judgment, says that he can find no case exactly in point, and (at p. 13)

¹ (1867) L. R., 2 Ch. 604.

² [1892] 3 Ch. 1

Nov. 21, 1912. he says quite truly that, "speaking generally, there is no doubt that a misrepresentation in order to vitiate a contract must be made by a party to it, or by his agent." The facts in *Karberg's case*¹ were these: A prospectus had been issued by the promoters before the company was formed, and that prospectus announced the intended formation of the company and solicited persons who received it to take shares in the company when it was formed. That prospectus contained a statement that two well-known persons, Lord Brabourne and Admiral Mayne, were to form part of a sort of directing body which was to control the company's operations. The company was formed, and the plaintiff sent in an application admittedly based upon the prospectus—that is to say, the only information he had about the company was derived from this prospectus. He accordingly applied for and got shares. He afterwards discovered that, as a matter of fact, neither Lord Brabourne nor Admiral Mayne had consented to join the company, and he therefore brought an action to get rid of his shares upon the ground that he had contracted upon the faith of the representation contained in the prospectus, which representation had not been made good by the company when it came into being. Accordingly, the misrepresentation there had been made in a document which had not been issued by the company itself, because the company itself was not in existence, and nobody could make a misrepresentation on its behalf before its birth. Well, Lord Lindley proceeds (at p. 13): "But this rule is not without exception. *Stewart's case*² and *Downes v. Ship*³ warrant the proposition that an application to a company when formed for shares, based upon a prospectus issued by the promoters of the company before its formation, cannot be disavowed by the company from such prospectus."

With great deference to Lord Lindley, I do not think that *Stewart's case*² and *Downes v. Ship*³ are really good illustrations for what he says, because I think both of these cases depended upon a different principle. *Downes v. Ship*³ went to the House of Lords. *Stewart's case*² was decided in the Court of Appeal. They were both cases where what was complained of was that, when the company came out, the contents of the memorandum—which, of course, constitutes the company—went far beyond the objects of the company as disclosed in the prospectus. Now there is, perhaps, a slight difficulty of words in this matter, and I will explain it as clearly as I can. In one sense there is no mistake as to identity, because there was only one company—a company registered in the office in London under such-and-such a name—and the company which was mentioned in the prospectus as going to be born was, in that sense, the same company which was born after registration. But in another sense there was not identity. As your Lordships very well know, a limited company is a creature of statute, and it can only do the things which are set forth in its memorandum. And therefore the company, as registered in that case, was really a different being from the being as set forth in the prospectus, and I think it is upon that view that those cases were truly decided. In other words, I think you do not come properly into the region

¹ [1892] 3 Ch. 1.

² (1866) L. R., 1 Ch. 574.

³ (1868) L. R., 3 H. L. 343.

of misrepresentation at all but into the region of essential error as to the subject—the chapter of law which is dealt with in the Digest in the well-known passages the heading of which might be “*Si aes pro auro veneat*,”¹ which I had occasion to comment on (and I will not repeat what I said) in January last in the case of *Edgar v. Hector*.² Accordingly, with deference to Lord Lindley, I do not think that *Stewart's case*³ and *Downes v. Ship*⁴ had much to do with what he was dealing with, though they were, so to speak, illustrations of the fact that you might get rid of a contract in respect of something that had been said in a document not issued by the person against whom you were claiming to have the contract rescinded. I think what was at the bottom of these cases was essential error and not misrepresentation.

But, none the less, I say, with great respect, that I entirely approve of the decision in *Karberg's case*⁵; I think it was rightly decided. But the point of it—as indeed is acknowledged by Lord Lindley in the book which he afterwards published—the point of it is that in *Karberg's case*⁵ the directors of the company were held to have known, when they accepted the application for the allotment, that the application was made upon the faith of the prospectus issued by the promoters. Without that knowledge I do not think that the plaintiff could have been relieved. And I am confirmed in this view by a correction which Lord Justice Buckley made in his well-known work (the last edition) in commenting upon a judgment of Mr Justice Romer's in the case of *Lynde v. The Anglo-Italian Hemp-Spinning Company*.⁶ In that case the company was registered to take over certain hemp works which had belonged to the promoters, whose names were Thomson and Waithman. Thomson and Waithman went about—if I may use the word—puffing the company and making extravagant and (I will assume) false statements as to the company and its prospects. Upon the faith of those statements the plaintiff applied for shares. He sought to be relieved upon the ground that he had been induced to take his shares by misrepresentation. But Mr Justice Romer refused him relief because he had not connected the company in any way with those statements of Thomson and Waithman. The statements had not been made in any document issued by the company, and there was no proof that Thomson and Waithman were, in any way, acting as agents of the company in what they did. And Mr Justice Romer distinguished the case from *Karberg's case*,⁵ because it was not shown that the directors knew that the application was made upon the faith of what Thomson and Waithman had said. Unfortunately, in setting forth, as he does in his opinion, the various heads under which cases fall in which rescission may be effectually craved, he makes a slip in the phraseology of the fourth head. That it is only a slip is made clear by the decision in the case, and by another subsequent passage of the opinion as given. I think the analysis of Mr Justice Romer is so well expressed and so valuable that I do not apologise

¹ Mackintosh, Roman Law of Sale, p. 34, Ulp. lib. xxviii. ad Sab.

² 1912 S. C. 348.

³ L. R., 3 H. L. 343.

⁴ [1896] 1 Ch. 178.

⁵ L. R., 1 Ch. 574.

⁶ [1892] 3 Ch. 1.

Nov. 21, 1912. for quoting it. What he says (at p. 182) is this: "It appears to me that, speaking generally, to make a company liable for misrepresentations inducing a contract to take shares from it the shareholder must bring his case within one or other of the following heads:—(1) Where the misrepresentations are made by the directors or other the general agents of the company entitled to act and acting on its behalf—as, for example, by a prospectus issued by the authority or sanction of the directors of a company inviting subscriptions for shares; (2) Where the misrepresentations are made by a special agent of the company while acting within the scope of his authority—as, for example, by an agent specially authorised to obtain, on behalf of the company, subscriptions for shares. This head of course includes the case of a person constituted agent by subsequent adoption of his acts; (3) Where the company can be held affected, before the contract is complete, with the knowledge that it is induced by misrepresentations—as for example, when the directors, on allotting shares, know, in fact, that the application for them has been induced by misrepresentations, even though made without any authority." Well, that is only another branch of the old doctrine that nobody can ever take benefit by anybody else's fraud if they know that it is fraud. Well, then, last and fourth, the learned Judge says: "Where the contract is made on the basis of certain representations, whether the particulars of these representations were known to the company or not, and it turns out that some of those representations were material and untrue." Now, Lord Justice Buckley¹ has corrected that by substituting the following words: "Where the contract is made to the knowledge of the company or its agents on the basis of certain representations." That Mr Justice Romer meant that is, I think, perfectly certain. In the first place, if you took the sentence as it stood, the judgment would have been the other way, because in that case the contract had been made on the basis of representations by Waithman and Thomson, and it turned out that some of those representations were material and untrue. And, secondly, when Mr Justice Romer comes to deal with *Karberg's* case,² which he puts under that fourth heading, he says this (at p. 185): "Lastly, this is not a case like *Karberg's* case,² or coming at all within the fourth head. The application for shares made by the plaintiff was not one made conditional upon, or to the knowledge of the directors based upon, any special or other representations made by Waithman." And indeed it becomes clear if one considers what would be the result of the opposite doctrine. The result of the opposite doctrine would be that any contract that you like might be set aside, because one party to the contract could afterwards come to the other and say: "Well, I never would have gone into this contract if it had not been that I trusted to statements made to me by A, B, or C, behind your back it is true, but still that is what induced me to make the contract with you"; which would really be an end of all business.

Well now, applying that case to this, I think it will be found that the argument just comes back again to the question what is the true meaning of the prospectus. There is no proof offered here—and none could be—that the application was made, to the knowledge of the directors, upon any

¹ Buckley on the Companies Acts, 9th ed. p. 90.

² [1892] 3 Ch. 1.

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representation at all. I agree that it would be inferred and held against the directors here that they must consider that any application which came to them might be, and probably was, based upon statements in their own prospectus. And therefore I would be perfectly willing to hold it as proved against the directors that, when they entertained the application, they must have known that it was made upon the statements that they had put into their own prospectus. But then, as soon as you come to that, you come to the prospectus as a whole, and then, if what I said at the beginning is right, you just have the same question as before. The truth is that the fallacy of Mr Sandeman's argument is this: In order to equiparate this case with *Karberg's* case,¹ he would have had to set forth that he had had an interview with Littler, or had had a letter from Littler, in which Littler had put, by themselves, the statements in his report, and that in some way or other it had been brought to the knowledge of the directors that the application was made upon the faith of what Littler had then said. Instead of that, the only thing that can be brought to the knowledge of the directors is that the application was made upon the prospectus as a whole. You cannot simply take out one bit of the prospectus and, taking out that bit, say, "This is the statement to which you, the directors, invited me to pin my faith."

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Upon the whole matter I am of opinion that the Lord Ordinary was right, and that his interlocutor should be adhered to.

LORD KINNEAR concurred.

LORD MACKENZIE.—I am of the same opinion. I do not think that the pursuer has set forth any relevant case for getting rid of the shares for which he applied. The pursuer's offer to take these shares was an offer to take them on the terms of the prospectus and on no other terms, and the acceptance of his application of the allotment of the shares was an acceptance of his offer on these terms. But then by the prospectus is meant the prospectus as a whole. I agree with the construction already put upon its terms, and do not think it necessary again to go over the different clauses. I content myself with saying that I am unable, on a just construction of this prospectus, to find that the Company put forward Mr Littler as their agent in making any of the representations that are contained in his report; and, therefore, there is no relevant averment that the Company or the directors, either by themselves or through their agent, made any misrepresentation in regard to matters of fact, and more particularly any misrepresentation as set out in article 6 of the condescendence.

But then, if Littler is taken as an outside party—and that was the condition of the alternative argument presented to us by Mr Sandeman—equally I think the pursuer has made no relevant averment, because, in order to get relief as against the defenders, he would require to aver that the contract that he made with them was not only on the basis of representations contained in the report, but was, to the knowledge of the directors, based upon the statements made by Littler in his report. That is to say, I entirely adopt the view of Mr Justice Romer's judgment in the case of

¹ [1892] 3 Ch. 1.

Nov. 21, 1912. *Lynda*,¹ which, as your Lordship has pointed out, is contained in the ninth edition of Lord Justice Buckley's work, at p. 90. The same point is dealt with in the sixth edition of Lord Lindley's book on Companies, vol. 1, p. 96. As it is impossible for the pursuer here, looking to the terms of the prospectus, to say that the contract he made was, to the knowledge of the directors, based upon statements in Littler's report, I agree that the action must fail.

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THE COURT adhered.

ST CLAIR SWANSON & MANSON, W.S.—J. STUART MACDONALD, Solicitor—Agents.

No. 26.

THE GLASGOW COURT HOUSES COMMISSIONERS, First Parties.—
Macmillan, K.C.—Hamilton.

Nov. 21, 1912.

THE PARISH COUNCIL OF GLASGOW, Second Parties.—
Murray, K.C.—Hon. W. Watson.

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Rates and Assessments—Exemption—Crown—Buildings held by statutory body and occupied for public purposes—Law Courts—Buildings partly let.

Held that a statutory body of commissioners created for the purpose of holding buildings in Glasgow, which were used for certain public purposes, viz., Justiciary Courts, Sheriff Courts, and Justice of the Peace Courts, were exempt from assessment both for owners' and occupiers' rates, except with regard to certain portions of the buildings which were let to the County Council and for which rents were paid; and that in respect of these portions, seeing that they were held as mere investments, the commissioners were liable for owners' rates.

Coomber v. Justices of Berks, (1883) 9 App. Cas. 61, *followed*.

1ST DIVISION. ON 12th November 1912 a special case was presented by the Glasgow Court Houses Commissioners, *first parties*, and the Parish Council of the Parish of Glasgow, *second parties*, for the opinion and judgment of the Court with reference to the liability of the *first parties* for rates in respect of certain buildings held by them.

The case stated as follows:—

"1. The Glasgow Court Houses Commissioners, incorporated by the 'Glasgow Court Houses Amendment Act, 1872' (35 and 36 Vict. cap. vi.), who are the first parties to this case, are charged with the statutory duty of providing court house buildings for the city of Glasgow, and the lower ward of the county of Lanark, and also courts for the sittings of the High Court of Justiciary on circuit for the city of Glasgow and surrounding districts. The Commissioners incorporated in 1872 come in place of the unincorporated body of commissioners appointed by the first Glasgow Court Houses Act, 1836, and they now administer the following local and private Acts all relating to the Glasgow Court Houses:—[Here followed a list of these Acts.]

"2. Since 1836 the Commissioners have from time to time acquired lands and heritages, and have built, furnished, and equipped, and now maintain and regulate, all under said various Acts of Parliament

¹ [1896] 1 Ch. 178.

² 6 and 7 Will. IV. cap. xxiv.; 19 and 20 Vict. cap. xxxv.; 31 and 32 Vict. cap. lxxxix.; 35 and 36 Vict. cap. vi.; 45 and 46 Vict. cap. lxxxii.; 53 and 54 Vict. cap. lviii. Also (so far as relating to Sheriff Court Houses) 23 and 24 Vict. cap. 79; 29 and 30 Vict. cap. 53; and 47 and 48 Vict. cap. 42.

relating thereto, extensive Court House Buildings known as (1) The County Buildings, Glasgow, and (2) The Justiciary Court Buildings, Glasgow.

"3. The County Buildings comprise the whole block bounded by Ingram Street on the north, Brunswick Street on the east, Wilson Street on the south, and Hutcheson Street on the west. These buildings are used for (first) the Sheriff Courts of the lower ward of the county of Lanark, and the Sheriff's Appeal Court for the whole county, and (second) the Justice of the Peace Courts for the county of the city of Glasgow and also for the county of Lanark. Accommodation is provided within the buildings also for the offices of the sheriff-clerk of the county of Lanark and his deputes, the clerk to the Justices of the Peace for the county of the city of Glasgow and for the county of Lanark, the Procurator-fiscal of the county of Lanark, and the Fiscal of the Justice of the Peace Court, and the subsidiary employees. There is also a dwelling-house consisting of four rooms and kitchen occupied by the superintendent of the buildings, who is a servant of the first parties.

"4. Further, under the terms of the Glasgow Court Houses Act, 1890 (53 and 54 Vict. cap. lviii.), section 18, the Commissioners are empowered to sell or let to the County Council of the county of Lanark any portion of the lands, houses, and other property which the commissioners then possessed or which they might acquire; and under these powers they have leased the following portions of the County Buildings:—

"(1) To the County Council of the county of Lanark for their meetings and general business, three rooms at a gross rental of	£121 2 10
"(2) To the said County Council, for use as headquarters of the County Police for the Lower Ward of the said county, two rooms at a gross rental of	45 0 0
"(3) To the District Committee of the district of the Lower Ward of the county of Lanark, for the administration of their Sanitary Department, three rooms at a gross rental of	100 0 0
	£266 2 10

"The gross rentals, however, include payment for the supply of lighting, cleaning, and attendance, which are not properly rental; and the net rental of the above premises may be taken at £90, £75, and £33 respectively, or £198 in all, the figures agreed to between the Commissioners and the Treasury in settling the annual Treasury allowance for maintenance, as aftermentioned.

"5. The Court Houses Commissioners also have vested in them the Justiciary Court Buildings in Jail Square at the foot of the Saltmarket, Glasgow. These buildings are at present under reconstruction, but they have been, and will again be, used for the sittings of the Justiciary Courts in Glasgow, held for the counties of Lanark, Dumbarton, Renfrew, and Ayr, with occasional cases from other adjoining counties. The buildings will also be used for criminal cases tried before the Sheriff and a jury, and for pleading diets in Sheriff and High Court cases, and they will also be available for ordinary Sheriff Court purposes should the accommodation in the county

Nov. 21, 1912. Buildings at any time be temporarily overtaxed. A court room, with retiring room attached, is being provided as an extra Sheriff Court. Board of Trade inquiries and inquiries under special Acts, such as the Fatal Accidents Act, may also be held there in preference to the County Buildings, if found more convenient. The Justiciary Buildings also contain a dwelling-house of four rooms and kitchen for the superintendent of the buildings, who is a servant of the first parties. The first parties have not hitherto leased any portion of said Justiciary Court buildings under their powers.

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"6. The duties of the Court Houses Commissioners are defined in the series of Acts of Parliament quoted, and relate solely to the proper provision of court houses within the city, and their maintenance and regulation.

"Under the Sheriff Court Houses (Scotland) Act, 1860 (23 and 24 Vict. cap. 79), the Commissioners of His Majesty's Treasury pay one-half of the cost of erecting Sheriff Court Houses in Scotland, and this Act was in 1872 first made applicable to the County Buildings in Glasgow so far as the accommodation is required for the Sheriff Courts only. Prior to 1872 the Commissioners had paid the whole cost of erecting the County Buildings, providing furniture, &c., from money raised by them by assessments for the purpose, and no part of this expenditure has been repaid by the Treasury. Since 1872, however, the Treasury has paid one-half of the cost of reconstruction and adaptation for Sheriff Court purposes of the buildings facing Ingram Street, which were acquired from Glasgow Corporation under the special Act of 1890, under deduction of the proportion of said cost applicable to the portions of said buildings devoted to Justice of Peace Courts, the latter being defrayed by the Commissioners out of assessments levied by them. The Treasury has paid no part of the cost of erecting and furnishing the Justice of Peace Courts and relative offices, safes, &c., which cost has been defrayed entirely from money raised by the Commissioners.

"The Sheriff Court Houses (Scotland) Act, 1860, was also made applicable to the Justiciary Buildings under the provisions of the Glasgow Court Houses Amendment Act, 1882 (45 and 46 Vict. cap. lxxxii.), after inquiry by the Secretary of State as to the accommodation afforded by these buildings, and this was confirmed by the Glasgow Court Houses Act, 1890.

"7. By section 16 of the Sheriff Court Houses (Scotland) Act, 1860, the expenses of maintaining, managing, and keeping in repair, and of cleaning, lighting, and warming the court houses erected or improved under the Act . . . were to be paid by the Commissioners of Her Majesty's Treasury . . . This section was, however, repealed by section 6 of the Sheriff Court Houses (Scotland) Amendment Act, 1884 (47 and 48 Vict. cap. 42), which provided that 'from and after the passing of this Act it shall be lawful for the Commissioners of Her Majesty's Treasury to contribute towards the expense of maintaining, managing, and keeping in repair, and of cleaning, lighting, and warming any court house within the meaning of the principal Act (that is the Act of 1860) . . . such fixed annual sum as may from time to time appear to them to be sufficient for that purpose . . . If there is any excess of expenditure under the said several heads over such fixed annual sum such excess, unless specially sanctioned by the Commissioners of Her Majesty's Treasury, shall be defrayed by the county . . . and the burgh or burghs situated therein . . .

"8. By section 7 of the last-mentioned Act the First Commissioner Nov. 21, 1912.
of Works was authorised to depute an officer from time to time to inspect any court house towards the cost of maintenance of which a contribution is paid from public funds, with power to the Secretary of State to call upon the persons in whom the court house is vested to execute any repairs which may be necessary. By section 8 of the same Act it is provided that if any court house is destroyed by fire the persons in whom such court house is vested are bound to re-erect and restore the same if required to do so by the Secretary of State and that the provisions of the Sheriff Court Houses (Scotland) Acts, 1860 to 1884, and the special Acts relating to the court houses, shall extend and apply to its re-erection or restoration.

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"9. Under the provisions of the Sheriff Court Houses (Scotland) Acts, 1860 to 1884, the Commissioners of His Majesty's Treasury make the following annual payments for the maintenance of the court houses buildings:—

"(1) For the County Buildings, Sheriff's Department, in Wilson Street and Ingram Street, £2546, 10s.

"(2) For the Justiciary Buildings at present under reconstruction a provisional allowance of £370.

The latter sum covers the extra expenditure, ordinary and extraordinary of the Commissioners at the County Buildings during the reconstruction of the Justiciary Buildings, but is merely an interim payment, and is subject to readjustment when the Justiciary Buildings are completed.

"(3) For extraordinary expenditure an annual allowance is made for County Buildings of £143, 10s.

The annual allowance from the Treasury for maintenance is made in respect of the Sheriff Courts only, and not for the Justice of Peace Courts, but a deduction of £99 is made from the foresaid maintenance allowance of £2546, 10s. in respect of one half of the net rents received for those portions of the County Buildings let to the County Council of Lanarkshire for general, police, and sanitary purposes, on the ground that the Treasury, having contributed one half of the cost of the buildings, are entitled to be credited with one half of the rents received in reduction of their liability for maintenance.

"10. No annual allowance is made by the Treasury for the maintenance of the Justice of Peace Department (which occupies about one-eighth of the total accommodation), the cost of which is provided from a local assessment under the powers of sections 7, 8, and 9 of the Glasgow Municipal Buildings Act, 1878 (41 and 42 Vict. cap. lxxix.), and section 15 of the Glasgow Court Houses Act, 1890. By this assessment, also, any deficiency arising in the first parties' annual accounts for the Sheriff's Department, after crediting the annual maintenance allowance from the Treasury, is made good from the city of Glasgow, the royal burgh of Rutherglen, and the county of Lanark in certain proportions. For the year to 31st August 1912 the deficiency of the Sheriff's department thus raised by assessment amounted to £686, 11s. 11d. or thereby.

"11. The Commissioners of His Majesty's Treasury voluntarily make an annual contribution to the local assessing authorities in lieu of payment of occupiers' poor and school-rates and municipal assessments in respect of all property occupied by Government departments. The contribution so made in respect of the County

Nov. 21, 1912. Buildings and the Justiciary Courts, for the year 1911-12, was as follows, viz. :—

Glasgow Court Houses Com- missioners v. Glasgow Parish Council.	To the Corporation of Glasgow,—					
	For the County Buildings, .			£466	19	2
	For the Justiciary Buildings, .			20	0	3
						<u>£486 19 5</u>
	To the Parish Council of the City of Glasgow,—					
	For the County Buildings, .			£237	6	11
	For the Justiciary Buildings, .			10	3	6
						<u>£247 10 5</u>

Similar equivalent sums have been paid by the Treasury since 1897-8. No account is taken by the Treasury of the rates leviable upon owners.

"12. The County Buildings and the Justiciary Court Buildings were entered in the Valuation-roll for the city and royal burgh of Glasgow . . . for the current year as follows, viz. :—

"PARISH OF GLASGOW, 1912-13.

Sec. 375.	Description.	Situation.	Proprietor.	Tenant.	Occupier.	Yearly Rent or Value.
105	Sheriff and Justice of the Peace Court house and offices.	149 Ingram Street.	Glasgow Court House Commissioners, per W. Boyd Anderson, 137 St Vincent Street, Glasgow.	The Commissioners of His Majesty's Treasury, the Justices of the Peace for the County of Lanark, and the Justices of the Peace for the County of the City of Glasgow.	Tenant.	£3307
106	Offices and meeting-rooms.	Do.	Do.	The County Council of the County of Lanark.	Tenant.	90
107	Constabulary offices.	Do.	Do.	The County Council of the County of Lanark.	Chief Constable for the County of Lanark and Police Officials.	33
108	Sanitary offices, &c.	Do.	Do.	The District Committee of the District of the Lower Ward of the County of Lanark.	Tenant.	70*
Sec. 369.						
1	Building.	Salt-market.	The Glasgow Court House Commissioners, Glasgow.	The Commissioners of His Majesty's Treasury.	Tenant.	150

* £75 is the figure adjusted with the Treasury and stated in the case.

"13. The second parties, who are the Parish Council of the parish of Glasgow, . . . collect the poor-rates . . . as well as the school-rates for the parish of Glasgow. . . .

"14. . . . In respect of their ownership of the County Buildings and Justiciary Court Buildings the first parties were assessed for the year 1911-12 to the poor and school-rates on the sums of £3500 and £150 respectively, which assessments amounted to £204, 17s. 11d. and £8, 15s. 8d. respectively, making together the sum of £213, 13s. 7d. as the amount of the owners' proportion of said rates. The occupiers'

proportion of said rates has, up to and including the year 1911-12, been met by a contribution by the Commissioners of His Majesty's Treasury, who were entered in said Valuation and Assessment-rolls as aforesaid.

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"15. Up to and including the year 1911-12 the first parties have been assessed in the owners' proportion of said rates, and have paid the same except for the year 1911-12, and as the amount was not recovered from the Treasury as maintenance, it swelled the balance of expenditure not covered by Treasury contributions, which balance is recovered by the first parties under their own powers of assessment year by year from the local bodies bound to pay the same in virtue of the Court Houses Acts. In making up the accounts for the maintenance and repair of the Court Houses for the three years, upon the average expenditure of which the present amount of the Treasury contribution is fixed, and also in 1908 and 1909 when an application which was made for an increased grant was refused, the owners' rates and assessments were entered as a proper expenditure of the Court Houses Commissioners; but in 1910 this item of expenditure was objected to by the Treasury on the ground that the buildings being public Courts for the administration of justice and for carrying on the business of the country fell within the privilege of the Crown and were not liable to assessment for local rates. This item of expenditure was therefore disallowed by the Treasury as not enforceable, and it was intimated that if paid, it could only be considered as a voluntary contribution to local rates by the first parties.

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"16. The first parties as proprietors have hitherto paid the local assessments on owners on the assumption that they were legally liable for them; but they are now advised that the rates leviable by the Corporation of Glasgow and the Parish Council upon owners of property cannot be legally charged against them. The first parties maintain (1) that the entries in the Valuation-roll for the year 1912-13, above set forth, represent the facts correctly; (2) that the said buildings are vested in the first parties for purposes required and created by Government for the administration of the government of the country, of justice, and of police; (3) that the Commissioners of His Majesty's Treasury and the Justices of the counties of the city of Glasgow and Lanark occupy the parts of the said buildings of which they are entered as tenants for the said purposes or one or other of them; or, otherwise, that the occupiers of the said parts of the said buildings are the Judges, Sheriffs, and Justices who administer justice there; and (4) that the parts of the said buildings of which the County Council of the county of Lanark and the District Committee of the district of the Lower Ward of the said county are entered as tenants, are occupied by them respectively for the said purposes or one or other of them. The first parties consequently contend that they are not liable for any local rates, and in particular for the rates levied by the Parish Council of the parish of Glasgow.

"17. The second parties, on the other hand, maintain that the first parties, as proprietors of the lands and heritages in question, have no statutory or other right of exemption from rating, and are liable to be assessed in the owners' proportion of the poor and school-rates of the parish of Glasgow calculated upon the annual value thereof entered in the Valuation-roll and parish Assessment-roll, and that whatever exemption there may be of the tenants or occupiers thereof from payment of the tenants' or occupiers' proportion of said rates in respect

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Council.

of the nature of the occupancy, such exemption does not operate to relieve the proprietors of the proportion assessed and levied upon them; that, in any event, exemption of the first parties in respect of occupancy by them, or alternatively by the Crown for the administration of justice, can only relate to the proportion of the annual value applicable to such occupancy, and the first parties still remain liable in the owners' proportion of the rates due in respect of the rentals paid by the County Council of Lanarkshire. The second parties further contend, in regard to the unlet portions of the County Buildings and the Justiciary Court Buildings, that the first parties—and not the Crown, or the Treasury as representing the Crown, nor the Judges, Sheriffs, and Justices who administer justice there—are within the true intent and meaning of the Lands Valuation (Scotland) Acts the occupiers thereof in respect of the occupation thereof for the purposes of repair and maintenance and regulation, and of supervision thereof by themselves and by their superintendents and servants resident therein, and that in respect of such occupancy the first parties are liable to be assessed in the occupiers' proportion of said rates."

The questions of law were:—"1. Are (a) the first parties, or (b) the Commissioners of His Majesty's Treasury as representing the Crown and the Justices of the Peace for the counties of the city of Glasgow and Lanark, or (c) the Judges, Sheriffs, and Justices who administer justice there, the occupiers within the meaning of the Lands Valuation Acts of the portions of the buildings in question appropriated to the administration of justice? 2. On the assumption that question 1 (a) is answered in the affirmative, are the first parties liable for (a) the owners' rates, and (b) the occupiers' rates assessable in respect of the said portions of the buildings in question? 3. On the assumption that question 1 (b) or 1 (c) is answered in the affirmative, are the first parties liable for the owners' rates assessable in respect of the said portions of the buildings in question? 4. Are the first parties liable for owners' rates assessable in respect of the parts of the buildings in question let respectively (a) to the County Council of the county of Lanark for their general administration, (b) to the said County Council for their police administration, and (c) to the District Committee of the district of the Lower Ward of the said county?"

The case was heard before the First Division (without Lord Johnston) on 20th and 21st November 1912.

Argued for the first parties;—The buildings in question, in view of the purposes for which they were occupied, must be regarded as in the constructive occupation of the Crown, and as the Crown was not mentioned in the statutes imposing the rates, they were accordingly exempt from all occupiers' assessments.¹ The same principle was applicable to owners' assessments for, even if there could not be such a thing as constructive ownership by the Crown, the first parties were at any rate holding as bare trustees for the Crown. With regard to the owners' rates demanded for those portions which were

¹ *Coomber v. Justices of Berks*, (1883) 9 App. Cas. 61, Lord Blackburn, at p. 65, Lord Watson, at pp. 73 and 77 (overruling *Clerk v. Dumfries Commissioners of Supply*, (1880) 7 R. 1157; *Mersey Docks v. Cameron*, (1864) 11 H. L. C. 443, Lord Blackburn, at p. 464; *cf. Greig v. University of Edinburgh*, (1868) 6 Macph. (H. L.) 97; *Clyde Navigation Trustees v. Adamson*, (1865) 3 Macph. (H. L.) 100.

let to the County Council, the position of the first parties was admittedly not so strong; but even with regard to these the first parties were merely holding them for public purposes, and therefore the same principles should be applied.

Argued for the second parties;—The law laid down in the case of *Coomber v. Justices of Berks*,¹ which, when regarded in the light of earlier decisions,² was an extension of the Crown exemption on the ground of constructive occupation for the Crown, could not be applied in the present case, inasmuch as the first parties were owners of the buildings here in question, and although there might be constructive Crown occupation, there could be no constructive Crown ownership. The test was exclusive use for the service of the Crown, and that did not exist here.³ Therefore the authority of *Coomber's* case¹ could not be appealed to as exempting the first parties; but, even if exempt from occupiers' rates, they were clearly liable for owners' rates, especially as there was no provision for exemption in the Acts under which they held the buildings.⁴

Glasgow Court
Houses Com-
missioners v.

Glasgow
Parish
Council.

LORD PRESIDENT.—The questions put to us here are as to the liability of the Court Houses Commissioners for poor-rates. They are a statutory body, created originally by a statute of 1836, but having had various additions to their powers and establishments by subsequent statutes which it is not necessary more particularly to describe. But the reason and sum of their existence may be described thus: they are a body created simply to hold certain buildings in Glasgow which are used for various public purposes—Justiciary Court, Sheriff Court, Justice of the Peace Court. The present state of the occupation of the property is quite well brought out by the entry in the current Valuation-roll of 1912-13. That shows that there is a block of buildings, part of which is put under the figure 105 in the Roll and consists of what I may call the Sheriff Court buildings. For them no rent is paid by anybody, and the entry put in the Roll as tenant and occupier is "The Commissioners of H.M. Treasury, the Justices of the Peace for the county of Lanark, and the Justices of the Peace for the county of the city of Glasgow," this part of the building being used for the purposes of the Sheriff Court and the Justice of Peace Court. Then there are three smaller parts of the same building, 106, 107, and 108, which are let by the Court Houses Commissioners in virtue of their powers under their recent Act of 1890, section 18, to the County Council of Lanark, and are occupied by the County Council and by the District Committee of the Lower Ward for general administrative, sanitary, and police purposes. Then there are also the Justiciary Court buildings in Jail Square, which are used for judicial purposes only.

Now, the substance of the questions that are put to us is whether there is a liability on the first parties in respect of these buildings (1) for occupiers', and (2) for owners' rates.

¹ 19 App. Cas. 61.

² *The Queen v. Overseers of Manchester*, (1854) 3 E. & B. 336, 23 L. J. Mag. Cas. 48; *Justices of Lancashire v. Stretford*, (1858) E. B. & E. 225, 27 L. J. Mag. Cas. 209.

³ *Surveyor of Taxes v. Smith*, (1901) 4 F. 31.

⁴ *M'Isaac v. Mackenzie*, (1869) 7 Macph. 598.

Nov. 21, 1912. It is useless to go at any length into the origin of these questions, because the whole matter is authoritatively settled by the case of *Coomber Houses Commissioners v. The Justices of Berkshire*.¹ In England the rate is upon the occupier; and therefore the rate that was there in question was an occupiers' rate, and the particular results to which the decisions have come are given in that case. I can conveniently refer to a passage of Lord Watson's opinion in *Coomber*¹ at p. 72, in which he quotes a passage in Lord Blackburn's opinion in the earlier case of the *Mersey Docks*² to this effect:—"Long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of State"—he states some of them and gives the authority for each—"in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police, . . . to county buildings occupied for the assizes, and for the Judges' lodgings, . . . or occupied as a County Court, . . . or for a jail. . . ." Now, in view of these high authorities, it is quite useless to go into the reasons from which that result was reached. It is enough for us to apply the result to the facts here, and the application at once answers the question as regards all occupiers' rates, because all occupation by the first parties of these buildings is for public purposes in the sense of Lord Blackburn's judgment.

But then a separate argument has been addressed to us on the question of owners' rates. Now, upon the owners' rates, generally, I think, the same case of *Coomber*¹ applies. Lord Blackburn, in the course of his opinion, where he had to deal with a Scotch case, *Clerk v. Dumfries Commissioners of Supply*,³ which was overruled by *Coomber*,¹ observes (at p. 69), "It has been pointed out that in the Scottish poor law half the poor-rate is imposed on the owner." Then he goes on to say:—"Whether the rate is exigible in respect of property, or in respect of occupation, the ground of exemption must be the same, viz., as said by the Lord Chancellor (Cairns) in *Greig v. University of Edinburgh*,⁴ 'The Crown not being named in the English or Scottish statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown or of persons using it exclusively in and for the service of the Crown is not rateable to the relief of the poor.'" In other words, the same proposition seems to be true for ownership as for occupation. I could quite understand that this would not apply if the ownership was really not the ownership of the Crown at all, but was the ownership of a private individual, because I do not think there could be constructive ownership of the Crown where a private individual merely lets out the property for occupation by the Crown. But here we have to deal, not with a private individual, but with a statutory body who really exist merely for the purpose of holding. In other words, although not the Crown itself, I think the Commissioners are what may be called an absolutely bare trustee for

¹ 9 App. Cas. 61.

² 7 R. 1157.

³ 11 H. L. C. 443, at p. 464.

⁴ 6 Macph. (H. L.) 97.

the Crown; and that accordingly the same class of argument that holds Nov. 21, 1912. good for occupation holds good for ownership.

Now, that solves the question of liability for owners' rates except as regards Glasgow Court House Com-
three of the parcels. I think it solves that question wherever the ownership missioners v.
and occupation are both devoted to what is called, in the extended view, Glasgow Parish
Crown purposes. But where the ownership is used to get rent, then, I Council.
think the matter is altered. Accordingly, so far as 106, 107, and 108 are Ld. President.
concerned, I do not think the ownership is a Crown ownership for the moment, because I think that the Commissioners meantime hold these offices really as a mere investment. They have made a building which is too large for their own purposes and they let part of it, as they are allowed to do by the statutes under which they act. By so doing, I think they turn that small portion of the building into a mere investment, and, in so far as they actually take money and put it into their pocket, I do not think there is any reason for exemption for this investment.

I do not think the questions are framed in a way in which it would be desirable for us to answer them. I do not think it is part of our duty to frame an entry in the Valuation-roll, which is what the first question proposes. I should propose simply to answer the questions put to us in the case by saying that, in the circumstances put before us in the special case, we consider that there is liability for the assessments, in so far as laid upon the owner, upon 106, 107, and 108, and that as regards all other owners' assessments and the whole of the occupiers' assessments there is no liability.

LORD KINNEAR and LORD MACKENZIE concurred.

THE COURT pronounced an interlocutor in the following terms:

—"Find in answer to the questions of law in the case that, in the circumstances set forth in the case, there is liability upon the first parties for owners' but not for occupiers' assessments in respect of the items of property entered in the Valuation-roll for 1912-13 under numbers 106, 107, and 108, but that there is no liability upon them for assessment either as owners or occupiers in respect of the other portions of property held by them as set forth in the case; and decern . . ."

JOHN C. BRODIE & SONS, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

PETER MILNE (Mary Ann Milne's Executor), First Party.—
Chisholm, K.C.—D. Anderson.

No. 27.

PERCIVAL WAUGH AND OTHERS (Trustees of Bristo Place Baptist Church, Edinburgh), Second Parties.—*Macmillan, K.C.—
C. H. Brown.*

Nov. 21, 1912.

REVEREND JOHN FRASER AND OTHERS (Kirk-Session of West United Free Church, Brechin), Third Parties—*Chree, K.C.—A. R. Brown.*

Milne's
Executor v.
Waugh.

PETER MILNE, Fourth Party.—*Chisholm, K.C.—D. Anderson.*

Writ—Deletions—Holograph testament—Authenticity of deletions.

A testatrix left certain holograph testamentary writings which were found in a locked desk in a chest of drawers in her house. The writings were contained in a closed envelope, which was addressed in the testatrix's handwriting to her brother, whom she appointed her

Nov. 21, 1912.

Milne's
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executor. The writings contained a number of bequests, some of which had been scored through in ink.

Held that the bequests deleted had been duly revoked, in respect that the inference to be drawn from the deletions themselves, and from the circumstances in which the writings were found, was that the deletions had been made by the testatrix herself with the intention of revoking the bequests.

Nasmyth v. Hare, (1821) 1 Sh. App. 65, *followed*.

1ST DIVISION. ON 25th April 1912 a special case was presented for the opinion and judgment of the Court upon certain questions of law arising with reference to holograph testamentary writings left by Mary Ann Milne, (the testatrix), in the following form:—

"1909.

This Document is to Certify
that after my decease it is my
Will and wish that my Estate—Money &
property be divided & given away—
as here stated—after any lawful debts
which may be due are paid—1st to
my Brother Peter Milne farmer—
—Wandershill £100 One hundred Pounds St.
[Here followed a number of small pecuniary legacies.]
signed M. A. MILNE. Isla Bank
39 Park Road, Brechin.

"1909

also to the Babtist Denomination—
To the ^B Congregation worshipping at
present in B. Church Bristo Place, Edinburgh
(of which I am a member) I bequeath £50, Fifty
pounds sterling to aid in maintaing Gospel
Ministry there, & also £50, Fifty pounds to
Building fund for proposed New Church—
~~Per-Treasurer~~

It is also my express wish that
the Residue of my Estate be equally
given to West Church Congregation—
Brechin to aid in Home and foreign—
mission work—according as Minister
& Session think best. The other half
to be given to The B. Congregation, before
mentioned at Bristo Place Edinburgh—also
for Missions at Home & abroad—For the
Advancement of Christ's Kingdom

MARY ANN MILNE.

Per.—The West Church Session Brechin
I bequeath to the, now, Central fund—
£100, one hundred pounds, as, a Thank—
—offering for the Gospel—Ministry of the
Late Rev, Dr Foote & Rev, John Fraser—

Colleague & successor to the former
 To the Mission for the Jews £50 fifty pounds
 To the Foreign Mission Fund £50 fifty pounds
 To the Zenana Mission 5 five pounds per—
 Mrs Fraser the Manse or Treasurer, & for
 clothing to poor of W, C, Congregation £5 pounds
per Mrs Fraser
 To Brechin Infirmary £50 fifty Pounds per Treasurer
 To Y. W, C, Association 5 five pounds per—
Treasurer
 To Mary Ann Young—Living—with
 her Father & Mother at St. James Place, Brechin
 (her Father James Young late of Westbank) „
 ten pounds

Nov. 21, 1912.

Milne's
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 Waugh.

M. A. MILNE

“August 1910

I bequeath to the West Church—Brechin
 My House, or property, in Macgregor St.
 To aid in maintaining Gospel Ministry—
 their—special to help—with Pastor's income.

M. A. MILNE.

“1909

A Special List of Household Articles
 to be given to Relatives & friends at
 My death—
 [Here followed a list of such articles.]

M. A. MILNE.”

The parties to the case were Peter Milne, executor-dative of the testatrix, *first party*; Percival Waugh and others, trustees of Bristo Place Baptist Church, Edinburgh, *second parties*; the Reverend John Fraser and others, the Kirk-Session of the West United Free Church, Brechin, *third parties*; and Peter Milne, as sole next of kin of the testatrix, *fourth party*.

The case stated:—

“1. Miss Mary Ann Milne, Isla Bank Cottage, Park Road, Brechin (hereinafter called the testatrix), died domiciled there on 3rd May 1911, aged seventy-five years. For the last twenty years of her life the testatrix resided alone except during the three months immediately prior to her death, during which time she was attended by a domestic servant. The testatrix was from time to time visited by friends and relatives. Her sole next of kin is her only surviving brother, Peter Milne, who, as her executor, is the first party hereto, and as an individual is the fourth party hereto.

“2. The testatrix left the testamentary writings which are printed in the appendix hereto, and held as forming part of this case. After the death of the testatrix the said writings were found by the first party on the day of the death of the testatrix in a closed envelope which was contained in a locked desk found in a drawer of a chest of drawers in one of the rooms of her house. The key of the desk was found in another drawer of the same chest. The envelope was gummed up and addressed in the handwriting of the testatrix as fol-

Nov. 21, 1912. **Milne's Executor v. Waugh.** lows:—‘To Mr Peter Milne, Annerley House, South Esk Street, Brechin.’ The envelope was opened by the first party and found to contain the said writings. The originals of the said writings, and the envelope in which they were found, will be made available to the Court at the hearing of the case. The flap of the envelope has been lost. The said writings are holograph of the testatrix.

“4. The said holograph testamentary writings, when found by the first party, were in their present condition and contained the scorings or deletions which they bear. Apart from any inference which the Court may draw, there is no evidence to show when or by whom these scorings or deletions were made.

“5. The testatrix was connected with the congregation now known as the West United Free Church, Brechin, during the whole of her life, and she was a member of that church up to the date of her death. Her ordinary residence was in Brechin, and while there she regularly attended the services of the said church. For a considerable number of years the testatrix worked as a Biblewoman amongst the poor of Brechin. Her salary as Biblewoman was furnished either by the said church or by Miss Foote, the daughter of one of the ministers of that church. In 1885 a brother of the testatrix, who was in the employment of the Indian Government, died leaving a considerable estate, which was divided equally between the testatrix and the fourth party, and after succeeding to that money the testatrix gave up her position as Biblewoman and lived on her own means. About eighteen years ago, in consequence of views which she came to hold upon the doctrine of baptism, she joined the Bristo Place Baptist Church in Edinburgh, there being no Baptist Church in Brechin. She continued a member of that church also till her death, and was in the habit of going to Edinburgh twice a year, staying there over two weeks, and while there attending Communion and other services in connection with the church.

“6. The estate left by the testatrix, besides a dwelling-house in Macgregor Street, Brechin, consisted of moveables, as given up in the inventory, at £2457, 9s. 8d. After paying the various personal and specific legacies bequeathed by the testatrix, there will be a sum of over £1000 falling to be dealt with as residue.

“7. Questions have arisen as to the rights of the second, third, and fourth parties under the said testamentary writings.

“The second parties contend that the bequest by the testatrix of £50 to the Building Fund of the Bristo Place Baptist Congregation, Edinburgh, and of one-half of the residue of her estate to the said congregation for missions at home and abroad are valid and effectual and ought to receive effect, notwithstanding the scorings or deletions of the passages containing these bequests, inasmuch as the said scorings or deletions are not authenticated in any way.

“The third parties contend that in the foregoing circumstances, and in the absence of any evidence that the scorings or deletions were made by anyone other than the testatrix, these must be presumed to have been made by the testatrix herself and must be given effect to.

“The fourth party contends that effect must be given to the deletions in the testamentary writings of the testatrix in respect that these deletions must be presumed to have been made by the testatrix herself.”

The first question of law was:—“(1) In the circumstances set forth

in this special case, ought the scorings or deletions in the testamentary writings of the testatrix to receive effect as cancelling the bequests so scored or deleted?" Nov. 21, 1912.

The case was heard before the First Division (without Lord John-
ston) on 21st November 1912. Milne's
Executor v.
Waugh.

Argued for the third and fourth parties;—The admitted facts with regard to the condition in which the testatrix's testamentary writings were found were sufficient to lead to the inference that the deletions were made by the testatrix herself with the intention of revoking these particular bequests.¹

Argued for the second parties;—In the absence of proof (1) that the testatrix made the deletions or ordered them to be made, (2) that they were final and not deliberative, the words deleted were to be treated as forming part of a subsisting will.² The circumstances of the present case supplied no such proof as was required in order to make the deletions effectual, such as might be found in the case of holograph interlineations or notes. If effect were given to the deletions half of the residue would fall into intestacy, and that pointed to the conclusion that they were to be regarded as deliberative, particularly in view of the nature of the markings themselves,³ and of the presumption being, in the absence of explanation to the contrary, in favour of a completed settlement.⁴ The case of *Lamont v. Magistrates of Glasgow*⁵ was distinguishable, because in that case a separate writing was found which explained the deletion; and the case of *Nasmyth v. Hare*⁶ was distinguishable, because removal of the seal in that case was only consistent with cancellation of the deed.

LORD PRESIDENT.—The first question in this case is whether the deletions which are found in the testamentary writings of the late Miss Milne are to have effect. I think it is quite clear that they must, when they are taken in connection with the facts and circumstances which are put before us in the special case. Here is an old lady, of probably not very great education, who lives alone and leaves behind her a set of testamentary writings, carefully addressed to a relation, in a closed envelope. All this is found with no suggestion of opening or tampering by anybody. And inside the closed envelope is found this set of holograph testamentary writings. It makes various bequests. There is more than one sheet, and there are additions made at various times, and there are, as it stands, deletions. These deletions are, so to speak, quite appropriate to the additions that are afterwards made. For instance, first of all, there originally stood a bequest of £50 to a building fund of a proposed new church. Well, that is taken

¹ *Nasmyth v. Hare*, (1821) 1 Sh. App. 65; *Winchester v. Smith*, (1863) 1 Macph. 685, Lord Cowan, at p. 695; *Crosbie v. Wilson*, (1865) 3 Macph. 870, Lord Justice-Clerk Inglis, at p. 877; *Lamont v. Magistrates of Glasgow*, (1887) 14 R. 603; *Pattison's Trustees v. University of Edinburgh*, (1888) 16 R. 73, Lord M'Laren, at p. 76.

² *Pattison's Trustees v. University of Edinburgh*, 16 R. 73, Lord M'Laren, at p. 76, II. (2); *Jarman on Wills* (6th ed.), vol. I. pp. 156, 161; *Currie's Trustees v. Currie*, (1904) 7 F. 364; *Hamilton's Trustees v. Hamilton*, (1901) 4 F. 266; *Parker v. Matheson*, (1876) 13 S. L. R. 405.

³ *Petticrew's Trustees v. Pettigrew*, (1884) 12 R. 249.

⁴ *M'Laren, Wills and Succession*, 3rd ed., p. 413.

⁵ 14 R. 603.

⁶ 1 Sh. App. 65.

Nov. 21, 1912. out, and one may guess that Miss Milne had either changed her mind, or
Milne's that by the time of the deletion that particular purpose had been made
Executor v. good by other funds from other people. One deletion I particularly refer
Waugh. to. In the document of 1909 she leaves to the session of the West Church,
Ld. President. Brechin, £100, and then that is deleted, and in August 1910 she bequeathes
to the West Church, Brechin, a certain property in Macgregor Street. It
would be quite natural that, when she came to leave this property in Mac-
gregor Street to the West Church, she should cancel the legacy of £100 to
the church.

I mention these things only to show that the deletions, so far from making the will unintelligible, are just such deletions as you might expect to find. But I put my judgment upon what was laid down in the House of Lords (*Nasmyth v. Hare*¹), that if, in circumstances like these, you find apparently undisturbed the holograph testamentary writing of a person which bears certain alterations there is then a presumption of fact that these alterations were made by the testator or testatrix. If that is so, that seems to me to end the question, because, if these deletions were made by the testatrix herself, I cannot imagine that they could have been made for any purpose except to alter the will to the extent of the deletions. Mr Brown argued that there must be a second stage, and that you must show, not only that the deletion had been made by the testatrix, but that it had been made with the intention of being final, and was not merely deliberative. I cannot think there is any such second stage. I quite agree that you must be satisfied that it is a proper deletion. It is not every ink mark upon a writing that necessarily infers a deletion, but in this case there is no doubt about that. We have had the advantage of seeing the original, and there is no question that these are proper deletions. The consequence is that, if I once come to the result, as I do here, that they were made by the testatrix herself, I also come to the conclusion that she made them for the purpose of altering her will.—[His Lordship then dealt with another point with which this report is not concerned.]

LORD KINNEAR concurred.

LORD MACKENZIE.—I am of the same opinion. I think that, in the circumstances stated here, we are quite justified in drawing the inference and coming to the conclusion which your Lordship proposes.

THE COURT answered the first question in the affirmative.

LEWIS JACK, Solicitor—MACLACHLAN & MACKENZIE, S.S.C.—GORDON, FALCONER, & FAIRWEATHER, W.S.—Agents.

¹ 1 Sh. App. 65.

MRS A. SUTHERLAND OR BRYDEN AND OTHERS, Petitioners
(Appellants).—*D. Anderson.*

No. 28.

JOHN H. CORMACK, Respondent.—*Riach.*

Nov. 22, 1912.

Succession—Testament—Construction—Subject of gift—Words importing gift of heritage—Titles to Land Consolidation (Scotland) Act, 1868 (31 and 33 Vict. cap. 101), sec. 20. Bryden v. Cormack.

A testatrix, by her holograph testamentary disposition, on the narrative that she had "resolved to provide for the settlement of my affairs," appointed a "trustee and executor"; and after making bequests which were all of moveable property, declared "that if there be any residue after all expenses and legacies are paid, I bequeath the said residue to" three nieces, reserving her "life use of the whole estate and effects hereby conveyed."

Held that the testatrix's heritable property was not carried by this deed, but passed to her heir-at-law.

THIS was a petition presented in the Sheriff Court at Wick by Mrs A. Sutherland or Bryden, Miss Jessie A. Sutherland, and Miss Elizabeth A. Sutherland, the residuary legatees under the testamentary disposition of Mrs Catherine Adamson or Cormack, for authority to make up title to Mrs Cormack's heritable estate in terms of section 10 of the Conveyancing (Scotland) Act, 1874.

2D DIVISION.
Sheriff of
Caithness,
Orkney, and
Shetland.

The petition set forth that Mrs Cormack's brother, William Adamson died in 1908, being then infest in certain heritable property in the parish of Wick. By his trust-disposition and settlement he conveyed to Mrs Cormack the liferent of these subjects, but did not dispose of the fee thereof; and accordingly one-half *pro indiviso* share thereof fell to Mrs Cormack as heir-portioner, the other half passing to the son of another sister of Mr Adamson who predeceased him.

Mrs Cormack died on 22nd June 1910, without having feudalised her title to her half share of the subjects, and leaving a holograph testamentary deed, dated 17th July 1909. This deed was in the following terms:—"I, Catherine Adamson or Cormack (Widow), Newton Swiney, Lybster, parish of Latheron, Caithness, having resolved to provide for the settlement of my affairs in the event of my death, and to prevent all disputes regarding same: Do hereby legate and bequeath—[Here followed a number of pecuniary legacies]. I also leave and bequeath all valuations and compensations payable by landlord, or due to me for outlays on dwelling-house, croft, &c., occupied by me at Newton Swiney, with farm stock, implements, furniture, napery, and personal effects and clothing, with all farm produce to my three nieces (my late sister's daughters) Amelia, Jessie, and Elizabeth, each of them to share and share alike. They, before sharing same, to give my nephews, Alexander and Donald Sutherlands, anything out of the dwelling-house they would like to have. If any of my nieces have trouble in nursing me at my death, they must be paid first along with all just debts and funeral expenses.—[Here followed pecuniary legacies to two institutions.] I hereby nominate and appoint my nephew, Alexander Sutherland, Draper, Lybster (failing whom from any cause, Donald Sutherland, Merchant, Latheronwheel) to be my sole trustee and executor, to do all that is competent for an executor to do by the laws of Scotland. Further declaring, that in the event of any dispute arising about the succession to these bequests, said trustee and executor shall interpret my

Nov. 22, 1912. wishes, determine the matter in dispute, and his decision shall be final. I further declare that if there be any residue after all expenses and legacies are paid, I bequeath the said residue to my three nieces, Amelia, Jessie, and Elizabeth. I reserve my own life use of the whole estate and effects hereby conveyed, and power at any time to alter or revoke the presents in whole or in part as I think proper. In witness whereof, I subscribe these presents written on these pages by mine own hand at Newton Swiney, Lybster, on the seventeenth day of July, nineteen hundred and nine years.

Bryden v.
Cormack.

"CATHERINE ADAMSON OR CORMACK."

On 9th February 1912 the Sheriff-substitute (Trotter) pronounced the following interlocutor:—"Finds . . . that the trust-disposition and settlement of Mrs Catherine Adamson or Cormack . . . imports a conveyance of the whole means and estate of the said Mrs Catherine Adamson or Cormack, including the subjects set forth and described in the petition, to Alexander Sutherland as trustee under and appointed by said trust-disposition and settlement: Therefore, and also in respect the petitioners do not found on and produce a disposition or conveyance by the said Alexander Sutherland, as trustee foresaid, in their favour, of the subjects described in the petition, refuses the prayer of the petition, and dismisses the petition, and decerns."

The petitioners appealed to the Court of Session. On 15th June 1912 the case was heard before the Second Division and was continued in order that the petition might be served on Mrs Cormack's heir-at-law. Thereafter her heir-at-law, John H. Cormack, lodged answers, objecting to the prayer of the petition being granted in respect that Mrs Cormack's settlement was not habile to convey heritage.

The case was again heard before the Second Division (without Lord Salvesen) on 22nd November 1912.

Argued for the petitioners;—The subjects in question were carried by Mrs Cormack's settlement, because that settlement showed that she intended to dispose of her whole estate. This appeared from (1) the preamble setting forth her desire to settle her "affairs"; (2) the appointment of a "trustee" and executor; (3) the residuary bequest; and (4) the reservation of her life use of "the whole estate and effects hereby conveyed." As the authorities,¹ and particularly the more recent decisions, stood, a will conceived in such terms was habile to convey heritage.

Argued for the respondent;—In order that a will should be habile to carry heritage it was necessary that there should be either (1) a bequest of the testator's whole estate in general terms; or (2) words directly referring to heritage.² Neither of these features was present in Mrs Cormack's deed. The word "affairs" was primarily referable

¹ M'Leod's Trustees v. M'Leod, (1875) 2 R. 481; M'Leod's Trustees v. M'Luckie, (1883) 10 R. 1056; Forsyth v. Turnbull, (1887) 15 R. 172; Wallace's Executors v. Wallace, (1895) 23 R. 142; Copland's Executors v. Milne, 1908 S. C. 426; Jack's Executors v. Downie, 1908 S. C. 718; Crowe v. Cook, 1908 S. C. 1178.

² Pitcairn v. Pitcairn, (1870) 8 Macph. 604; Edmond v. Edmond, (1873) 11 Macph. 348; Urquhart v. Dewar, (1879) 6 R. 1026; Grant v. Morren, (1893) 20 R. 404; M'Laren on Wills and Succession (3rd ed.), vol. i., p. 332.

to moveable property; the expression "residue" was not appropriate to heritage unless there was also a direction to sell or realise¹; the word "effects" included only moveable property,² while "estate" was at best a flexible term³; and the scope of the phrase "estate and effects" was restricted by the reference to the earlier portion of the will contained in the words "hereby conveyed." Nor did the use of the word "trustee" in conjunction with the word "executor" indicate that the estate to be administered included heritage. None of the decisions were adverse to the respondent's contention. In *M'Leod's Trustees v. M'Leod*,⁴ and *M'Leod's Trustee v. M'Luckie*,⁵ and also in the three cases reported in 1908 S. C., cited for the petitioners, there was a direction to "realise" the estate; in *Wallace*⁶ there was a bequest of certain heritage; and the decision in *Forsyth*⁷ was doubted in *M'Laren on Wills and Succession*.⁸

Nov. 22, 1912.
Bryden v.
Cormack.

LORD DUNDAS.—The first question, and, indeed, in the view which I take of this case, the only question which we have to decide is whether the testamentary disposition of the late Mrs Cormack carried the heritable subjects which were vested in her at her death, or whether there was intestacy with regard to them. The disposition bears to be holograph of the testatrix, but its language suggests to one that it probably was not her own unassisted handiwork. We must consider whether the instrument is habile to convey heritage, whether Mrs Cormack's intention, as it may be gathered from the language used, was to do so, or not. Our answer must, in my opinion, be in the negative; and I shall state, as briefly as I can, my reasons for this conclusion.

I turn at once to the disposition, and shall notice the clauses which seem to make for one or other of the two views. The preamble relates a resolution "to provide for the settlement of my affairs in the event of my death, and to prevent all disputes regarding same." Mr Anderson seized on these words as importing a universal settlement of the whole estate, of whatever kind. I think that this is asking too much of the words, which are, after all, common words of style. They must, of course, be construed; but I do not think they necessarily imply a disposition of estate of every kind. To see whether or not they were intended to do so, we must read them in connection with the other clauses of the deed which follow. The testatrix goes on to leave a number of money legacies to various persons, then she bequeathes all valuations and compensations due to her in respect of the croft she occupied, and stock and personal effects, and then come more legacies of money. All her bequests are of a pecuniary nature, and of no other. Then she appoints her nephew "to be my sole trustee and executor, to do all that is competent for an executor to do by the laws of Scotland." In many of the cases on this branch of the law, the use of the word "trustee" or "executor" figures in the discussion. The word "executor" points, *prima facie*, to a disposition of moveables, and the mere collocation of the word "trustee" has

¹ Bell v. Bell, (1906) 14 S. L. T. 244.

² M'Laren on Wills and Succession (3rd ed.), vol. i., pp. 332, 333.

³ 2 R. 481.

⁴ 10 R. 1056.

⁵ 23 R. 142.

⁶ 15 R. 172.

⁷ (3rd ed.), vol. i., p. 334.

Nov. 22, 1912. been held not to produce a different result. On the other hand, I do not suppose that the mere fact that an "executor" is nominated would be in itself conclusive. One need only say that the clause here seems rather to favour the view that this disposition is intended to convey moveables only. The testatrix goes on to declare that "if there be any residue after all expenses and legacies are paid, I bequeath the said residue to my three nieces." Mr Anderson founded on the word "residue," but I think "residue" is a flexible term, colourless in itself. It is really identical with "remainder"—what is left over—and may relate to moveable or heritable estate, according to the context and the facts of any particular case. The concluding portion of the instrument contains a reservation of the liferent use of "the whole estate and effects hereby conveyed." Now, as to the words "estate and effects," I take it that "effects" is a word importing moveables, while the word "estate" is more flexible, and may include heritage. But then the estate and effects are expressly designed as the "estate and effects hereby conveyed," and that necessarily takes one back to find, from the language of the settlement as a whole, what it was that was truly intended to be conveyed. These are all the clauses which need to be noted, and the points which Mr Anderson founded on were just the four already indicated, viz. :—(1) the terms of the preamble; (2) the nomination of a "trustee and executor"; (3) the gift of residue; and (4) the words "estate and effects" in the reservation of liferent. On the other hand, I can find no words of general gift importing a conveyance of the whole estate of every kind, and no language sufficiently indicating an intention to deal with heritage.

I think it would be idle to review the authorities, which are very numerous. Every time they are cited, as they were to-day, it strikes one how fertile they are in judicial doubts, dissents, and reversals. This is not surprising, for it just shows how largely all these cases depend on impression. They are, at best, illustrations of the application of general rules which are well understood, and are explained in many of the cases. But each individual case has its own special features, which were sufficient to bring down the balance on one side or the other. In the case now before us, a consideration of the clauses of the particular deed in question leads me to the conclusion that it is not habile to carry heritable estate.

Mr Anderson admitted that if the Court held this view there was no other question to be decided. I think, therefore, that we ought to recall the Sheriff-substitute's interlocutor; find that the heritable subjects in question were not carried by Mrs Cormack's disposition; and of new refuse the prayer of the petition, and dismiss it.

LORD GUTHRIE.—I concur. We have had an able argument in this case, and my opinion has varied in the course of the discussion. The deed might have contained by a slight alteration words which would have made the testator's meaning clear one way or the other. As an illustration I refer to the words "whole estate and effects" used in the clause of reservation of liferent, which, if they had occurred in a clause of conveyance, would have carried the heritage. The trouble is that that clause, by the addition of the words "hereby conveyed," merely throws you back to the

clause of residue, which says,—“I further declare that if there be any residue after all expenses and legacies are paid, I bequeath the said residue to my three nieces.” That seems rather to indicate that what was in the testator’s mind was moveable estate. Then there are the introductory words, but these are equivocal. We are thus thrown on the other parts of the deed itself, and it is not possible to find in them any words of general gift which in one form or other are to be found in all the cases to which we were referred. It is true that the tendency in recent decisions has been to endeavour, if the words of the deed make it possible, to hold that the testator intended to deal with his whole estate. It may be that the lady here had that intention, but I am not able to find words under which we can hold that she has carried it out.

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Lord Guthrie.

LORD JUSTICE-CLERK.—I concur in the opinion of Lord Dundas. The features of the deed on which Mr Anderson relied were the testatrix’s declaration that she was resolved to provide for the settlement of her “affairs”; the bequest of “residue”; and the reservation of her liferent of the “whole estate and effects hereby conveyed.” But none of these features unequivocally indicate that the testatrix intended that the will should carry her heritage, and, looking to the whole will and to the position of these expressions as used in it, I am satisfied that it does not have that effect.

THE COURT pronounced the following interlocutor:—“Recall the interlocutor appealed against: Find that the trust-disposition and settlement of Mrs Cormack . . . is not habile to convey the heritage which belonged to the said truster, Mrs Cormack: Therefore of new refuse the petition.”

MACPHERSON & MACKAY, S.S.C.—W. & J. H. GUNN, S.S.C.—Agents.

JOHN MACKENZIE, Pursuer (Respondent).—*G. Watt, K.C.—Duffes.*
THE FAIRFIELD SHIPBUILDING AND ENGINEERING COMPANY, LIMITED,
Defenders (Reclaimers).—*Horne, K.C.—A. Crawford.*

No. 29.

Nov. 26, 1912.

Reparation—Negligence—Safety of the public—Unfenced sandpit on private ground—Use of pit by children as playground—Hidden danger.

Mackenzie v.
Fairfield Ship-
building and
Engineering
Co., Limited.

In an action by a father for solatium for the death of his daughter, aged seven, the pursuer averred that the defenders were the owners of ground abutting on a public path and separated therefrom by a hedge in which there were gaps; that on the ground there was an unfenced sandpit 80 yards from the path; that children were in the habit of entering the ground and using the pit as a playground; that the defenders knew of this practice and “allowed” it; that the pursuer’s child was killed by a fall of sand while playing in the pit; and that the defenders knew, before the accident happened, that the face of the sand was at a dangerous angle and liable to fall, but took no steps to have the danger removed or to exclude the children.

Held that the pursuer’s averments were relevant, and issue allowed.

Devlin v. Jeffray’s Trustees, (1902) 5 F. 130, and *Cummings v. Darnagavil Coal Co., Limited*, (1903) 5 F. 513, distinguished, on the ground that the dangerous state of the sandpit was not a danger that was manifest to a child of that age.

Nov. 26, 1912. ON 4th March 1912 John Mackenzie, blacksmith, Govan, brought an action against The Fairfield Shipbuilding and Engineering Company, Limited, Govan, concluding for £300 as solatium in respect of the death of his daughter.

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2D DIVISION.
Ld. Ormisdale.

The pursuer averred:—(Cond. 2) "The defenders are owners and occupiers of a piece of ground situated immediately to the west of their shipbuilding yard on the south side of the River Clyde. The said piece of ground is bounded on the north by a hedge which separates it from a public path along the south bank of the Clyde. The said hedge was, on 1st August 1911, and had been to the knowledge of the defenders for a considerable time prior thereto, in a defective condition, in respect that there were a number of gaps in it, some of these being 5 or 6 feet wide. The public were in the habit of going to the said piece of ground through the said gaps, and children were in the habit of playing constantly on said ground on which the sandpit after mentioned was situated, and that with the knowledge of the defenders. . . ." (Cond. 3) "In the centre of the said piece of ground, about 80 yards from the said path, there is an unfenced sandpit belonging to the defenders from which they are in the habit of taking sand for use in their yard, leaving a large hole 15 feet deep. The sandpit was a dangerous place, as the defenders were well aware. It is believed and averred that to their knowledge several accidents had occurred previous to the accident to the pursuer's daughter, as hereinafter described. In particular, in the autumn of 1909, a man named Robert Dunlop, care of M'Menemy, 31 Hamilton Street, Govan, was injured by a fall of sand which had been left by defenders' servants in a dangerous position. This the defenders were well aware of. Nevertheless the defenders and their servants have for a considerable time past allowed children to enter the said ground and use the sandpit as a playground, and that when it was a source of great danger to those frequenting the place. . . ." (Cond. 4.) "On 1st August 1911 the pursuer's daughter, Maggie Paterson Mackenzie, aged seven years, along with other children, went to the said ground from the public path, and proceeded to the sandpit. Whilst they were playing there the wall of the sandpit fell upon them and killed the pursuer's said child. The face of the sand was at the time 15 feet high, and at the place where the accident happened the top overhung the face about 5 feet, thus being most dangerous to anyone approaching it. . . ." (Cond. 5) "The said accident was due to the fault of the defenders in respect that they and their servants, being aware that the said pit was dangerous to the public, and particularly to children, knowingly allowed children to use the said pit as a playground, while it was in a highly dangerous condition as aforesaid, without seeing that the sand was left at such an angle as to be safe for the public and children who frequented the place. In such sandpits it is usual, and indeed necessary even for those employed at them, to have the top of the face taken down and the face at a safe slope. This the defenders culpably failed to do, with the foresaid result. The said place immediately adjoined a public path, and was as aforesaid a common resort of children for the purpose of recreation. Further, the defenders culpably failed to have the said sandpit properly fenced or guarded. In the circumstances known to them it was the duty of the defenders to take reasonable precautions to exclude children from the said pit. This they failed to do, and on the contrary for a long period had allowed the foresaid hedge at the

public path to be in such a dilapidated condition as practically to be an invitation to the youth of the district (which is a populous one) to use the said ground as they constantly did. The death of the pursuer's child was the natural and probable result of their failure to take such precautions."

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The defenders pleaded, *inter alia*, that the averments of the pursuer were irrelevant.

On 17th July 1912 the Lord Ordinary (Ormidale) allowed an issue.*

* "OPINION.—I sustain the relevancy of this action, and I arrive at that result chiefly because of the case of *Cooke*, recently decided in the House of Lords ([1909] A. C. 229).

"As I read this record there is a distinct averment that the sandpit was a place of resort for children, that they constantly went there and used the sandpit as a playground, and that they did so with the full knowledge of the defenders. I do not go much upon the gap in the hedge being an invitation to the children to pass on to the ground in question, because I think the children would have gone there whether there had been a gap in the hedge or not. It is of importance that the ground in which the sandpit is situated abuts upon the public footpath, which entitled the children at any rate to be in the neighbourhood.

"The only difficulty I have had in the matter is whether I am entitled to consider, looking at the case from any point of view, that the sandpit was a feature that was attractive or alluring. If it is, and the pursuer says that it is, then I think the case is exactly covered by the case of *Cooke*. Without some inquiry I cannot very well say that it was, or was not. So far as the child was concerned, I can very well understand that it was a dangerous attraction. It was a dangerous attraction, and I do not think the danger of it could be realised by children.

"Now, according to the House of Lords, the liability of the defenders in the matter of taking precautions may vary according to the qualities of the person injured. He may be an adult or a child, an insane or a blind person. Here the averment of the pursuer is that no precautions were taken by the defenders to safeguard children from the danger to which they were exposed when they played about the sandpit. Mr Crawford maintained that the position was different here because the ground was not a waste piece of ground on which there was an old disused quarry or anything of that sort, but that the sandpit was in the actual industrial occupation of the defenders. That is certainly a distinction, but I do not think there is any real difference in principle. I am entitled to infer that apparently the sandpit was not in constant use, and that at the time we are dealing with there were no workpeople about. The defenders may have taken some precautions by warning the children off or in some other way, but the averment of the pursuer is that they took none.

"These being the circumstances as stated by the pursuer, I think the case of *Cooke* covers this case, especially as in the case of *Cooke* the House of Lords appears to have made no distinction between mere licensees and persons who have been actually invited on to the ground. As I read the decisions in this Court, the decision in *Cooke* is not entirely in accord with the decisions upon which Mr Crawford very rightly founded. In the cases of *Devlin* (5 F. 130) and *Cummings* (5 F. 513) what was considered a vital distinction was taken by the Judges between a person who is there merely with the permission of the defenders or the owners of the ground and a person who is actually invited on to the ground by the defenders.

"With regard to the point advanced by Mr Crawford that the case is more suited for proof than for jury trial, the case belongs to a class which is generally remitted to jury trial on an issue, and I do not think, although

Nov. 26, 1912. The defenders reclaimed, and the case was heard before the Second Division (without Lord Guthrie) on 26th November 1912.

Mackenzie v. Fairfield Ship-building and Engineering Co., Limited. Argued for the reclaimers;—The facts averred disclosed no duty on the defenders to ensure the safety of the child. Responsibility could arise in respect of ownership of a dangerous piece of property, only if (a) it was contiguous to a public place, or (b) was dedicated to public use. In the present case the point of danger was 80 yards from the road. Further, dedication was negatived because the sand-pit was admittedly in the industrial occupation of the defenders. This distinguished the case from that of *Cooke*,¹ where the ground was practically derelict, and was not used by anyone except the public. The pursuer's child did not come by invitation; she was at most a mere licensee, and, accordingly, took all the risks incidental to the use of the property.² The proximate cause of the accident was the fault of the pursuer in allowing his child to go to a dangerous place. In any view, the case raised difficult questions of law, and should be tried before a Judge, as was done in the case of *Holland*.³

Counsel for the respondent were not called upon.

LORD JUSTICE-CLERK.—I do not think that we should interfere with the judgment of the Lord Ordinary. As regards the mode of proof, I think he was quite right to allow an issue. It may be, and often is, said that certain cases would be better tried before a Judge than before a jury, but this case is just one of the class which are generally remitted to a jury, and therefore my view is that we should not interfere in that matter.

As to the relevancy, I have no doubt that the case is relevant. It is averred that the defenders, knowing that their sandpit was a dangerous place, allowed children to enter their ground and use the sandpit as a playground. It is also averred that the place immediately adjoined a public path in the fence of which there was a gap, and that it was a common resort of children for the purpose of recreation. What force is to be given to the averments as to the dilapidated condition of the fence will depend entirely on the evidence. But the real ground of liability as alleged is the fact that the defenders allowed the children to make use of the pit.

LORD DUNDAS.—I concur.

LORD SALVESEN.—I am of the same opinion. I think the crucial distinction between this case and the cases of *Devlin*⁴ and *Cummings*⁵ is that the danger here was not manifest to a child of tender years. Every child which is able to go out by itself is supposed to know that a pond or a hole is dangerous, but not that a bank of sand may give way because it is at a greater angle than the angle of repose. As the case is to go to a jury, and

in one view of the case there may be delicate questions of law involved, there will be any difficulty in keeping the law of the matter quite clearly before the jury, and directing them accordingly. No exception has been taken to the form of the issue which is proposed, and I shall approve of it as the issue in the cause."

¹ *Cooke v. Midland Great Western Railway of Ireland*, [1909] A. C. 229.

² *Holland v. Lanarkshire Middle Ward District Committee*, 1909 S. C. 1142; *Devlin v. Jeffray's Trustees*, (1902) 5 F. 130; *Cummings v. Darn-gavil Coal Co., Limited*, (1903) 5 F. 513; *Ross v. Keith*, (1888) 16 R. 86.

³ 1909 S. C. 1142.

⁴ 5 F. 130.

⁵ 5 F. 513.

the facts may turn out to be otherwise than the pursuer avers, I refrain from commenting upon these averments except to say that I agree with your Lordship in the chair that they disclose a relevant case.

Nov. 26, 1912.
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THE COURT adhered.

JAMES G. BRYSON, Solicitor—WEBSTER, WILL, & Co., W.S.—Agents.

WILLIAM ELLIS, Pursuer (Appellant).—*G. Watt, K.C.*—*T. D. K. Murray.*

THE FAIRFIELD SHIPBUILDING AND ENGINEERING COMPANY, LIMITED,
Defenders (Respondents).—*D. P. Fleming—A. Crawford.*

No. 30.
Nov. 27, 1912.
Ellis v.
Fairfield Ship-
building and
Engineering
Co., Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 2 (1)—
Delay in giving notice and making claim—"Mistake or other reasonable
cause."

In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator found that the claimant alleged that he was injured by an accident on 1st June 1911; that thereafter he suffered from pain in his neck and shoulders, which he attributed to the accident; that on 5th August he consulted a doctor, who diagnosed his trouble as, and treated him for, muscular rheumatism; that on 11th November the claimant left his employment and thereafter was treated for severe strain of the neck; that on 13th December he consulted another doctor, who told him that he was suffering from partial dislocation of the head from the spine, and advised him that his case was dangerous and required treatment in a hospital; that in January 1912 (i.e., after he had left his employment and more than six months after the accident) he for the first time gave notice of the accident to his employers and claimed compensation from them.

Held that, as the delay in giving notice and claiming compensation was due to the workman's ignorance of the serious nature of his injury, it was occasioned by "mistake or other reasonable cause," within the meaning of sec. 2 (1) of the Act, and so was not a bar to the maintenance of proceedings for compensation.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58)—Arbitration—
Procedure—Preliminary defences—Duty of arbitrator to dispose of whole
case.

Where an arbitrator had allowed a separate proof on preliminary defences and had issued findings thereon without having heard the case as a whole, *opinions* that, there being no exceptional circumstances calling for the procedure followed, the arbitrator ought to have heard and disposed of the case as a whole.

Observations per Lord Kinnear in Rankine v. Alloa Coal Co., Limited, (1903) 5 F. 1164, at p. 1169, approved.

THIS was a note presented by William Ellis, shipwright, Govan, for an order on the Sheriff-substitute (Lyll) at Glasgow to state a case in an arbitration under the Workmen's Compensation Act, 1906, between the pursuer and the Fairfield Shipbuilding and Engineering Company, Limited, Fairfield Works, Govan. In the arbitration the pursuer claimed compensation in respect of injuries alleged to have been received on 1st June 1911 while at work in the defenders' employment.

The defenders pleaded, *inter alia*;—(1) Notice of the accident to the pursuer not having been given to defenders as soon as practicable

1st DIVISION.
Sheriff of
Lanarkshire.

Nov. 27, 1912. after the happening of said accident, and the defenders being prejudiced by want of such notice, the pursuer is barred from insisting in the present proceedings. (2) The pursuer having failed to claim timeously from the defenders is barred from insisting in the present proceedings.*

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Co., Limited.

The Sheriff-substitute, having allowed the defenders a proof as to the alleged want of notice and claim, found "that the failure to make a claim within the statutory period was not occasioned by mistake or other reasonable cause," and dismissed the application.

The pursuer requested the Sheriff-substitute to state a case for appeal. The Sheriff-substitute refused, and the pursuer presented this note for an order on the Sheriff-substitute to state a case.

Appended to the certificate of refusal to state a case was a statement by the Sheriff-substitute in the form of a proposed stated case, which, for the purposes of argument, was adopted by parties at the bar.

The proposed case stated:—

"Having considered the cause together with the proof led, and heard parties' procurators, I found the following facts to be established:—(1) That it was alleged that the accident in question occurred on 1st June 1911. (2) That the appellant remained in the employment of the respondents until 11th November 1911, when he left and did not return. (3) That no notice of the alleged accident was given and no claim for compensation made until 30th January 1912. (4) That it was practicable for the appellant to have given notice of the accident immediately after the happening thereof and before he left the employment.

"In these circumstances I found in law that these proceedings were not maintainable unless it should be proved (a) that the respondents were not prejudiced by the want of timeous notice, and (b) that the appellant's failure to make a claim within six months was occasioned by mistake, absence from the United Kingdom, or other reasonable cause; and in this connection I found further in fact:—(5) That it was not proved that the respondents were not prejudiced by the appellant's failure to give timeous notice; but, on the con-

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), enacts, sec. 2:—"(1) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death:

"Provided always that—

"(a) the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause; and

"(b) the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

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trary, that they were so prejudiced by being deprived of the opportunity, of which they would have availed themselves, of having the appellant medically examined. (6) That from the date of the alleged accident up to 5th August 1911 the appellant suffered pain in his neck and shoulder, which he himself attributed to the result of the accident. (7) That on 5th August 1911 he consulted a doctor at the Western Infirmary, who diagnosed his disease as, and treated him for, muscular rheumatism of the right shoulder. (8) That up to 11th November 1911 the appellant remained in his employment, being off work for certain short periods during that time, but on the said 11th November 1911 he finally left his employment and did not thereafter return to work (it is alleged that on that day he was attacked by severe pains in the neck, but this was not proved, the appellant himself not being examined as a witness). (9) That the appellant was thereafter treated by a doctor for a severe strain of the neck up to 13th December 1911. (10) That on 13th December 1911 the appellant consulted another doctor, who found, and informed the appellant, that his head was partially dislocated from the spine, and recommended his removal to the infirmary for treatment, the said doctor's opinion being that the appellant was then in a dangerous condition. (11) That, at the request of the appellant, respondents obtained for him free removal in an ambulance of the St Andrew's Ambulance Association to the infirmary on 20th December 1911. (12) That the respondents are in the habit of obtaining this privilege for their workmen in all cases where removal to the infirmary is ordered whether on account of accident or disease. (13) That some time in January 1912 the appellant's wife intimated, for the first time, to an official of the respondents' Company that the appellant claimed compensation, in respect that his then condition was attributable to the alleged accident on 1st June 1911. (14) That a claim, signed by the appellant, was made on 30th January 1912 for compensation for injury by accident not on 1st June 1911, but 'on the middle of June.'

"I found further in fact that, although the appellant may have been under a mistake as to his symptoms and condition between 5th August 1911 and 13th December 1911, he was under no mistake, but himself attributed his condition to the result of the alleged accident from the date thereof until 5th August 1911 and from 13th December 1911 to 30th January 1912.

"I therefore found in fact and law that the failure to make a claim within the statutory period was not occasioned by mistake or other reasonable cause, dismissed the application, and found the respondents entitled to expenses."

The proposed questions of law for the opinion of the Court were :—(1) Was the arbitrator right in holding that these proceedings were not maintainable unless it should be proved (a) that the appellant's failure to give notice as soon as practicable and before leaving his employment was not to the prejudice of the respondents; and (b) that his failure to make a claim within six months of the accident was due to mistake or other reasonable cause? and, if so, (2) Was it competent for the arbitrator to hold on the facts proved (a) that the appellant's failure to give timeous notice was to the prejudice of the respondents; and (b) that the appellant's failure to make a timeous claim was not due to mistake or other reasonable cause?"

The case was heard before the First Division on 27th November 1912.

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Argued for the pursuer;—Section 2 (1) (a) provided that failure to give notice was excusable if caused by mistake; and such mistake was an excuse even though prejudice had been suffered by the defenders. This part of the proviso had been disregarded by the Sheriff-substitute in framing the first question, and apparently also in disposing of the case. Failure to give timeous notice here was clearly due to mistake, and to a mistake that was obviously a reasonable cause.¹ The present case was a *fortiori* of *Rankine v. Alloa Coal Company*.² *Egerton v. Moore*,³ founded on by the defenders, was distinguishable from the present case, in that the claimant in *Egerton*⁴ was not ignorant of his true condition.

Argued for the defenders;—By section 2 of the Act notice of the accident was to be given before the workman voluntarily left his employment and notice of claim was to be given within six months of the date of the accident. Neither of the conditions had been fulfilled in this case. This case was ruled by *Egerton v. Moore*,⁵ and the cases relied on by the pursuer were distinguishable, because in them it was not possible, as it was possible in this case, that notice could have been given timeously. There was sufficient evidence before the arbitrator to entitle him to find as he did.⁶

LORD PRESIDENT.—William Ellis, a shipwright and an inmate of the Victoria Infirmary in Glasgow, sought to recover compensation from the Fairfield Shipbuilding and Engineering Company, Limited, Govan, in respect of an accident which he alleged happened to him, when he was in their employment, on 1st June 1911. The respondents in their answers to the application pled that notice of the accident had not been given as soon as practicable after the happening thereof, and also that a claim had not been made within six months of its occurrence. Seeing that plea, the learned Sheriff-substitute, as arbitrator, allowed the respondents a proof as to the alleged want of notice and claim, and to the applicant a conjunct probation, and did not allow a proof at this stage as to the general facts of the case. In so doing I think that the learned arbitrator adopted an inconvenient procedure—I do not say an incompetent, but an inconvenient procedure—a procedure which has more than once been said in this Court not to be, except in very exceptional circumstances, the proper procedure, with the result (as will be presently apparent) that the case has got into a more or less unfortunate position. On this point I may remind your Lordships of the remarks that were made by Lord Kinnear, with the approbation of the other Judges of this Division, in *Rankine v. Alloa Coal Company, Limited*.⁷

The learned arbitrator decided that proper notice had not been given, and that a claim had not been timeously made, and therefore dismissed the application. The workman, wishing to bring that judgment under review,

¹ *Rankine v. Alloa Coal Co., Limited*, (1904) 6 F. 375; *Brown v. Lochgelly Iron and Coal Co., Limited*, 1907 S. C. 198; *Millar v. Refuge Assurance Co., Limited*, 1912 S. C. 37; *Hoare v. Arding & Hobbs*, (1911) 5 Butterworth's Compensation Cases, 36.

² 6 F. 375.

³ [1912] 2 K. B. 308.

⁴ *O'Neill v. Motherwell*, 1907 S. C. 1076.

⁵ 5 F., at p. 1169; *cf. Colquhoun v. Woolfe*, 1912 S. C. 1190.

asked the arbitrator to state a case, and eventually, after a certain amount of difference between the parties as to what form the case should take, the learned Sheriff-substitute did state a case which, although it was not at the time accepted by the workman, has been accepted quite properly by his learned counsel to-day, and quite properly also by his opponent. We have therefore had the argument upon the stated case as framed by the Sheriff-substitute, which, although not technically before us, is so of consent of parties.

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Now, taking the stated case as framed by the Sheriff-substitute, he first finds that it was alleged that the accident occurred on 1st June 1911. I do not think there can be any more obvious commentary upon the procedure adopted than this, that we have, for the purposes of argument, to assume that the accident happened without really knowing anything about the accident, and yet when it comes to the question whether there has been reasonable delay or not, it is quite evident that a good deal turns upon the fact of the accident and what happened afterwards. The learned Sheriff-substitute then goes on to say "that no notice of the alleged accident was given, and no claim for compensation made, until 30th January 1912." Now that is a finding in fact, and indeed there is no dispute that no actual notice or claim was made until that date. He then makes this finding, "that it was practicable for the appellant to have given notice of the accident immediately after the happening thereof, and before he left the employment." It is perhaps difficult to say exactly how far that finding, standing by itself, goes. If it means that the man knew on the 1st June that something had happened to him, and that therefore he could have said so, it is really no more than a truism. If, on the other hand, it means more than that, then, upon the face of it, it is perfectly impossible to discover how much more it does mean. The learned Sheriff-substitute then goes on to enumerate certain other facts which he finds established, but he first interpolates this finding in law, "that these proceedings were not maintainable unless it should be proved (a) that the respondents were not prejudiced by the want of timeous notice, and (b) that the appellant's failure to make a claim within six months was occasioned by mistake, absence from the United Kingdom, or other reasonable cause." I do not think that the Sheriff-substitute there is really wrong, but he has certainly made a slip. He has left out something that he ought to have put in, because he means to echo what the statute says. Now what the statute says in section 2 is this: "Proceedings . . . shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death: Provided always that," and then there follows a double proviso, one branch applying to each of the two requisites I have mentioned. And so far as the requisite of notice is concerned, the want of notice is not to have any effect if it is found in the proceedings that the want of notice did not prejudice the employer. That is mentioned by the learned Sheriff-substitute. But then the same branch of the proviso goes

Nov. 27, 1912. on to say, "or that such want . . . was occasioned by mistake, absence from the United Kingdom, or other reasonable cause," and that he

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The Sheriff-substitute then proceeds, as I have said, to make certain other findings, and first of all he finds that it was not proved that the respondents were not prejudiced by the appellant's failure to give timeous notice, but that in fact they were, inasmuch as they were deprived of the opportunity of having him medically examined. Then he gives us what really are the material facts upon which I think we can dispose of the case. He finds "that from the date of the alleged accident up to 5th August 1911 the appellant suffered pain in his neck and shoulder which he himself attributed to the result of the accident; that on 5th August 1911 he consulted a doctor, who diagnosed his disease as, and treated him for, muscular rheumatism of the right shoulder"; that up to 11th November 1911 he remained in his employment, but that he left on the 11th November; "that the appellant was thereafter treated by a doctor for a severe strain of the neck"—that is much the same as muscular rheumatism—"up to 13th December 1911," when he consulted another doctor, who informed him that his head was partially dislocated from the spine, and recommended his removal to the infirmary for treatment; that he was removed on 20th December 1911; and that afterwards, sometime in January 1912, he intimated for the first time that he "claimed compensation in respect that his then condition was attributable to the alleged accident on 1st June 1911." He does not actually say, but I think it is obvious, that the appellant, in the infirmary, after the 1st January, was suffering from a condition which, in his own opinion at least, and in the opinion of his advisers, was consequent upon the state of matters which had been diagnosed by the last doctor on the 13th December, namely, partial dislocation of the head from the spine. He further finds that a formal claim was made upon 30th January 1912.

The learned Sheriff-substitute then proceeds to say: "I found further in fact that, although the appellant may have been under a mistake as to his symptoms and condition between 5th August 1911 and 13th December 1911, he was under no mistake but himself attributed his condition to the result of the alleged accident from the date thereof until 5th August 1911, and from 13th December 1911 to 30th January 1912." With regard to this last finding I cannot help saying that it seems to me that there is a play upon the word "condition." In view of the facts that the learned Sheriff-substitute has just found, it is clear that in one sense this man was aware of his condition from the date of the accident until 5th August 1911,—that is to say, he knew that he had had an accident and that his shoulder was sore; but if "condition" means true condition, he, upon the facts, is found to know nothing about it, because he was suffering from something he did not know anything about—dislocation of the head—until he was told on the subsequent 13th December. It is true, I think, that from the 13th December until January he did know from what he was suffering, for he had been told by the doctor on the 13th December; and afterwards, when he got into the infirmary, it is probable—though the learned Sheriff-substitute does not tell us so—that the infirmary doctor then

told him that his condition was serious and that it bore out the diagnosis Nov. 27, 1912. of the 13th December. The learned Sheriff-substitute then says this: "I ^{Ellis v. Fairfield Ship-building and Engineering Co., Limited.} therefore found in fact and law that the failure to make a claim within the statutory period was not occasioned by mistake or other reasonable cause, dismissed the application, and found the respondents entitled to expenses." He had previously found in fact that it was not proved that the respondents ^{Ld. President.} were not prejudiced by the want of timeous notice, but he had made no finding at all as to whether such want of notice was or was not occasioned by mistake, absence, or other reasonable cause.

I am of opinion, and I must say very clearly, upon the facts as found, that the learned Sheriff-substitute's finding cannot be supported. There is ample authority upon this matter. There is first of all the case of *Randine v. Alloa Coal Company*,¹ which was followed in this Court by the case of *Brown v. Lochgelly Iron and Coal Company, Limited*,² and by the cases of *Hoare v. Ardning & Hobbs*,³ and *Moore v. Naval Coal Company*,⁴ in the Court of Appeal in England, and, finally, by the case of *Egerton v. Moore*,⁵ to which I shall refer more particularly later on. Now, the result of the cases which I have mentioned, other than *Egerton v. Moore*,⁵ seems to me to affirm this proposition perfectly clearly—that a man may have an accident, and honestly believe at the time that nothing serious has happened to him, and therefore, not conceiving that he has a good claim against his employer, make no claim, but if it afterwards turns out that he has made a mistake in fact and really has been injured, that may be (I do not say must always be, because the question of time might enter into it) reasonable cause for his not making the claim within the six months, or not giving notice of the accident before he left the employment; or, if one likes to use the other words, that his failure to give notice or make a claim in such circumstances may be occasioned by a mistake, in the sense of the statute, for I think the words "mistake, absence from the United Kingdom, or other reasonable cause" are really exegetical of each other—that is to say, reasonable cause is *ejusdem generis* with mistake.

I think, further, that in this case the whole facts point clearly the one way. Not only did the man himself not think at the time that he was much injured, but on going to the doctor for skilled advice, he was told, "You are suffering from muscular rheumatism." Well, muscular rheumatism may sometimes be occasioned by an accident. In the strict sense of the word it is not so caused, because a blow cannot directly occasion rheumatism. In fact, to borrow the words of Lord Justice Fletcher Moulton in *Egerton v. Moore*⁵ (he is talking of a tubercular abscess, but, *mutatis mutandis*, the same language may be applied to a case of rheumatism being caused by a blow),—"The medical evidence showed that the abscess might have come from other causes, although it most probably came from this blow, but it must be remembered that the ultimate mischief was only an indirect consequence of the blow. The blow would not produce the tubercular abscess, but, like any other lesion of the tissues, it might produce a state of things which would cause the tubercular tendency which was in the

¹ 6 F. 375.² 1907 S. C. 198.³ 5 Butterworth's C. C. 36.⁴ 5 Butterworth's C. C. 87.⁵ [1912] 2 K. B. 308.

Nov. 27, 1912. man's system to show itself there. Other lesions might have caused it to show itself elsewhere." Substituting rheumatism for tubercular abscess, Ellis v. Fairfield Ship-building and Engineering Co., Limited. that is exactly in point in this case. This workman is told by his doctor: "You have only got muscular rheumatism, and that is a thing which will pass off." He does not think it is anything very serious, he does not make a claim, and he goes on in that state of ignorance until nearly the end of December, when he gets much worse, and then he goes to another doctor, who makes, I suppose, a more careful examination and finds out that he has sustained a very serious injury. I agree that after that the man might have given notice. But then, as I think was said by one of the learned Judges in this Division, "We are not to measure this question of notice in very nice scales"; and I think the trouble occasioned to this man by his removal to the infirmary and his being laid up there, are all reasonable causes for a little longer delay in giving of the notice. I therefore think that there is only one conclusion to be reached upon these facts, viz., that there was here a reasonable cause for the man not giving notice of the accident.

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Now, I come again to what I think shows the inconvenience of the procedure which was adopted here. In all that I have said I have been bound to assume that it could be clearly proved that the man's present condition, following upon the partial dislocation of his head from his spine, was really the result of the accident, an accident of which we do not know the details. It is quite clear that this workman is not entitled to get anything unless he proves that his present condition is due to the accident, and that he will still have to prove in the proceedings before the Sheriff-substitute; and it would have been much more satisfactory if one had not had to give a decision upon the question of reasonable cause upon an assumed state of facts. But, on the other hand, I do not think it would be justice to the workman not to give a decision upon the assumed state of facts, because, if the facts are as assumed, then undoubtedly I think there was here reasonable cause in the sense of the statute.

I said that I would refer specially to *Egerton v. Moore*.¹ *Egerton v. Moore*¹ was relied on by the learned counsel for the employers here, because in it there are certain criticisms upon Lord Adam's judgment in *Rankine v. Alloa Coal Company*.² I am satisfied that there is nothing in *Egerton v. Moore*¹ which is at all inconsistent with the judgment in *Rankine v. Alloa Coal Company*,² or with what was said in that case by Lord M'Laren and Lord Kinnear, or, indeed, with what was said by Lord Adam, except in one portion of his judgment, where—with great respect for all Lord Adam says—I agree with the English Judges in thinking that he went beyond the necessities of the case and seemed to lay down some general propositions which go too far. As it is well put by Lord Justice Buckley: "There are expressions in the judgment of Lord Adam in *Rankine v. Alloa Coal Company*² which might be used to sustain an argument that the two expressions 'to make a mistake' and 'to take a wrong course' are equivalent expressions." But nothing could be clearer than Lord Justice Buckley's opinion itself to the effect that *Rankine v. Alloa Coal Company*² was well decided, because,

¹ [1912] 2 K. B. 308.

² 6 F. 375.

after making that criticism upon what Lord Adam says, and pointing out Nov. 27, 1912. that "mistake" in the Act of Parliament does not mean "taking a wrong course," he goes on to say this: "Let me instance what might be a mistake —Assume a person who has sustained an injury which, for the time being, is latent. He does not know whether it is going to result in anything serious or not. He may for some time be under a mistake of fact whether he has really received an injury, and may not give notice. That would, I think, be a mistake within the meaning of the word in the Act of Parliament." I could not have a better description in very few words, according to my view, of the facts of this case.

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On the whole matter, I think the case must be remitted to the Sheriff-substitute with instructions to allow the applicant to prove his original averments as to the accident and as to his state in order that compensation may be assessed if it is found that what he is suffering from is the result of the accident.

LORD KINNEAR.—I am entirely of the same opinion, for the reasons which your Lordship has given. The only question which is actually before the Court at present is whether, upon the averments of the applicant for compensation that are before us, and upon the state of the facts which the Sheriff-substitute has found with reference to these averments, the applicant has lost his right to maintain these proceedings by reason of his failure to give notice of the accident as soon as practicable after it had happened, or by reason of his failure to make a claim within the statutory specified period.

Now, the answer to both these objections is that the want of notice and the failure to make a claim were occasioned by mistake or some other reasonable cause, and that is the only question that is formally before us now. It is primarily a question of fact for the arbitrator. But the appellant is entitled to say that, in answering it, he has been misled by an erroneous construction of the statute; and that is a question which he is entitled to bring under the consideration of the Court. Upon the statement which the learned Sheriff-substitute has made, it appears to be proved to his satisfaction that immediately after the alleged accident by which this man says he was injured, he suffered from pain in his neck and shoulder, that he consulted a doctor, and that the doctor told him that he was suffering from muscular rheumatism. In that state of opinion, he gave no notice of the accident and made no claim against his employer. He remained under that impression, induced by his doctor's advice and by his own suffering, until 13th December 1911. He then consulted another doctor, who informed the workman that his head was partially dislocated from the spine. From this second diagnosis, therefore, he found that he was suffering from a very serious injury of a totally different kind from that which he supposed he had been suffering from before. That he should not have made a claim when he thought that the accident resulted in nothing worse than rheumatism, and yet have made a claim when he found it had caused a dislocation of the head from the neck, is perfectly intelligible. He abstained from making the claim when he did not know the extent of his injury; and when he was at last informed what the extent of his injury was, it was reasonable that he should make his claim.

Nov. 27, 1912. I agree with your Lordship that his delay in giving notice and making a claim was occasioned by a reasonable cause, and therefore that the delay should form no bar to carrying on proceedings for obtaining compensation under the statute. I agree that the course your Lordship proposes to take is the right one in the circumstances. I only add that I still adhere to the opinion expressed in the case of *Rankine*¹ on the merits, and also to the decision in the first stage of that case² as to the proper course of procedure in actions of this kind, in which it is extremely desirable that if a case is to be brought to this Court at all it should be brought once for all, and not by several successive appeals upon different questions raised at different stages.

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LORD JOHNSTON.—The course adopted by the learned Sheriff-substitute is, I think, competent, though, unless in exceptional cases, inconvenient. There is nothing in the present case to make it an exceptional case, and I therefore agree that the Sheriff-substitute should here have dealt with the whole matter as one. On the merits of the preliminary questions dealt with by the learned Sheriff-substitute I entirely agree with your Lordships.

LORD MACKENZIE.—I agree with your Lordships. It is apparent from the findings of the learned arbitrator that the injury for which the workman here seeks to recover compensation was partial dislocation of the head from the spine, and it also appears that he was not aware that he had sustained this injury until the 13th December 1911, although the accident is assumed, for the purposes of this case, to have happened on the 1st June. Now, in these circumstances, I think that the case is really a *fortiori* of the decision in the case of *Rankine v. Alloa Coal Company*.¹ I cannot hold that the workman had not reasonable cause for his failure to give notice of the accident or to make the claim within the time specified in the section of the Act.

THE COURT pronounced this interlocutor:—"Find in answer to the questions of law in the case that on the facts stated to have been proved there was good and reasonable cause for the failure of the appellant to give earlier notice of the accident and intimation of his claim: Recall the determination of the Sheriff-substitute as arbitrator appealed against, and remit to him to allow to the appellant a proof of his averments, and to proceed as accords."

D. MACLEAN, Solicitor—WEBSTER, WILL, & Co., W.S.—Agents.

¹ 6 F. 375.

² 5 F. 1169.

ELIZABETH BURNS, Pursuer (Appellant).—*Moncrieff, K.C.—Fenton.* No. 31.
 THE SUMMERLEE IRON COMPANY, LIMITED, Defenders (Respondents).—*Horne, K.C.—Strain.* Nov. 28, 1912.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)— Burns v. Summerlee Iron Co., Limited.
Accident arising out of and in the course of the employment—Miner taking upon himself duty not entrusted to him.

A repairer was engaged in making repairs on an air course in a mine, and it was necessary for him to bring wood to that place for the purpose. This could be done by hauling the wood up the air course, or by taking it up in hutches by a wheel brae, and the repairer was directed to take it by the air course and not by the wheel brae. The wheel brae was worked by gravity, an empty hutch or a hutch loaded with wood being pulled up by a descending hutch loaded with coal. At the foot of the wheel brae was posted a "hanger-on," to whose sole charge was entrusted the duty of attaching hutches there, and of giving the necessary signals to the man at the top who then set the hutches on the wheel brae in motion. The hanger-on had attached an empty hutch and had given the appropriate signal to the man at the top, and then temporarily left the foot of the brae to wheel out a full hutch. In his absence the repairer loaded the empty hutch in an unskillful manner with wood, and the man at the top, having already received the necessary signal, attached a full hutch and started the wheel. The chain broke, and the repairer was struck by the descending full hutch and killed.

Held that the repairer was killed while arrogating to himself a duty which he was neither engaged nor entitled to perform, and accordingly that the accident did not arise out of his employment.

Kerr v. William Baird & Company, Limited, 1911 S. C. 701, followed.

IN an arbitration under the Workmen's Compensation Act, 1906, in which Mrs Elizabeth Burns claimed compensation in respect of the death of her husband, John Burns, road repairer, from the Summerlee Iron Company, Limited, the Sheriff-substitute of Lanarkshire at Airdrie (Glegg) found that the accident to Burns did not arise out of his employment, and, at the request of the pursuer, stated a case for appeal.

The case set forth the following facts as admitted or proved:—

"(1) John Burns was a repairer in the employment of the Summerlee Iron Company, Limited, at an average weekly wage of 32s. 4d. (2) Burns worked along with and under Hugh Waters. (3) A plan of the section of the pit at which these men were engaged at the time in question was roughly an oblong. (4) The left-hand side was a wheel brae, 57 fathoms long, and with a rise of 1 in 3½ from the bottom to the wheel. (5) The bottom side of the oblong was a way across to a return air course forming the right-hand side. (6) This return air course at its start at the right-hand corner was nearly level for a few feet, then it was a perpendicular shaft for 19 feet, then it was level for 24 feet, and for the rest of its course it rose in 1 in 2 or 2½. (7) Near the foot of the wheel brae and above the previously mentioned crossway, there was a 'through' to the air course, and near the top there was another 'through.' (8) Waters and Burns had been working for some months at repairs on said air course, and prior to the day of the accident had worked for a day or two at least, at a point in the air course above the perpendicular shaft. (9) In taking

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Nov. 28, 1912. supplies of wood to these points above the perpendicular shaft they had taken them past the foot of the wheel brae through the crossway to the air course, and hauled them up and along the air course with a chain or wire, and not up the wheel brae. (10) On the day of the accident, 13th November 1911, they were working at a point of the air course opposite the upper 'through.' (11) On this day Burns asked White, the hanger-on in charge of the wheel brae, to put the wood they had there on to a hutch to be taken to the head of the wheel brae. (12) White agreed, and loaded one hutch with part of the wood, taking care that the wood was so stowed as to distribute its weight equally between the fore and hind wheels of the hutch so that an equal pressure was kept on both sets of wheels. (13) The wheel brae was worked by gravity, a full hutch put on at the top bringing up, by a chain passed over the wheel, an empty hutch put on at the bottom. (14) When the hanger-on put on an empty hutch he belled two. (15) The man at the top then attached a full hutch if one was forward, or waited, as was usually the case, till one was forward, and then without further signal released the brake on the wheel and let the hutch away. (16) When wood was sent up, which was done for the coal getters at the workings at the top of the brae, four bells were signalled, the procedure otherwise being the same as in the case of an empty hutch. (17) When a person walked up the incline three bells were signalled, and the hutch was kept stationary until the person arrived at the top. (18) The deceased was ignorant of the signals. (19) On the occasion in question Waters and Burns went up the wheel brae after the first hutch of wood, and Burns returned to the bottom of the brae to get the rest sent up. (20) Burns arrived at the bottom of the brae after White had attached an empty hutch and belled two, and had gone out to the lye with a full hutch. (21) The man at the wheel started it after getting a full hutch forward, and after ten or fifteen yards of the chain had gone out the chain broke. (22) Burns's dead body was then found towards the foot of the brae; and between the empty and the loaded hutch, which were both derailed. (23) Burns was killed by being struck by the loaded hutch. (24) In White's absence Burns had loaded the left-over portion of the wood, and had done so unskilfully, as he had let it project over the back of the hutch. (25) This had a tendency to raise the front, and derail the hutch. (26) It is not proved whether Burns preceded or followed the hutch with the wood, or whether he started before the hutch was in motion. (27) No further signal was given than the two bells sounded by White. (28) Burns, as well as Waters, had been directed by the fireman to take their supplies of wood by the air course, and had been also directed by him not to use the wheel brae. (29) There were duly posted at the pit head Special Rule 81 under the Coal Mines Regulation Act, 1887:—' Benchers, hangers-on, or other persons employed in connection with inclined or engine planes shall control the putting forward and coupling of hutches, and the attaching of the chains or ropes thereto. They shall make and attend to the signals, and shall prevent anyone approaching or travelling on self-acting inclined planes on which hutches are in motion. They shall stand clear of hutches in motion, so as to avoid danger from breakages or runaways'; and (30) also Special Rule 100:—' All workers are prohibited from entering or remaining in any place throughout the whole mine, where not absolutely required by duty to be at the time; and on no account shall they proceed

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through any fence or pass any notice erected to indicate that danger exists.' (31) White had the sole charge of loading and attaching hutches at the foot of the wheel brae, and of giving signals. Nov. 28, 1912.
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"On these facts I found that the accident to John Burns did not arise out of his employment with the Summerlee Iron Company, Limited. I assoilized the defenders from the conclusions of the action, and found them entitled to expenses."

The question of law for the opinion of the Court was:—"In the circumstances stated, was I right in holding that the death by accident of the said John Byrne or Burns did not arise out of his employment with the Summerlee Iron Company, Limited?"

The case was heard before the First Division (without Lord Johnston) on 22nd October 1912.

Argued for the appellant;—Burns's employment required him to carry wood to his working place, therefore, in doing so, he was acting in the scope of his employment, and the fact that he had adopted a wrong, even a forbidden, method of doing so did not take him out of the scope of his employment.¹ Apart from any orders he might have received, Burns had not departed from the ordinary course of his employment, because, from the signals employed, it was shown that the wheel brae was habitually used for the conveyance of wood, and it had been so used by him on this occasion for the purpose of expediting the work upon which he was employed. In the cases cited for the respondents a distinction was drawn between the introduction of a risk in the performance of the employment and a risk foreign thereto. On this ground the cases of *Kane v. Merry & Cunningham, Limited*,² and *Barnes v. Nunnery Colliery Company*³ were distinguishable from the present case. In the case of *Conway*,⁴ in which the facts were less favourable to the workman than those here, an accident had been held to have arisen out of and in the course of his employment. In any event, it was not proved that the loading of the hutch was the cause of the accident. Any breach of orders committed by Burns was over before the accident happened, and the danger from breaking of the chain was a risk incidental to walking up the wheel brae which, from the finding as to the signals, was shown to be a practice in the mine. If the Court were not prepared to sustain the appeal, the matter should be remitted to the arbitrator for an explanation of finding 28.

Argued for the respondents;—The only question for the Court was whether on a consideration of the facts found proved the decision of the Sheriff-substitute could competently be reached.⁵ It appeared clearly that the use of the wheel brae was not permitted for the carriage of any wood except that required by coal-getters at the top of the brae. The appellant had failed to show that the accident arose in any way out of the employment of Burns, for his work was in the air course, and he was ignorant of the signals used on the wheel brae, and of all the other requirements specified in the Special Rule quoted in finding

¹ *Durham v. Brown Brothers & Co., Limited*, (1898) 1 F. 279; *M'Nicholas v. Dawson & Son*, [1899] 1 Q. B. 773, A. L. Smith, L.J., at p. 776; *Whitehead v. Reader*, [1901] 2 K. B. 48; *Logue v. Fullerton, Hodgart, & Barclay*, (1901) 3 F. 1008.

² 1911 S. C. 533.

³ [1912] A. C. 44.

⁴ *Conway v. Pumpherston Oil Co., Limited*, 1911 S. C. 660.

⁵ *Euman v. Dalziel & Co.*, 1912 S. C. 966.

Nov. 28, 1912. 29, and had apparently started to go up the wheel brae without the appropriate signal specified in finding 17 being given. In making use of the wheel brae he had not only done what he was directed not to do, but had arrogated to himself duties which were not his, and had exposed himself to an added peril which did not arise out of his employment.¹ In the case of *Conway v. Pumpherston Oil Company*,² the workman exposed himself to a risk for something that was required for his employment, and that case was therefore clearly distinguishable from the present.

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Limited.

At advising on 28th November 1912,—

LORD PRESIDENT.—This is a stated case in an arbitration under the Workmen's Compensation Act in which a woman, for herself as widow, and as tutrix for her child, asks for compensation in respect of the death of her husband, John Burns, who was killed in a pit belonging to the respondents. The learned Sheriff-substitute held that the death did not arise out of the employment of the deceased, and the question before your Lordships is whether that finding can be supported on the evidence.

The case is exceedingly clearly and well stated by the learned Sheriff-substitute, and discloses the following facts :—[His Lordship narrated the facts]. The learned Sheriff-substitute has held that in these circumstances the workman's death did not arise out of his employment.

Upon the general matter that is raised by such a question I have nothing to say beyond what I said in two cases, both reported in 1911 S. C., namely, the case of *Conway v. Pumpherston Oil Company* (at p. 664), and the case of *Kerr v. William Baird & Company, Limited* (at p. 703); and the whole point here is under which of these two categories does this case fall. Put in a single sentence, the law, I think, is perfectly well settled, that mere disobedience to an order will not take a man out of the scope of his employment. Therefore, if the learned Sheriff-substitute held that this man was out of the scope of his employment because he had gone to the wheel brae instead of doing what he had been told to do, viz., to take wood by the direct access to the air course, that, I think, would not have taken him out of the scope of his employment. He would have been engaged in what was his employment, namely, getting the wood to the place where it was wanted, although doing it in an improper way, and in a way in which he had been told not to do it. But, on the other hand, if the true view of the case is that, to use my own words in *Kerr's case*,³ "he was arrogating to himself duties which he was neither engaged, nor entitled, to perform," then he was out of the scope of his employment.

This is the view that the learned Sheriff took, and I cannot say that I think he was wrong. I mean that I think there was evidence on which he could reach that conclusion. Indeed, I think that he was right, because it

¹ *Barnes v. Nunnery Colliery Co.*, [1912] A. C. 44; *Kane v. Merry & Cunninghame, Limited*, 1911 S. C. 533; *Kerr v. William Baird & Co., Limited*, 1911 S. C. 701, Lord President, at p. 704; *M'Daid v. Steel*, 1911 S. C. 859; *Revie v. Cumming*, 1911 S. C. 1032, Lord President, at p. 1034; *M'Laren v. Caledonian Railway Co.*, 1911 S. C. 1075.

² 1911 S. C. 660.

³ 1911 S. C., at p. 704.

was not a mere case of taking up the wood in a wrong way ; it was a case Nov. 28, 1912.
 of taking upon himself to do what nobody except the "hanger-on" ought to have done. He had no right to make himself a "hanger-on" and to take upon himself the work of the wheel brae. He knew nothing about the signals or the method of packing, and it is just because he knew nothing about the signals and nothing about the method of packing that the accident happened. He really went into the department of the "hanger-on" with which he had no concern. His doing so exposed him to a risk which his ordinary employment did not call on him to face. Therefore I think that this case falls within the category of cases of which *Kerr*¹ is an example, and not within the category of which *Conway*² is an instance, and that the judgment must stand.

Burns v.
 Summerlee
 Iron Co.,
 Limited.
 Ld. President.

LORD KINNEAR.—I am of the same opinion for the reasons which your Lordship has given. The statement of facts by the learned Sheriff-substitute shows that the "hanger-on," White, had the sole charge of loading the hutches at the foot of the wheel brae and of giving signals to the man at the top, and that the deceased man, Burns, took it upon him to perform the duty which was entrusted not to him but to White. On that statement I think that what he undertook to do was not part of his employment. It is found that he did it unsuccessfully, because he loaded the hutch in such a way as to raise the front and derail the hutch, and not only had he loaded the hutch unsuccessfully, but he had failed to give the proper signals, which he does not seem to have known anything about because it was not part of his business to know. In these circumstances, as I understand the learned Sheriff-substitute's judgment, he finds that the man exposed himself to an additional risk outside the risks incidental to his employment, and therefore that this accident which he met with was not one arising out of his employment. I think that was a question of fact for the learned Sheriff-substitute, and I see no ground upon which we should be justified in interfering with his judgment.

LORD MACKENZIE.—I think there is sufficient evidence in the eighteenth and twenty-fourth findings, both of which have been referred to by your Lordships, to justify the Sheriff-substitute in reaching the conclusion that he has reached. From the facts set out in these two findings I think there is evidence from which it may be inferred that the deceased man usurped the functions of another, and that he suffered in consequence. Therefore I agree with the conclusion at which your Lordships have arrived.

THE COURT answered the question of law in the affirmative.

SIMPSON & MARWICK, W.S.—W. & J. BURNES, W.S.—Agents.

¹ 1911 S. C. 701.

² 1911 S. C. 660.

- No. 32. WILLIAM HENDERSON DONALDSON AND OTHERS (T. N. Mackinnon's Marriage-Contract Trustees), Pursuers (Respondents).—
 Nov. 28, 1912. *Sandeman, K.C.—Normand.*
 Mackinnon's WILLIAM DUNLOP (T. N. Mackinnon's Trustee), Defender (Appellant).
 Trustees v. —*Chree, K.C.—T. G. Robertson.*
 Dunlop.

Marriage-Contract—Provisions for children—Obligation by father to pay "at such times and in such sums as he finds it convenient"—Jus crediti or right of succession—Bankruptcy of father—Competition with father's creditors.

A husband, by antenuptial contract of marriage, bound himself to pay to the trustees thereunder "before his death, at such times and in such sums as he finds it convenient," a sum of £4000, and, until it was paid over, to pay interest thereon to the trustees or to his wife. The trustees were directed to hold this sum and the profits thereof for the liferent alimentary use alienarily of his wife, and on her death, in the event of her predeceasing him, then for himself as an alimentary liferent provision for himself and the children of the marriage, and on the death of the survivor of the spouses to hold the sum for, or pay it over to, the children of the marriage.

No part of the sum having been paid to the trustees, and the father having become bankrupt, the trustees claimed to be ranked as creditors for this sum in the bankruptcy.

Held that, as the father had come under no obligation in favour of his children which involved his parting with the control of this sum, the children's right therein was not a *jus crediti*, but only a right of succession; and claim for the trustees *rejected*.

Opinion (per the Lord President) that the wife would have a good claim for the actuarial value of her liferent provision.

Herries, Farquhar, & Co. v. Brown, (1838) 16 S. 948, *commented on. Fotheringham v. Fotheringham*, (1734) M. 12,941, and *Fair v. Hunter*, (1861) 24 D. 1, *discussed and explained*.

1ST DIVISION. ON 18th March 1912 William Henderson Donaldson and others, the Sheriff of Lanarkshire. trustees acting under an antenuptial contract of marriage between Thomas Neil Mackinnon and his wife, dated 26th September 1882, appealed to the Sheriff-substitute of Lanarkshire, at Glasgow against a deliverance by William Dunlop, C.A., the trustee on Mackinnon's sequestrated estate, rejecting a claim by the pursuers as creditors of the bankrupt based on the provisions of his antenuptial contract.

Mr Mackinnon undertook in his marriage-contract (to which he was the first party and his wife was the second party):—"(*Tertio*) To pay to the said trustees before his death, at such times and in such sums as he finds it convenient, a further sum of Four thousand pounds, and until the said sum is paid over to pay to the said trustees or the second party half-yearly at Martinmas and Whitsunday interest thereon at the rate of four per cent per annum, all which subjects and the profits and produce thereof shall be held by the said trustees in trust as follows:—(*First*) For behoof of the second party in liferent for her liferent alimentary use alienarily till her death or second marriage, and on her death, in the event of her predeceasing the first party, then to him in liferent as an alimentary provision for behoof of himself and the children of the marriage, for the proper upbringing, education, and maintenance of such children, and that in such sums or proportions as the said trustees shall deem proper, and of which they shall be the sole judges: (*Second*) On the death of the

survivor of the said spouses or the second marriage of the said Rachel Nov. 28, 1912.
Catherine Donaldson [the second party], the said trustees shall hold the
said estate for behoof of or pay and convey the same to the children Mackinnon's
of the said marriage and the issue of any child or children who may Trustees v.
have predeceased leaving issue, in such proportions and on such Dunlop.
conditions and subject to such restrictions as the first party, whom failing,
the second party, may appoint by any writing, whether testamentary
or otherwise, and, failing such appointment, then equally among the
said children *per stirpes*, the issue of any predeceasing child or chil-
dren taking equally among them the share which would have fallen
to their parent if in life, payable said shares to children as after pro-
vided: and (Third) In the event of there being no children or remoter
issue of the said intended marriage surviving at the dissolution
thereof by the death of one of the spouses, then the said trustees shall,
in the event of the first party being the survivor, pay and convey the
said estate to him or his assignees, and in the event of the second
party being the survivor then the said trustees shall hold the said
estate and apply the annual interest or produce thereof for behoof of
the second party for her life for her alimentary use alienably during all
the days and years of her life till her death or second marriage, and
on her decease or second marriage shall pay or convey the said estate
to the heirs or assignees of the first party."

Both the spouses were alive, and there were eight children of the marriage. The further facts giving rise to the appeal were thus stated by the pursuers and admitted by Mr Dunlop, the defender:—(Cond. 3) "The said Thomas Neil Mackinnon has never paid the said sum of £4000 to the trustees. The value of the obligation before set forth is £4000. The pursuers accordingly, on the sequestration of the said Thomas Neil Mackinnon, lodged an oath and account of debt, in which oath and account of debt they claim, *inter alia*, the said sum of £4000. Said oath and account of debt was dated 24th March 1911. The defender rejected the said claim by deliverance dated 4th March 1912, in respect that 'the terms of the obligations for payment of the £4000 to the claimants do not import a *jus crediti* in the trustees entitling them to rank in the sequestration.'"

The pursuers pleaded, *inter alia*;—(1) The bankrupt having been at the date of his sequestration indebted to the pursuers in respect of the obligation contained in the said contract of marriage before condescended on in a sum of the value of £4000, the defender's deliverance falls to be recalled, and the pursuers to be ranked for said sum, and the defender found liable in expenses.

The defender pleaded that the averments of the pursuers were irrelevant.

On 2nd July 1912 the Sheriff-substitute (Boyd) pronounced an interlocutor in the following terms:—"Recalls the deliverance of the trustee appealed against: Finds that the pursuers are entitled to be ranked as creditors in terms of their affidavit and claim lodged in the sequestration, and ordains the trustee to rank them accordingly."*

* "NOTE.— . . . (1) Is there a *jus crediti* in the trustees in respect of the obligation to pay them £4000? I think there is. The authorities are numerous, and after comparing them and the above provisions I conclude that in a competition with creditors the wife in this marriage-contract has a *jus crediti*. With regard to the children, I think

Nov. 28, 1912.

Mackinnon's
Trustees v.
Dunlop.

The defender appealed to the Court of Session, and the case was heard before the First Division (without Lord Johnston) on 19th November 1912.

Argued for the appellant;—On a sound construction of the terms of the marriage-contract the rights of the children of the bankrupt were not rights of credit but only of protected succession.¹ Interest was not payable to them directly at any time upon the amount of the provision, and no *jus crediti* in their favour could be set up in the absence of provisions creating obligations prestatable at their instance against their father during his life.² Here the father had undertaken only an indefinite obligation to pay to the pursuers funds in which his children would have an interest at his death, but with regard to which he had placed himself under no restriction as to his power of disposing of them during his life, and so had not secured his children against himself.³ This was a claim against the onerous creditors of the father, and the decisions relied upon by the respondents which dealt with solvent estates, as in the case of *Fair v. Hunter*,⁴ did not affect the present question.

Argued for the respondents;—The pursuers were entitled to rank

I may conclude from the authorities that when a father undertakes obligations in their favour to be performed after his death, but with interest to run on it before his death, then there is a *jus crediti* in the children and not a mere *spes successionis*. The sum may be retained for the father's convenience, but the right of the children in it is so real that interest is due on it. If interest is due it seems to follow that the capital sum must be a debt of the father. Here there is an obligation to pay to the trustees before death, and interest is to run. *A fortiori* I think a *jus crediti* is established.

"The principles applicable are to be found in Erskine, iii. 8, 40 to iii. 9, 22; Bell's Commentaries, i. 682-685; Bell's Principles, sec. 1946; Fraser, Husband and Wife, 1355-1358; M'Laren, Wills and Succession, sec. 1209, 1211, 1215, 1217, 1219. The earlier cases which start in Morrison, *voce* Provisions to Heirs and Children, with *Lyon v. The Creditors of Easter Ogle*, 12,909; *Douglas*, 12,910; *Ballingall*, 12,919; *Mackenzie*, 12,924 (where the sum was not due till the father's death, but interest was due from the majority or marriage of the children), seem to have been all considered and given effect to in the leading case of *Wilson's Trustees v. Pagan or Wilson*, 2nd July 1856, 18 Dunlop, 1096.

"The defender's view is that no action was competent against the father during his lifetime to compel performance, and unless the provisions conferred a *jus exigendi* a *jus crediti* did not exist. So far as I am aware the case of *Wilson's Trustees* has never been overruled, and I think from it and the cases that precede it I may conclude that, although the right of action may never come, yet a *jus crediti* may be conferred. I think it was conferred in the present case."

¹ Ersk. iii. 8, 39; Bell's Com. (7th ed.) i. 685-6; *Brown v. Govan*, Feb. 1, 1820, F. C.

² *Children of Mactavish v. His Creditors*, (1787) M. 12,922; *Creditors of Lockhart v. Anna Lockhart*, (1741) M. 12,914; *Creditors of Mackenzie v. His Children*, (1792) M. 12,924; *Herries, Farquhar, & Co. v. Brown*, (1838) 16 S. 948; *Goddard v. Stewart's Children*, (1844) 6 D. 1018, Lord Moncreiff, at pp. 1023-4; *Strachan v. Creditors of Strachan*, (1754) 5 Br. Sup. 274.

³ *Wilson's Trustees v. Pagan or Wilson*, (1856) 18 D. 1096, Lord Deas, at p. 1136.

⁴ (1861) 24 D. 1.

pari passu with the other creditors of the bankrupt. An obligation to pay at convenience, such as had been undertaken by the bankrupt in his marriage-contract, was distinguishable from an obligation to pay at pleasure, because objective convenience, dependent upon mercantile or other considerations, was a suspensive condition to which the death or bankruptcy of the debtor at once put an end.¹ The pursuers might enforce payment in terms of the marriage-contract at any time during the life of the bankrupt on proving that he could conveniently pay.² Thus, there being an obligation upon which either the pursuers or the children of the bankrupt might have sued during his life, so as to transfer the fee from him or restrict his right of administration, there was a *jus crediti* in the pursuers entitling them to rank in competition with his other creditors.³ The obligation to pay interest was alone sufficient ground for the presumption of a *jus crediti* in favour of the children of the marriage,⁴ and it was immaterial who were the particular individuals at different times entitled to the interest. The deliverance of the defender upon the pursuers' claim to a ranking could not be supported except on the ground that the provision was made for the benefit of the truster, who was the bankrupt, or was so indefinite as not to be enforceable. Neither of these grounds could be supported; and on a construction of the whole clauses of the marriage-contract—for that was the test by which alone the matter fell to be determined⁵—the pursuers were entitled to be ranked for the interests of the wife and children.

At advising on 28th November 1912,—

LORD PRESIDENT.—The question in this case arises in the bankruptcy of Mr Thomas Neil Mackinnon, and the point is whether the learned Sheriff-substitute has been right in recalling the deliverance of the trustee and ranking the marriage-contract trustees of the bankrupt for the sum of £4000.

The bankrupt entered into an antenuptial marriage-contract under which he became bound to make good certain provisions in favour of his wife and children. As to some of these provisions no question arises, but the one upon which the whole matter turns is this—[His Lordship read the clause of the marriage-contract quoted *supra*, and continued]—

The marriage-contract trustees claimed for this £4000, which *de facto* had never been paid to them, and the trustee in the sequestration rejected the claim. The learned Sheriff-substitute recalled the trustee's deliverance and ranked them in terms of their claim, and he states the question thus: "Is there a *jus crediti* in the trustees in respect of the obligation to pay them £4000?" He thinks there is. He gives a general citation of authorities; but he particularly calls attention to the fact that when a father undertakes obligations in favour of his children to be performed after his death, "but with interest to run on it before his death, then there is a *jus*

¹ Fair v. Hunter, 24 D. 1, Lord Justice-Clerk Inglis, at pp. 9-10; Crawshaw v. Hornstedt, (1887) 3 T. L. R. 426.

² Shaw v. Kay, (1904) 12 S. L. T. 6 and 262.

³ Herries, Farquhar, & Co. v. Brown, 16 S. 948.

⁴ Wilson's Trustees v. Pagan or Wilson, 18 D. 1096, Lord Benholme, at p. 1105.

⁵ Wilson's Trustees v. Pagan or Wilson, 18 D. 1096, Lord Ardmillan, at p. 1114.

Nov. 28, 1912. *crediti* in the children and not a mere *spes successionis*." He says: "If interest is due, it seems to follow that the capital sum must be a debt of the father. Here there is an obligation to pay to the trustees before death, and interest is to run. *A fortiori* I think a *jus crediti* is established." I

Ld. President. think there the learned Sheriff-substitute made a slip. It may follow from the fact that interest is to run that a *jus crediti* is created, but only if interest is to run in favour of the same people to whom the principal is payable, in this case the children. Now, the Sheriff-substitute has not noticed here that the children directly never get any of this interest at all. The wife gets it so long as she is alive, and, after her death, the father gets it or else nobody gets it; and, accordingly, that ground of judgment fails as soon as that is explained.

We had a very good and very able argument on the general question with which the Sheriff-substitute does not more particularly deal than by a citation of authorities, and the whole question comes to be whether in this marriage-contract there is a *jus crediti* or not.

I am not going through all the cases that have been decided upon this matter, which would indeed be a lengthy proceeding. I could not possibly put the general result so well or with the same authority as was done long ago by Mr Bell in his Commentaries.¹ He puts the point that applies to this case in one single sentence in the middle of p. 684, vol. i. After stating all the ways in which a husband may be able to provide for a wife and children in case of his own bankruptcy, he says: "6. It is quite incongruous to attempt to give to the husband the command of his funds, and at the same time secure the wife and children against the effect of his insolvency." Now that would be just the attempt that is made here if the obligation were intended to confer a *jus crediti*, because it is perfectly clear that when the only thing this gentleman binds himself to do is to pay the £4000 at such time and in such sums as he finds convenient, then, in the words of Professor Bell, he retains the "command of his funds." The *locus classicus* on the subject which bears out what Professor Bell says is the judgment of the Court in *Herries, Farquhar, & Company v. Brown*.² The consulted Judges, in their opinion (at p. 963), began with the general proposition, which is undoubtedly law, that "Whether a provision in an antenuptial contract of marriage, to children *nascituri*, does or does not vest in them, when they come into existence, a proper right of credit, depends on the terms in which the obligation is conceived, and the conditions with which it is affected." Reverting to the matter, there is another passage which was quoted by the learned Judges in the subsequent case of *Wilson's Trustees v. Wilson*,³ and may be taken really to be the foundation of the matter. I quote now from the bottom of p. 964 of the opinion in *Herries, Farquhar, & Company*:—"As we have already observed, if it be a simple and unconditional provision *liberis nascituris*, the term of payment being suspended till the father's death, the presumption of law has been received and is still in force, that no *jus crediti* is contemplated, although the obligation is conceived in favour of the children directly, so that, *ex figura verborum*, they are creditors. But, if words are used which express, or plainly imply,

¹ 7th ed., vol. i., p. 682.

² 16 S. 948.

³ 18 D. 1096.

a restriction on the father's power of disposal, or if any conditions are adjoined incompatible with that power, the presumption ceases, and the children are held not to have a *spes successionis* merely, but a proper right of credit." That is putting exactly the same criterion as Professor Bell—
 Is there a restriction upon the father's power of disposal during his life—
 time? There is, if he has to part with his own funds so far as to pay interest at a time which may arrive before his death. There is not, in a case like this, where he makes it clear that he is going to keep the management of his own fortune in his own hands.

I think that would be enough, and I could now stop, were it not for the case that is mentioned in the opinion of the consulted Judges in *Herries, Farquhar, & Company*,¹ which would certainly, as they put it, seem to go the other way, and although it seems almost sacrilegious to touch this opinion which has always been looked on as a very great authority, and which I think is a very great authority, still, none the less, I feel bound to point out what I think is an undoubted slip in the opinion. In that opinion a certain case is discussed, and if that case can be used as it is used there, it would go against the doctrine I have laid down and against its application to the present case. In the opinion of the consulted Judges it is said²: "A case still more applicable to that which is now before the Court is noticed in the case of *Gordon v. Sutherland*³:—'In a contract of marriage in which the husband "became bound to join the sum of 3000 merks with 17,000 merks of portion received with his spouse, and to lay out the same upon security to himself and spouse, and longest liver in conjunct fee and liferent, and to the children of the marriage in fee; and how often the sum should be uplifted, that he should so often re-employ the same in the above terms"; the man having died bankrupt, action was brought against the cautioner, who was bound with him in the contract: His defence was that the obligation barred only gratuitous deeds, and was no impediment to the husband from laying out the money upon trade, though it should be sunk thereby. But the Court found the import of the obligation to be that, in all events, this sum should be secured to the children of the marriage; and therefore sustained action against the cautioner for replacing the same.'" So far quotation from the notice of the case in *Gordon v. Sutherland*.³ Then the opinion of the consulted Judges proceeds: "In that case there was not only no stipulation that the father should denude of the fee in his lifetime; but it was necessarily implied that he should not denude, for it is contemplated that he might employ and re-employ; that is, that after having employed the sum, he should have the power of uplifting it at his pleasure. Neither was it stipulated that any part of the sum, nor of the interest accruing upon it, should be payable during the father's lifetime. But the Court held the obligation that the father should employ, and if he uplifted that he should re-employ, to import that he was bound to make the provision effectual to the children after his death, and consequently that they were proper creditors to the father." Now, if the case referred to had decided that, I quite agree it would be contrary to what my view of the true meaning of the restriction of the

¹ 16 S. 948.² 16 S., at p. 965.³ (1748) M. 12,915.

Nov. 28, 1912. father's power of disposal is, and to the application to this case ; but I think it is clear that that was not decided in that case. It is quite evident that the learned Judges in referring to that case did not know what case it was, because they only refer to it as "noticed in" *Gordon v. Sutherland*¹ ; they would have given the name of it if it was known. And it is only referred to in the argument in *Gordon v. Sutherland*.² I notice, to begin with, that the decision in *Gordon v. Sutherland*¹ was to the opposite effect. It is perfectly well brought out by the rubric : "A settlement in a contract of marriage is in *dubio* not understood to give more to the heirs *nascituri* than *spes successionis*." And the obligation there was as to land, instead of as to merks as in this other case, but it was an obligation to provide for the spouse in life-rent and to the children in fee. But it is not impossible, although it is not done by the learned Judges, to find the case that was quoted in the case of *Gordon v. Sutherland*,¹ and I have no doubt whatsoever that the case is the case of *Fotheringham v. Fotheringham of Pourie*,³ which is reported as follows : "In a contract of marriage the husband's cautioner being bound to employ a sum for the use of the wife in life-rent, and the children of the marriage in fee ; and the husband having died bankrupt without implementing, in a process at the instance of the children against the cautioner, the defence was, that the pursuers, as heirs of provision, are ultimately liable to relieve the cautioner, and *frustra petit quod mox est restitutus*. Answered, the pursuers have got nothing by their father, and so cannot be liable for any of his debts ; nor will the sum they recover from the defender make them liable for their father's debts, because their claim is not *qua* heirs to their father, but as the defender's creditors. The Lords found the cautioner bound to implement, and that without relief." I concede that, reading that case as I have read it, there would not be a necessary identity with the case referred to in *Gordon*,¹ but the identity is satisfactorily made out when one goes to another report of the same case which is found in Lord Elchies' Decisions, *voce* Cautioner, No. 2. And if you compare the report of the case in the first volume of Elchies with the report in the second volume, i.e., in Elchies' Notes, there is no longer any doubt about it. In the first volume of Elchies it is thus : "Cautioner in a contract of marriage for the husband's employing and re-employing his stock, and the bride's tocher, to them two in conjunt fee and life-rent, and the bairns of the marriage in fee, found liable to the children for the money, without relief against them as heirs of provision to their father ; and it was found no good defence, that the father had employed and lost the money in trade, being a merchant." Now, there you have the expression "employing and re-employing" of the bride's tocher along with the husband's provision. And then, when you come to the same case in the second volume, Elchies' Notes, *voce* Cautioner, No. 2, you find there that there is a special mention of this sum of 3000 merks : "The Lords sustained the defence in the discharge *quoad* the life-rent of the 3000 merks paid, but repelled it *quoad* the remainder of the life-rent, and found Powrie" (that is, Fotheringham's cautioner) "liable to the children of the marriage for the whole sums without relief." That makes the identity, I think, absolutely certain.

¹ M. 12,915.² M., at p. 12,917.³ (1734) M. 12,941.

Now, having got the case, it is perfectly clear that it was not decided Nov. 28, 1912. upon the ground stated by the learned Judges in *Herries, Farquhar, & Mackinnon's Company*,¹ viz., that the children were proper creditors to the father, but *Trustees v. Dunlop*. what the case was decided upon is rightly set forth by Mr Erskine in his *Institutes* (iii. 8, 40), where, after having dealt with this question of *jura* Ld. President. *crediti*, he says: "Though such marriage-settlements, when executed in the ordinary form, are postponed to every *onerous* debt of the granter" (that is to say, do not create a proper *jus crediti*), "even those contracted after, and so cannot come in competition with his extraneous creditors; they are nevertheless effectual against a cautioner who has engaged himself in the marriage-contract for the father's performance of his obligation. For the plain language of that engagement is, that he shall make the provision effectual to the heir in case the father himself shall fail; so that the claim competent to the heir of the marriage in such case is not as heir to his father, but as creditor to the cautioner." Then he cites the case of *Dickson*² and the case of *Fotheringham*.³ So that, in other words, the case of *Fotheringham*³ was decided against the cautioner upon the hypothesis that there was no proper *jus crediti* in favour of the children against their father's estate. That, I think, ends the matter, and leaves it precisely as Mr Bell put it, namely, Can you find any proper restriction upon the power of the husband? Here I find none, and, in point of fact, if the argument upon the other side is right, the husband here would have succeeded in doing what Mr Bell says above all things he cannot do—he would have reared up a claim on behalf of his children which never could incommode him, because he need never pay except when he liked, but which would always incommode his creditors, because it would be a *jus crediti* the moment he became bankrupt.

Counsel for the respondents in a very able argument particularly appealed to the case of *Fair v. Hunter*,⁴ in which it was held that an obligation to pay "as soon as I have it in my power" was a proper debt. Well, all depends on what one means by proper debt. The truth is, there are three forms of obligations in such matters. There is the form of an ordinary debt which you are bound to pay the moment that you are sued upon it. It is not suggested that there is such a debt here. Then, on the other hand, there is a form of *quasi*-obligation which is truly no obligation at all, which simply says, "I promise to pay if I like to pay"; and I agree with the learned counsel that the obligation here is not of that kind. But there is the third and intermediate case of which I think *Fair v. Hunter*⁴ was an instance, in which a debtor may be bound in the sense that the obligation is good against him and yet it cannot come into competition with his ordinary and proper creditors, and that is just where the respondents' case fails, because there is no proper *jus crediti* which will destroy the father's power of disposal.

The circumstances in *Fair's* case⁴ were that Mr Hunter had a son through whom Fair had lost money, and the father was very anxious to make up to Fair the money which his son had lost. He was not in a condition at the

¹ 16 S. 948.² (1717) M. 12,938.³ M. 12,941.⁴ 24 D. 1.

Nov. 28, 1912. time to do so. He had not any ready money, his money being locked up in Australia, and he was a member of a firm of Writers to the Signet in Edinburgh under a contract of copartnery by which he had become bound not to enter into any obligation, and he therefore did not wish to transgress the terms of his own copartnery. He entered into negotiations with Fair, and they came to an agreement by which Fair remitted a certain considerable portion of the son's debt, and the father gave an obligation that he would pay the rest when he could. And the father wrote a letter in which he said: "I shall be most happy to pay to you, with interest, so soon as I have it in my power, by remittances from Australia or otherwise."¹ The father died, and an executor was appointed who proceeded to realise the estate, and the action was brought by Fair for constitution of the debt against the father's executor. The learned Judges held that it was a debt which could be constituted against the executry. But I think they clearly held that it was a debt of what I may call the intermediate kind, because the Lord Ordinary (Lord Kinloch), after giving his views, in which he said that this was not a mere promise which was no promise at all, namely, to pay if he chose, says this²: "Whether or not the pursuer shall be entitled to rank on the executry funds in competition with other creditors of the deceased, is not, as the Lord Ordinary thinks, now the question. Those creditors are not here. No question is or can be raised in this process with them. It will be for the pursuer to consider, when he has got his decree, what he will do with it; and for other creditors of the deceased, and for the defender, to consider what effect is due to it, as respects any ranking on the estate of the deceased." And Lord Justice-Clerk Inglis says the same thing at the end of his opinion³: "We are not going one step beyond that in giving judgment in this action. What the executor may have to say as to the condition of the executry estate"—that is to say, whether it can pay or not—"we are not here to inquire. But that there is this legal obligation against Mr Hunter, created by means of these letters, and which we are bound by our decree to constitute against his executry estate, I entertain no doubt, and I do not think it the least necessary to proceed one step farther in deciding the present case." Accordingly that judgment merely comes to this, that it was a good obligation as against Hunter, and therefore a good obligation against the free estate which Hunter left in his executry. But then, it was not in any way decided that it was a good obligation against the onerous creditors of Hunter if, as a matter of fact, Hunter died insolvent, which we do not know.

Now, here I am not doubting that this would have been a good obligation against the estate of this gentleman, supposing he had never paid the sum during his lifetime and had died leaving free executry, and I am not doubting, under the authority of *Fotheringham*,⁴ that if a cautioner had been bound along with him, it would have been a good obligation against the cautioner, but that is a different thing from saying it is a *jus crediti* ranking along with the claims of present creditors in bankruptcy, and upon the doctrine I have examined, that depends on whether the father is or is not

¹ 24 D.; at p. 3.

² 24 D., at p. 5.

³ 24 D., at p. 10.

⁴ M. 12,941.

maintained in full possession of his funds. I think he is; and I am of opinion that the judgment of the learned Sheriff-substitute should be recalled and the deliverance of the trustee replaced.

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I ought to state, and I think it follows from the judgment, that if the wife chooses to make a claim, which she has not done at present, for the actuarial value of her life interest right to the interest which is due, that would be a perfectly good claim in the sequestration; that, indeed, was admitted by the learned counsel who appeared for the trustee.

—
Ld. President.

LORD KINNREAR concurred.

LORD MACKENZIE.—The decision in this case turns upon whether the children of the marriage have a *jus crediti* in the sum of £4000 dealt with in the third article of the marriage-contract.

The statement of the law applicable to the question I take from the opinion of Lord Moncreiff in the case of *Goddard*,¹ and from Lord Deas's summary in *Wilson's Trustees*,² which is the law laid down in 1 Bell's Com. 684 (6) and *Herries, Farquhar, & Co.*³ A father cannot secure his children against his other creditors without securing them against himself. He cannot secure them against himself without making such a provision that his own powers of administration or beneficial enjoyment are or may come to be abridged in his own lifetime. It is because the provision in question here fails to satisfy, on any reasonable construction, this condition, that it cannot be regarded as conferring a *jus crediti*. If the fund had been made payable at majority or marriage of the children, even though this should happen in the father's lifetime, or if it had been provided that interest was to run from a term which might happen in his lifetime, the children would then have had a *jus crediti*. There is, however, no such provision here in favour of the children. We are not concerned in the present case with the interests of the wife, whose provision is of a different character. So far as regards the rights of the children the father does not appear to me to have tied his hands in any way.

It was argued on the authority of *Fair v. Hunter*⁴ that the proper construction to be put upon this clause is that it contains an absolute obligation to pay money qualified only to this extent that it was only to be paid if and when it should be convenient, in a commercial sense, to do so. The opinion of the Lord Justice-Clerk in *Fair's* case⁴ was founded on to the effect that the death or bankruptcy of the debtor puts an end to all such conditions. The case of *Fair*⁴ was, however, different from the present. As the Lord Justice-Clerk points out in the concluding portion of his opinion, the question that was then being disposed of was only the constitution of the obligation against the executry estate. Here the obligation is a good one against the father, and will subsist notwithstanding any discharge he may obtain in the sequestration, but it is an obligation that must be construed according to its terms. To construe it as conferring a *jus crediti* on the children in a question with creditors would be to hold that although the father retained full control of the £4000 during his life (except in a

¹ 6 D. 1018, at p. 1023.

² 16 S. 948.

³ 18 D. 1096, at p. 1136.

⁴ 24 D. 1.

Nov. 28, 1912. question with his wife), the moment he becomes bankrupt his children are entitled to step in and say they are secured. This, in my opinion, they cannot do. The interlocutor appealed against should, in my opinion, be recalled, and the deliverance of the trustee sustained.

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THE COURT recalled the interlocutor of the Sheriff-substitute, and affirmed the deliverance of the trustee.

J. & J. ROSS, W.S.—CARMICHAEL & MILLER, W.S.—Agents.

No. 33. HENRY MONCRIEFF STEELE (Tosh's Judicial Factor), Petitioner.—
Lippe.

Nov. 28, 1912.

Tosh's
Judicial
Factor.

Judicial Factor—Powers—Power to grant lease of urban subjects—Application for special powers.

Apart from special circumstances it is unnecessary for a judicial factor who desires to grant a lease of urban subjects to apply to the Court for authority to do so, the granting of such a lease, if the approval of the Accountant of Court has been obtained, being within his ordinary powers of administration.

Observations, per the Lord President, on the meaning of an application by a judicial factor for special powers.

1ST DIVISION. ON 6th January 1911 Henry Moncrieff Steele, chartered accountant, Glasgow, was appointed judicial factor on the trust-estate constituted by a minute of agreement, dated in November 1898, between Mrs Jane Lauder or Tosh, widow of Henry Tosh, ironmonger in Glasgow, of the first part, his surviving children of the second part, and certain trustees of the third part.

The purposes of the trust were to hold the estate for the widow in liferent and the children in fee. One of the sons died in 1910, leaving two pupil children.

On 21st March 1912 the judicial factor reported to the Accountant of Court that he had received an offer to lease for ten years certain business premises in Buchanan Street, Glasgow, belonging to the trust. The judicial factor stated that he considered the offer to be very favourable to the trust, and was desirous of accepting it.

On 8th July 1912 the Accountant of Court issued an opinion containing the following passage:—

"The factor at a meeting with the Accountant raised once again a question which, although it crops up repeatedly in the course of factorial management, has never been judicially decided. Can a factor as part of his ordinary administration grant a valid lease of urban subjects, or can he not do so without first obtaining powers from the Court? The point was discussed in the case of *Carnochan*, (1894) 2 S. L. T., p. 79, where, on authority being asked to grant a five years' lease of urban premises, the Lord Ordinary 'suggested that the curator had power to grant the lease without authority from the Court, and that the note was unnecessary,' but after hearing counsel intimated that 'in view of the doubt which appeared to exist as to the power of the curator bonis to grant the lease without the intervention of the Court he would grant the authority craved.'

"The statutory powers of a factor in regard to granting leases would appear to be as follows:—

"(a) *By the Act of Sederunt of 1730* he can 'grant tacks or leases

to continue during all the time that the estate set in tack shall remain under the inspection of the said Lords of Session and for one year further.' Nov. 28, 1912.

- "(b) *By the Trusts (Scotland) Act, 1867*, section 2, trustees have power to 'grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals.'
- "(c) *By the Trusts (Scotland) Amendment Act, 1884* 'trustee' is defined to include tutor, curator, and judicial factor.
- "(d) *By the Judicial Factors (Scotland) Act, 1889*, section 19, factors are given power to make abatements or reductions of rent.

"By the Trusts (Scotland) Act, 1867, section 3, trustees have to petition the Court before they can grant 'feus or long leases,' and it does seem anomalous that a factor should have extensive powers of granting leases of agricultural and mineral subjects, and yet be unable to let a house or shop for a period of five to ten years without on each occasion putting the estate under his charge to the expense of an application to the Court. But unless he does so, he cannot at present let that class of property to advantage. A tenant is often at considerable expense in fitting up premises to suit the requirements of his business, and naturally he is not willing to enter on a lease which, through no fault of his own, may be brought to an end at any time on comparatively short notice.

"Section 2 of the 1867 Act above quoted being somewhat ambiguous in its terms, the Accountant for his future guidance reports the matter to the Court. In the present case, if powers are considered necessary, they may, in his opinion, be granted as craved."

The judicial factor accordingly presented a note to the Court craving for special power to grant the lease, and, on 25th July 1912, the Lord Ordinary officiating on the Bills (Kinnear) reported the note to the First Division.*

On 12th November 1912 counsel for the petitioner formally moved the Court to grant the special power in order that the question whether the application was necessary might be disposed of, but he submitted that a judicial factor had power to let urban subjects with the approval of the Accountant of Court. The undernoted cases were referred to.¹

* "OPINION.—This case is reported on the motion of the judicial factor. I should have granted the powers craved in accordance with the opinion of the Accountant, but it appears that there are other subjects within the factory with reference to which a similar question may arise, and the factor considers it to be for the interest of the estate that he should have a general power to let urban property subject to the supervision of the Accountant without incurring the expense of an application for special powers in each particular case. It is said to be an open question whether the granting of such leases falls within the general powers of administration conferred upon a judicial factor by his appointment, or whether it is a special power to be given or withheld by the Court with reference to the circumstances, and it is desirable that this should be definitely settled by an authoritative judgment."

¹ *Proctor v. Gordon*, (1824) 2 S. 659 (N. E. 553); *Smith v. Smith*, (1862) 24 D. 838, *per Lord Deas*, at p. 843; *Noble's Trustees*, 1912 S. C. 1230.

Nov. 28, 1912. At advising on 28th November 1912,—

Tooh's
Judicial
Factor.

LORD PRESIDENT.—This case was reported by Lord Kinnear when officiating on the Bills in vacation, and raises a question as to granting special powers to a judicial factor. The factor on this trust-estate has under his charge heritable property consisting of urban subjects in Glasgow, and he approached the Accountant of Court to ask whether he would be entitled to grant a lease of a certain portion of these urban subjects under circumstances which I need not detail but which leave no doubt whatsoever—and that is also the Accountant's view—that it was very desirable that the lease should be granted. But the factor, as the Accountant of Court says in a note now before the Court, “raised once again the question which, although it crops up repeatedly in the course of factorial management, has never been judicially decided. Can a factor, as part of his ordinary administration, grant a valid lease of urban subjects, or can he not do so without first obtaining powers from the Court?” In order to bring the matter to a head, the factor accordingly applied for special powers, and the application coming to depend before Lord Kinnear on the Bills, his Lordship reported the matter to the Court. The Accountant of Court brings before the notice of the Court the various provisions in Acts of Sederunt and statutes which deal with this matter. By the Trusts Act of 1867, section 2, trustees have power to grant leases of heritable estate of a duration not exceeding twenty-one years for agricultural lands and thirty-one years for minerals, and by the subsequent amending Act of 1884 “trustee” is defined to include “judicial factor.” I am of opinion that the section does not directly apply. I think it is limited in its terms to heritable estate of the class of agricultural lands and minerals, but, on the other hand, I do not look upon the Trusts Act of 1867 as giving the only powers which trustees have got. In that matter it is probably more a declaratory Act than an enacting Act, and I am far from adopting the proposition that before the Act trustees had no power in regard to leases. I do think that there is sometimes a little confusion in the minds of those who apply for them as to what special powers are. The Court has not *ex nobili officio* the power to validate anything which it allows the applicant to do, it can only do so if that right resides in it either in respect of the common law, or in respect of some special powers given to it by statute. These applications for special powers might, I think, more accurately be called applications for special directions, because what the Court is asked to do is to give a special direction to its own officer, namely, the factor. In a case like the present there is, so far as I see, no necessity for a special direction. In other words, it seems to me to be part of the duty of the factor to deal with urban property by letting it. Whether he is to let it for a term of years depends upon several considerations. It depends first of all upon the practical consideration whether the lease is a good lease for the trust-estate, or whether he could get better terms elsewhere. That is for the determination of the judicial factor, with, of course, the assistance that he gets from the Accountant of Court, to whom he must go. But there is also a set of considerations which depend upon the particular circumstances of each trust. Where a trust is likely to continue for some time and where a beneficial return to

the trust-estate can be got by a lease for a term of years which could not Nov. 28, 1912. otherwise be got, then obviously the course is expedient. On the other hand, if a trust is of such a character that in all probability there will be an early distribution of the trust-estate it is quite conceivable that even although the factor might get a better return of income for, say, the next year by granting a lease, this advantage would be more than paid for by the hampering effect of the lease upon the distribution. One cannot lay down a rule, because each case depends on its own circumstances. I only say that it is a question which the factor must consider, and in which he must also be guided by the Accountant of Court, to whom he has to refer all such matters. The result to which I come generally is that the letting of urban property is within the ordinary powers of a factor, and that it is only necessary to go beyond the Accountant to the Court for special powers where there is some special circumstance. I can figure a case where the circumstances might be so balanced as to make the proper duty of the factor a question of great difficulty, and that would be a case for coming to the Court for further direction. But where there is no complication and the Accountant is satisfied that the course proposed by the factor is beneficial for the trust-estate in both senses I have mentioned, then there is no reason to come to the Court for special powers. I think that, as the case is here, there will be no harm in granting the special powers; but it follows from the opinion that I have just given that had it not been for the absence of authoritative pronouncement upon this matter there would have been no need for the factor to come to the Court.

LORD KINNEAR concurred.

LORD JOHNSTON.—In this case the difficulty that I felt arose from the Pupils Protection Act, 1849, which, while it clearly recognises that factors had no power to make leases for a period of years, makes, by section 7, an express provision for their applying for special powers to that end. Had it not been for that I do not think there would have been any difficulty. But then comes the Trust Act of 1867, which I quite agree is a declaratory Act, and which declares the powers of trustees to make leases of ordinary duration of agricultural or mineral subjects. The Trusts (Scotland) Amendment Act of 1884 follows, and declares that the term "trustee" in the Trusts Acts shall for the future apply to judicial factors. That would have got over the difficulty created by the Pupils Protection Act, 1849, if it had not been for the limited nature of the subjects to which the Trusts Act of 1867 expressly applies. But I think that on reading the two Acts of 1867 and 1884 together one may conclude that these Acts indicate by implication that trustees and factors have, and are to have, similar powers with regard to all classes of heritage. But that does not quite solve the whole question because, as your Lordship has pointed out, there are two aspects in which a lease has to be considered by a factor—one in deciding whether it is within the scope of the trust which he is administering, and the other in deciding whether it is a beneficial and proper lease to be entered into. On the former subject I think that he is quite entitled to direction from the Court, but on the latter that it is his duty to act on his own discretion. Accordingly I agree with your Lordship.

Nov. 28, 1912. LORD MACKENZIE concurred.

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THE COURT remitted to the Junior Lord Ordinary to grant the prayer of the note, and to find the judicial factor entitled to the expenses thereof and incidental thereto out of the factory estate.

DOVE, LOCKHART, & SMART, S.S.C., Agents.

No. 34. MRS AGNES EUMAN, Pursuer (Respondent).—*Wark*—*T. G. Robertson*.
Nov. 28, 1912. JAMES DALZIEL & COMPANY, Defenders (Appellants).—*Wilson, K.C.*
—*W. J. Robertson*.

Euman v.
Dalziel & Co. *Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule*
(1) (a)—*Where death "results" from the injury—Death from disease following on an accident.*

A workman had a fall from a ladder whereby his ankle was injured, and he also suffered from severe pain and general shock. He was thereafter confined to bed and, although the injury to his ankle improved, he continued to suffer pain and remained in a low state of health until, about a month after the accident, he was seized with violent internal pains and died, the cause of death being certified as appendicitis peritonitis.

In an arbitration upon a claim by his widow for compensation, in which two doctors were examined for each side, there was a conflict of medical evidence, one doctor, for the pursuer, being of opinion that it was probable that the workman "would have been alive now had he not met with the accident," the other being of opinion that the condition of which the workman died "was consequent, indirect if you will, of the accident," and that "in all probability" he "would not have died but for the accident." The two doctors examined for the defenders could see no connection between the accident and the cause of death.

The arbitrator having found that the death was the result of the accident, held that there was evidence upon which that judgment could be supported.

1st DIVISION. (REPORTED *ante*, 1912 S. C. 966.)

Sheriff of the
Lothians and
Peebles.

In an arbitration under the Workmen's Compensation Act, 1906, between Mrs Agnes Euman, widow of Robert Euman, mill foreman, and James Dalziel & Company, manufacturers, Walkerburn, Euman's employers, the Sheriff-substitute at Peebles (Orphoot) found that the death of Euman was the result of an accident arising out of and in the course of his employment, and, at the request of the employers and in pursuance of a remit from the Court of Session,¹ stated a case for appeal.

The case set forth that the following facts were proved or admitted:—

"1. The respondent is the widow of the late Robert Euman, and at his death was dependent upon him. He was sixty-two years of age when he died.

"2. Up to the time of the accident aftermentioned Robert Euman was a healthy man. He was a mill foreman in the employment of the defenders at Tweedholm Mills, Walkerburn.

"3. On 18th July 1911, in the course of and arising out of his

¹ Reported 1912 S. C. 966.

employment by the appellants, Euman required to ascend a ladder supplied by the defenders in order to examine and take down from a shelf yarns for the mills in which he worked. While he was on that ladder it accidentally slipped, and he was thereby thrown to the ground, and sustained injuries to his right ankle and otherwise.

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"He was dazed by the fall and suffered great pain, but was assisted, practically carried, home by two friends, who supported him one on each side to his house, which was close to the mill. He was at once put to bed, and in his trousers, which, owing to the pain he suffered, could not then be removed. The doctor, Dr MacRobert (the family doctor), was immediately sent for, and he found Euman suffering very much from general shock, and locally his right ankle was very badly damaged, though not broken, being what is known as a 'staved' ankle, i.e., damaged inside the joint. Euman also complained of feeling being gone from the heel and of pains generally all over him. A district nurse was immediately sent by the appellants. The treatment by the doctor was specially directed to the ankle.

"4. Euman was thereafter confined to bed till 10th August. The doctor thought that he called every day during July, and he certainly called every second day after that except on two occasions. For about two weeks of that time Euman's drawers could not be removed owing to the pain which he suffered on moving his body. To the nurse Euman always complained of pain all over the body. During that time the foot was slowly getting better, but the nurse never thought him really convalescent. Euman occasionally made general complaint of digestive mischief and constipation, which was treated with mild aperients. The rest of the medical treatment was directed to the ankle. During this period the motions of the bowels did not give proper relief, and several times when these motions occurred in presence of the nurse, Euman suffered so much pain that the nurse ordered him to get a little brandy to prevent him from fainting. During this period Euman's temperature was normal and his pulse about seventy-two.

"5. On 10th August Euman's ankle was better, but it had got better very slowly, and his vitality was very low. He was allowed by Dr MacRobert to get up in the afternoon, which he did. On Sunday, 13th August, he again rose. He then went to the garden with assistance, but on returning to his house he was very tired and glad to get back to bed.

"6. On Monday, 14th August, about 5 A.M., Euman was seized with violent pains in the stomach and all over. Dr MacRobert was sent for and found his temperature to be 104, pulse at or over 120. The doctor prescribed remedies which relieved Euman's pain, but Euman never rallied and he died next day about 3 P.M. Dr MacRobert certified the death to be due to appendicitis peritonitis, but in Court he explained that while it was his opinion that appendicitis and consequent peritonitis were the cause of death, that might have happened from ulceration and perforation of the duodenum, which might have existed although he did not think they were present. The sufferings of Euman on 14th August were such that a complete examination of the abdomen could not be made, and therefore while peritonitis certainly was present the cause of that disease could not be ascertained definitely.

"The medical witnesses for the respondent were:—Dr MacRobert, B.M.M.S. Glas., Innerleithen; Professor John Glaister, M.D. and

Nov. 28, 1912. D.Ph. of Cambridge, F.R.S. Edin., Professor of Forensic Medicine in Glasgow University and in consulting practice there.

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"The medical witnesses for the appellants were:—Alexander Miles, M.D., F.R.C.S. Edinburgh, surgeon in Royal Infirmary, Edinburgh, and consulting surgeon to Leith Hospital; Archibald Nathaniel Shirley Carmichael, M.B., C.M. Edinburgh, 1892, Fellow, late President of Royal Medical Society, resident medical officer of Chalmers Hospital.

"Dr MacRobert was of opinion that looking to the previous good health of Euman, to the accident with severe nervous shock and consequent lowering of vitality, then confinement to bed with digestive trouble, the strong probabilities are that Euman would have been alive now had he not met with the accident. Professor Glaister, proceeding upon Euman's previous healthy condition, upon the accident and the sequence of symptoms which followed upon it, 'was fairly clear of the view that the condition of which Euman died was consequent, indirect if you will, of the accident, and that in all probability Euman would not have died but for the accident.'

"Dr Miles could not see any causal connection between the accident and Euman dying of peritonitis, or between the symptoms during his illness and appendicitis. Euman would probably have had appendicitis just the same without any accident. Dr Miles did not hear the evidence in Court of the symptoms of Euman's illness, but he had seen a statement by Dr MacRobert as to the treatment of the deceased, and the diagnosis of the deceased's symptoms. Dr Carmichael 'could not associate the accident as the cause of death.' Euman was just as likely to have died of appendicitis if there had been no accident. Dr Carmichael had read a statement of fact and precognition of Dr MacRobert taken by the defenders. While the medical witnesses for the defence saw no connection between the accident and the death, or between the accident and appendicitis, they do not as specifically state that they saw no connection between the accident and ulceration and perforation of the duodenum—two possible causes of death.

"The preceding facts are those bearing upon the question whether the death of Robert Euman was the result of an accident.

"Upon the remaining question raised in the question of law remitted, viz.:—Whether there is evidence upon which it can competently be found that the accident arose out of and in the course of Euman's employment as already stated, the appellants admit that the accident arose out of and in the course of his employment by them.

"Upon the foregoing facts proved or admitted before me, I was of opinion that there was evidence upon which it could competently be found that the death of Robert Euman was the result of an accident arising out of and in the course of his employment, and I therefore so found."

The question of law for the opinion of the Court was:—"Whether there was evidence upon which it could competently be found that the death of Robert Euman was the result of an accident arising out of and in the course of his employment."

The case was heard before the First Division (without Lord Johnston) on 15th October 1912.

Argued for the appellants;—There was no evidence upon which the arbitrator was entitled to hold that the death of the deceased was the result of the accident, because to justify such a holding it

was necessary for the pursuer to exclude any other cause. That onus Nov. 28, 1912.
 the pursuer had not discharged. Here not only were two alternative Euman v.
 internal complaints put forward as possible causes of death, but there Dalziel & Co.
 was no proof that either of these was connected with the accident.
 The arbitrator had proceeded only on surmise, and surmise was not
 enough. It was not even enough to prove that but for the accident
 the workman would not have died at the time at which, and in the
 way in which, he did die.¹ That the death was the result of the
 accident must be the legitimate inference to be drawn from the facts
 established.² The case of *Golder v. Caledonian Railway Company*³
 was distinguishable from the present, because in that case the chain
 of causation was complete, it being proved that death was accelerated
 by injury from an accident. In view of the second finding it could not
 even be said that the accident here had "given life to certain latent
 causes of mischief in the body."⁴ The case of *Jackson v. Scotstoun*
*Estate Company*⁵ did not help the pursuer, because in that case there
 was medical evidence which directly supported the decision of the
 arbitrator, while here there was no such direct evidence.

Argued for the respondent;—The medical evidence supported the
 proposition that but for the accident Euman would not have died,
 and that sufficed to justify the arbitrator's award.⁶ The case of
*Dunnigan v. Cavan & Lind*⁷ was primarily a decision upon the form
 of the arbitrator's finding, but when that case came to be disposed of
 on the merits, it was entirely in favour of the respondent's contention
 here. Where there was a direct conflict of testimony it could not be
 said that there was no evidence upon which the Sheriff's finding could
 be based, because he was entitled, as the judge of fact, to decide which
 of the witnesses was to be believed.⁸

At advising on 28th November 1912,—

LORD PRESIDENT.—The question here arises upon a stated case, which
 was stated in deference to an interlocutor of your Lordships. The
 learned Sheriff-substitute, as arbitrator, originally found that there was a
 claim for compensation, but the respondents were desirous that the facts
 should be set forth, in order that they might be enabled to argue that no
 evidence had been led upon which it could competently be found that the
 death of the man whose widow is claiming was the result of an accident
 arising out of and in the course of his employment. The Sheriff-substitute
 has now stated a case, and from the facts which he there states it appears

¹ *Dunnigan v. Cavan & Lind*, 1911 S. C. 579, Lord President, at p. 582.

² *Hawkins v. Powells Tillery Steam Coal Co., Limited*, [1911] 1 K. B. 988, *Cozens-Hardy, M.R.*, at p. 992; *Barnabas v. Bersham Colliery Co.*,
³ *Butterworth, W. C. C.* 216; *Dunham v. Clare*, [1902] 2 K. B. 292,
Collins, M.R., at pp. 295-6.

⁴ (1902) 5 F. 123.

⁵ *Ystradowen Colliery Co., Limited, v. Griffiths*, [1909] 2 K. B. 533,
Cozens-Hardy, M.R., at p. 536.

⁶ 1911 S. C. 564.

⁷ *Golder v. Caledonian Railway Co.*, (1902) 5 F. 123, Lord President
Kinross, at p. 125; *Ystradowen Colliery Co., Limited v. Griffiths*, [1909]
⁸ K. B. 533, *Cozens-Hardy, M.R.*, at p. 536.

⁹ 1911 S. C. 579.

¹⁰ *Jackson v. Scotstoun Estate Co.*, 1911 S. C. 564, Lord President, at p.
 568.

Nov. 28, 1912. that on 18th July 1911 the deceased workman, Euman, had a bad fall off a ladder. He was thrown to the ground and was shaken and bruised, and in particular he suffered locally from an injured ankle. He was thereafter confined to bed from 18th July to 10th August. During the time that he was in bed (I abbreviate the findings) he complained of pain all over the body, and had a certain amount of disturbance of the functions of his bowels. He was attended by a doctor, but the treatment was, not unnaturally, mainly directed to what was obviously thought at the time to be the chief if not the only injury, the injury to his ankle. On 10th August his ankle was rather better, but he was in a low state. He was allowed to get up in the afternoon. On the 13th he again got up for a little and went out, but he was very tired, and came back and went to bed. On the 14th he was suddenly seized with violent pains in his stomach. His temperature went up considerably, and he died next day about 3 P.M. He never rallied. The cause of death, as certified by the doctor at the time, was appendicitis peritonitis. I take it that the collocation of those two words means that there was severe inflammation of the appendix, and that the inflammation had spread to the peritoneum. He was in such pain that a complete examination of his abdomen could not be made, and there does not seem to have been a post-mortem examination upon him.

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The learned Sheriff-substitute, after stating these facts, goes on to tell us who the medical witnesses were and what they said. I do not think that is quite the form the stated case should have taken. It is not for us to judge of what the witnesses said; it is for the learned Sheriff-substitute to find as the result of their evidence the facts which he held to be proved. But, taking the case as it stands, we are told that two doctors were examined for the workman's representative and two doctors for the employer. The first doctor, if his testimony is correctly reported by the Sheriff, makes that old mistake which I have already had to call attention to in other cases, of substituting a test of his own for the test of the statute. He says that "the strong probabilities are that Euman would have been alive now had he not met with the accident." Well, that is not the question that he really had to answer. The question that ought to have been put to him, and that he ought to have been made to answer directly, one way or another, was whether, in his opinion, seeing the man's symptoms, death was the result of the accident. The next doctor, Professor Glaister, does, I think, go that length. He says that he is "fairly clear of the view that the condition of which Euman died was consequent, indirect if you will, of the accident, and that in all probability Euman would not have died but for the accident."

The two other doctors could not see any connection between the accident and Euman dying of peritonitis. They said he might have had appendicitis peritonitis without the accident; but they did not say that it was impossible that the accident should have caused the general condition upon which the tendency to inflammation seized, which gave rise to the peritonitis and appendicitis. As regards that there are a few words in the judgment of Fletcher Moulton, L.J., in the case of *Egerton v. Moore*,¹ which are very

¹ [1912] 2 K. B. 308.

much to the point. In that case his Lordship points out that a blow—and Nov. 28, 1912.
 the same thing might be said of a fall—could never, in one sense, be the Euman v.
 direct cause of a thing like an abscess, but that, like any other lesion of the Dalziel & Co.
 tissues, it might produce a state of things which would cause a tendency Ld. President.
 which was in the man's system to declare itself. I suppose there is no
 question that the state of modern knowledge is that an abscess itself, if
 you want the actual cause, is caused by the presence of a certain bacillus ;
 but still, an abscess is in the class of diseases that might be brought about
 by an accident or blow.

Your Lordships will remember that before he stated the case the Sheriff-
 substitute had already found that the workman's representative was entitled
 to compensation, that is to say, he had made a positive finding that the
 accident did arise out of and in the course of the employment. He now says,
 first, that the appellants admitted that the accident arose out of and in the
 course of the employment in this sense, that when he had the fall from the
 ladder the workman was actually engaged in his employment. Then he
 says, "upon the foregoing facts proved or admitted before me, I was of
 opinion that there was evidence upon which it could competently be found
 that the death of Robert Euman was the result of an accident arising out
 of and in the course of his employment, and I therefore so found." I
 think there the Sheriff-substitute has fallen into a very unfortunate form of
 expression, because he is really confounding the question your Lordships
 have to decide upon the stated case with the question which he himself had
 to decide as arbitrator. But, notwithstanding that unfortunate form of
 expression, I do not think there is any reasonable doubt—if I did I would
 remit the case again to the Sheriff-substitute—that the Sheriff-substitute
 found as he did find because he preferred the evidence of the doctors who
 said that Euman's death was the consequence, indirect if you will, of the
 accident, to the evidence of those who saw no connection at all between
 the two occurrences. It is no business of the arbitrator to find that there
 is possible evidence on which some finding can be supported. He has got to
 judge between the evidence on the one side and on the other ; and in a case
 of conflict like this there is evidence upon which a decision in favour of
 either party could be supported. The phrase used by the Sheriff is one
 which, in cases under this Act, is appropriate only to this tribunal, which
 does not review the arbitrator's judgment as a Court of appeal reviews
 the decision upon fact of the Court below, but simply inquires whether
 there is evidence upon which the arbitrator's judgment can fairly be sup-
 ported.

Now, coming to that question, which is the question for us, I am of
 opinion here that there was evidence upon which the arbitrator's judgment
 can be supported, and that therefore, he having given his decision, we
 should not disturb it. I think the case is a very narrow one, and I do not
 say what I would have done if I had been the arbitrator. I do not think
 it necessary to make up my mind as to that. This arbitrator has said
 that he is satisfied, and I think there was evidence on which he might
 say so.

I desire to say most emphatically that I entirely accept as the law of
 this matter what was laid down by the Court of Appeal in England in the

Nov. 28, 1912. case of *Hawkins v. Powells Tillery Steam Coal Company, Limited*.¹ I respectfully adopt the judgments in that case, which professed to follow—
 Euman v. Dalziel & Co. and I think they do follow—the law laid down by the House of Lords in several cases, but particularly in the case of *Barnabas v. The Bersham Colliery Company*.² I shall quote from Lord Justice Fletcher Moulton's opinion in *Hawkins's* case,¹ and with great respect I should like to adopt it as my own. But I shall first, for clearness, state what the facts of that case were. An elderly man was engaged on a morning shift in helping to push empty trucks up an incline and tumble them from off the rails. Ten minutes later he complained of pain, and he died in the evening of angina pectoris. There was a post-mortem examination, and the medical evidence upon it included these statements:—"There was a patch of atheromatous disease at the aortic valve, and another small patch at the mouth of one of the coronary arteries. . . . Having regard to the existence of those two patches very mild exertion on the part of a man of Hawkins's age might bring on a spasmodic attack of the heart, which might or might not end fatally." And then it was also proved that very many other things might bring on angina besides exertion in the case of a man who had this tendency to it; "it might be brought on by walking against a wind or by walking upstairs, or even by emotional excitement." Now, Lord Justice Fletcher Moulton went so far as to say this, that, if he was asked his own opinion as a man of ordinary common sense, he thought that the most probable conjecture was that the exertion which Hawkins had put forth in the course of his employment was the real cause of the attack of angina pectoris. And now I quote textually (from p. 995):—"So far I go with the applicant. But that is not sufficient to establish the case of those who are applying for compensation. They have to prove their case; that is to say, they must show with reasonable clearness that the accident actually did come from the employment. Many phrases have been used in this connection, all of them useful but all of them liable to abuse. Inference is certainly not excluded if it be a legitimate inference. Proof is required, but on the other hand proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to the conclusion as a fact that the employment was the cause of death. If that evidence is forthcoming, that is sufficient to establish the applicant's case." Now, I think that really states the matter fully, so far as it can be stated in a general proposition. Then the learned Judge goes to the facts of the particular case which I have just given to your Lordships, and says (at p. 995):—"We are bound to say that when dependants leave the case in that condition" (that is to say, not proved the one way or the other) "they have not given evidence justifying a Judge in deciding in their favour." I do not quote any more because it would make my remarks too long, but the judgments of the Master of the Rolls and of Lord Justice Buckley are precisely to the same effect.

Now, I accept all that law, and when I come to the application of that law to the facts of this case, I do not disguise from myself that

¹ [1911] 1 K. B. 988.

² (1910) 103 L. T. 513.

it is a very narrow question whether the result should not be here Nov. 28, 1912. the same as there. It was argued to us with great force that the case was left in this position, that although it was very possible that this fall may have caused the appendicitis peritonitis, still there were other causes that might have caused it, and that, consequently, the case remains unproved. If the evidence of the doctors for the employers had been the only evidence in the case, that would be so. That is precisely the state of their evidence. They do not exclude the fall as a possible cause of peritonitis, but they say there is no reason that it should have been the cause more than something else, and they do not know what the actual cause of death was. But then I think that the other doctors, whom the learned arbitrator has preferred, do go the length that is necessary, and, accordingly, if that evidence commended itself to the person made judge in this matter, I think that is enough.

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If it is incumbent on me to note a distinction between the facts of this case and the facts in *Hawkins's* case,¹ there is one very obvious distinction. In *Hawkins's* case¹ there had been no accident in the popular sense of the word at all. I am quite aware that the word "accident" is used all through the discussions in connection with this statute in two different senses. The matter was noticed long ago by Lord Lindley in his judgment in the case of *Fenton v. Thorley & Company, Limited*.² His Lordship, at p. 453, says this: "The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended or unexpected loss or hurt apart from its cause; and if the cause is not known, the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them." In the beginning of the series of cases it was strenuously argued that in order to entitle a person to recover there must be an accident in the sense of something happening extraneous to the person concerned, but that argument was finally set at rest by the case of *Fenton v. Thorley*,² and by the other well-known case—the aneurism case—of *Clover, Clayton, & Company, Limited, v. Hughes*³; so that there is no doubt that in the sense of the statute an accident need not mean an extraneous occurrence, though in popular parlance it often does. In *Hawkins's* case¹ there was no accident. Nothing happened. The man pushed the truck in the ordinary way with other men, and he upset it in the ordinary way. Nothing extraneous happened at all. In the case before your Lordships there was an accident. In popular language anybody would have said this man had met with an accident, because he tumbled from a ladder and fell to the ground and hurt himself very much; and then you have this, that the man went to bed, no doubt with a bad ankle but also with a bad shake, and he was ill and was in a low condition, and he never recovered from that low condition up to the moment of his death.

It seems to me that in the present case it was very much easier to reach

¹ [1911] 1 K. B. 988.

³ [1910] A. C. 242.

² [1903] A. C. 443.

Nov. 28, 1912. the inference (and Lord Justice Fletcher Moulton points out that inference is not excluded so long as it is fair inference) that the illness of which the Euman v. Dalziel & Co. man died was the result of accident than it was in the case of *Hawkins*,¹ where there was nothing to connect in time the angina pectoris with the particular exertion that had taken place at the time of pushing the truck. The first symptom did not appear until some time afterwards, and therefore the case was left in such a position that you could not tell what had brought on the attack. Here the case is left in a position in which you are certainly very far from mathematical certainty; but, at the same time, one cannot say that a person who draws the inference has no facts from which he could reasonably draw it. That inference has been drawn by a medical man; it has commended itself to the person who is made the judge of the facts, the arbitrator; and I cannot say that the arbitrator is wrong.

Accordingly, upon the whole matter, I am of opinion that we should answer the question of law by holding that there was evidence on which it could competently be found that the death resulted from the accident, and that the arbitrator's finding to that effect should stand.

LORD KINNEAR.—I have found this case of very considerable difficulty, and, if the statement by the learned Sheriff-substitute of the facts and of the opinion he had formed upon them were subjected to any severe critical analysis, I should say there was strong ground for the argument, which was in fact maintained, that there was nothing really before us to show more than that there was a probability one way and a probability the other way, and that the Sheriff himself had come to no final conclusion upon the question of fact. But then I think that is not the proper way of dealing with a case of this kind. We must take the whole case as it is laid before us, to see if we can find out what the arbitrator really intended to decide and what he has decided in fact. And so treating it I have come to think, with your Lordship, that the stated case clearly discloses a question of medical fact which the arbitrator was called upon to decide, and that the case states sufficiently clearly the decision upon that question at which he actually arrived.

There is no dispute that an accident happened to this unfortunate man arising out of and in the course of his employment, and that he was injured by it. The only question is whether it was the cause of his death. Now it is plain enough upon the learned Sheriff-substitute's statement that no one without sufficient medical knowledge could say that the death was plainly and obviously the natural consequence of the accident. It was a question for skilled opinion. There was, as is not unusual, a conflict of medical opinion. The doctors called by the employers are of opinion that there was no causal connection, so far as they could see, between the accident and the peritonitis which caused death. One of the doctors examined for the respondent, the claimant of compensation, does not go further than to say that in all probability the workman would have been alive now if he had not met with the accident. If the evidence stood there it would be very unsatisfactory and insufficient, but then there is another doctor who

¹ [1911] 1 K. B. 988.

says in quite plain language that he was clearly of opinion "that the condition of which Euman died was consequent . . . of the accident," and he qualified that so far as to say that it may have been an indirect consequence, but a consequence it was.

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Now upon the question on which the medical witnesses were so divided it was necessary that the Sheriff-substitute should form his opinion as to which testimony he preferred, and he preferred to accept the evidence of Professor Glaister, which was to the effect I have already read, rather than the evidence of the other doctors. That was a question for him. I do not think it is possible for us to see upon his statement—nor is it necessary that we should see—why he preferred Dr Glaister to the other, and no Court could form any satisfactory opinion upon a question of that kind except the Court which heard and saw the witnesses set up against one another. I think there was here a clear question for the Sheriff-substitute which he had to decide upon evidence which was competently before him. That the opinion which he gave was an inference of fact from facts specifically proved is true, but that makes no difference either to the logical or the legal effect. As to the Sheriff-substitute's final deliverance, I think it would be putting an undue strain upon language to say that he had not in fact decided anything more than that the evidence was competent. I cannot entertain any doubt that what he meant to say was that, the evidence being competent, he had taken it into account and decided the case in the way in which he had previously given effect to his views before he was asked to state this case.

Upon the whole I have come to the opinion of your Lordship, that there is no ground upon which we ought to interfere with the decision of the Judge who is final upon fact.

LORD MACKENZIE.—I have had very great difficulty in this case, but in the result I am prepared to hold that that difficulty arises more from the form in which the learned Sheriff-substitute has presented the case for our consideration than from the substance of the case itself. I agree with the view of your Lordships.

THE COURT answered the question of law in the affirmative.

J. & J. GALLETLY, S.S.C.—STEEDMAN, RAMAGE, & Co., W.S.—Agents.

THE GOVERNORS AND COMPANY OF THE BANK OF SCOTLAND, Reclaimers. No. 35.

—*Morison, K.C.*—*Hon. W. Watson.*

JOHN MACKINTOSH MACLEOD AND ANOTHER (Liquidators of Hutchison, Main, & Company, Limited), Respondents.—*Horne, K.C.*—*Black.*

Nov. 29, 1912.

Bank of Scotland v. Liquidators of Hutchison, Main, & Co., Limited.

Bankruptcy—Effect—Company—Winding-up—Creditor's right to a security—Obligation to assign debenture in security for debt—Assignment not completed at date of liquidation.

A company, which was indebted to a bank, entered into an arrangement with the bank whereby it was agreed that, on the bank surrendering certain moveables belonging to the company which the bank held in security, the company should obtain from J., who was indebted

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to them, a debenture over his assets, and should assign the debenture to the bank in lieu of the surrendered security. The moveables were surrendered and the debenture was obtained from J.; but before it had been assigned to the bank the company went into liquidation. The bank having claimed the debenture on the ground that the company were merely the holders of it for their behoof,—

Held that the company did not hold the debenture for the bank, but had, at most, come under a contractual obligation to assign it; that accordingly they were the parties beneficially interested in it at the date of the liquidation; and claim for the bank *rejected*.

2D DIVISION.
Lord Cullen.

THE BANK OF SCOTLAND presented an appeal against a deliverance of John Mackintosh Macleod, C.A., and Robert Dick Fraser, C.A., the liquidators of Hutchison, Main, & Company, Limited, Springvale Works, Glasgow, on a claim in the liquidation lodged by the Bank on 30th September 1910.

In their claim the Bank stated that they were creditors to the amount of over £23,700, and after narrating the details of the debt and of securities held by the Bank, the claim proceeded:—“(5) The Bank of Scotland claim to be entitled to the extent of £14,000 to a security constituted by a debenture to the total nominal amount of £17,000 created and issued by Frank A. Johnson, Limited, to Hutchison, Main, & Company, Limited, in pursuance of, and in accordance with, an agreement, dated the 4th day of March 1910, and made between Frank Alexander Johnson, of the first part, Frank A. Johnson, Limited, of the second part, and Hutchison, Main, & Company, Limited, of the third part. The Bank of Scotland maintain that the correspondence about the beginning of 1910 between Hutchison, Main, & Company, Limited, or their agents, Messrs W. Baird & Company, and the manager of the Bank in Glasgow, constitutes a binding obligation on Hutchison, Main, & Company, Limited, to make over this security, to the extent above mentioned, to the Bank. Reference is made in particular to Messrs W. Baird & Company's letter of 3rd February 1910 to the manager of the Bank in Glasgow. The Bank, on or about 4th February 1910, gave up security in the shape of gutta-percha and golf balls upon the express condition that the debenture, to the extent above mentioned, would be made available to the Bank as security forthwith.”

The facts relating to the Bank's claim, as set forth in the averments of the parties, were thus narrated by the Lord Ordinary:—

“A certain debenture for the overhead sum of £17,000 was, in March 1910, granted by the English Company, ‘Frank A. Johnson, Limited,’ in favour of Hutchison, Main, & Company, Limited. Prior to the granting of this debenture Mr Frank A. Johnson had been the agent of Hutchison, Main, & Company in London, and had accepted a series of bills drawn by that Company in respect of his indebtedness to it. Some of these bills had been discounted with the Bank of Scotland and some with the British Linen Bank, while others were held by Hutchison, Main, & Company undiscounted. In or about February 1910 Johnson was in course of converting his business into that of a limited liability company. At the same time the Bank of Scotland was pressing Hutchison, Main, & Company to have the indebtedness of that Company to the Bank put on a more satisfactory footing. The Bank held certain corporeal moveables [the gutta-percha and golf balls above referred to] by way of security, and it is averred by the Bank (answer 7) that they agreed that they would transfer this secu-

rity to the value of £2000 to the British Linen Bank, 'and should
 take in lieu thereof bills on F. A. Johnson for £3000 to be held in
 security, along with which, as collateral security, as mentioned in the
 next article, the Company (Hutchison, Main, & Company, Limited)
 would give the Bank a debenture or floating charge over the assets
 of F. A. Johnson for the sum of £12,000.' Hutchison, Main, & Com-
 pany were, of course, not in a position to give a debenture over the
 assets of F. A. Johnson; and what was meant by this is to be found
 in the next answer (No. 8). It is there set forth that the Bank of
 Scotland surrendered and passed on to the British Linen Bank part
 of the said corporeal moveables to the value of £2000 held by them in
 security, and that at the same time the agents of Hutchison, Main, &
 Company, Messrs W. Baird & Company, writers, Glasgow, wrote on 3rd
 February 1910 to the Bank of Scotland stating:—'We are authorised
 by the directors, and our London correspondents have instructions
 forthwith to procure from Mr Johnson a debenture or floating charge
 over the whole of his assets in the name of the Company for the
 amount required to secure the debt due by Mr Johnson to our clients.
 So soon as that debenture reaches our hands we have instructions to
 make it available to the Bank of Scotland as further and additional
 security for the repayment by our clients of their indebtedness to the
 Bank, and it is understood, in respect of the arrangements made, that
 the Bank will give to those interested in the Company the benefit of
 the arrangements referred to in past correspondence.'

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"This letter was acknowledged and accepted by the Bank of Scot-
 land by letter of 4th February 1910 from their Bank manager in
 Glasgow to Messrs Baird & Company, in which they said:—'With
 regard to the debenture or floating charge over Mr Johnson's assets,
 we shall rely on your having this completed as soon as possible, and
 sent to us for assignation to the Bank as a security for the Company's
 indebtedness.'

"It thus appears that the nature of the security which the parties
 contemplated was an assignation to the Bank by Hutchison, Main, &
 Company of a debenture to be granted in their favour over 'Johnson's
 assets.'

"Hutchison, Main, & Company proceeded to make an agreement,
 dated 4th March 1910, between them and (1) Frank A. Johnson and
 (2) Frank A. Johnson, Limited. This agreement recites that John-
 son had acted as agent for Hutchison, Main, & Company, and had
 accepted bills to the Company, and that, after giving him credit for
 all these bills current (or unpaid), there was standing to his credit
 £1276, 2s.; that the English Company of Frank A. Johnson, Limited,
 was temporarily in need of funds; that Hutchison, Main, & Com-
 pany had refused to transfer the agency to Frank A. Johnson, Limited,
 unless that Company and Johnson should, jointly and severally,
 undertake to pay the said bills and any sums that might become due
 to Hutchison, Main, & Company by Frank A. Johnson, Limited, in
 respect of advances made by Hutchison, Main, & Company after 31st
 January 1910, and costs, 'and to secure the repayment of the said
 sums in manner hereinafter appearing.' The agreement goes on to
 provide, *inter alia*, (art. 5) that Frank A. Johnson, Limited, 'shall
 forthwith execute and deliver to the Scotch Company a debenture or
 series of debentures in the form hereto annexed for a total sum of
 £17,000, and such debenture shall be held by the Scotch Company
 as security for all amounts which may from time to time be owing

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The Bank reclaimed, and the case was heard before the Second Division (without Lord Dundas) on 30th and 31st October 1912.

Argued for the reclaimers;—This was a case for the application of the principle enunciated by Lord Westbury in *Fleeming v. Howden*¹ that “an obligation to do an act with respect to property creates a trust.” By the letter of 3rd February 1910 Hutchison, Main, & Company obliged themselves to assign the debenture to the Bank, and accordingly when they received the debenture they held it in trust for that purpose. The liquidators had no higher right to the debenture than the Company. The debenture, having been sent to the Company for a specific purpose, never became their absolute property.² It was true that the security in favour of the Bank was not completed by assignation, but this was immaterial, for in such cases the Court disregarded the formal title and awarded the property to the person having the true beneficial interest therein.³ In the ordinary case if the Company had bound itself to grant a debenture in security of the debt and had gone into liquidation before doing so, the Bank could not have insisted on the security being completed. But here there was an onerous contract with regard to property in the hands of the Company, and the Bank had fulfilled its part of the bargain. If the Bank had purchased and paid for goods in the possession of the Company, it could have claimed the goods notwithstanding that the Company had gone into liquidation before delivery was made. On the same principle it was entitled to an assignation of the debenture for which it had given value. The obligation of the Company was definite both as to mode and time of performance, and this was a case in which specific implement of the obligation would not have been struck at by the Act of 1696. The case of *Mansfield*,⁴ cited by the respondents, was distinguishable, because there was no obligation there to grant the deed by which the security was extended. Further the reference in the schedule to the agreement of 4th March 1910 to bills discounted by the Bank, indicated that the debenture was intended to operate as a security in favour of the Bank, and gave the Bank a direct claim thereto. The reclaimers were entitled to a proof of their averments regarding the negotiations of parties and the arrangement which was come to.

Argued for the respondents;—The principle founded on by the Bank had no application in the circumstances because—in contradistinction to the position of the creditor in all the cases cited by the respondents—the Bank never had any beneficial interest in the debenture. In the contract between Hutchison, Main, & Company and Johnson, Limited, the only reference to the Bank was the enumeration in the schedule to the agreement of the bills discounted

jus quesitum tertio in favour of the Banks. The mention of the Banks in the schedule appears to me to be descriptive merely. And in the body of the agreement the object of it and of the granting of the debenture is explicitly stated only as that of securing of the Scotch Company.”

¹ (1868) 6 Macph. (H. L.) 113, at p. 121.

² *Macadam v. Martin's Trustee*, (1872) 11 Macph. 33.

³ *Watson v. Duncan*, (1879) 6 R. 1247; *Graeme's Trustee v. Giersburg*, (1888) 15 R. 691; *Heritable Reversionary Co., Limited v. Millar*, (1892) 19 R. (H. L.) 43; *Forbes's Trustees v. Macleod*, (1898) 25 R. 1012; *Colquhoun's Trustee v. Campbell's Trustees*, (1902) 4 F. 739.

⁴ *Mansfield v. Walker's Trustees*, (1833) 11 S. 813, *aff.* (1835) 1 S. & M'L. 203.

by the Bank. This was merely for the purpose of identifying the bills, and conferred no *jus quæsitum* on the Bank.¹ It appeared from the correspondence that the assignation of the debenture to the Bank was no part of the arrangement concluded between the Bank and Hutchison, Main, & Company on 3rd February 1910, but even if it were, the Bank had no more than a personal right to insist on an assignation being granted, not a right to the debenture itself. The assignation would have been far more than a formal completion of title. It would have been a grant of further security which would have been struck at by the Act of 1696 if granted after,² or even within a period of 60 days before, liquidation. There was no fiduciary relation between the Company and the Bank; merely the relation of debtor and creditor. This was just the ordinary case of an uncompleted security, to which the Bank had no prior claim in a question with other creditors.³

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of Hutchison,
Main, & Co.,
Limited.

At advising on 29th November 1912,—

LORD SALVESSEN.—In this case the facts so far as material are fully narrated in the opinion of the Lord Ordinary. The case turns on the effect of an agreement between the Bank and the Company under which, on the Bank surrendering moveables to the value of £2000 held by them in security, the Company undertook to procure a debenture or floating charge over the whole assets of their debtor, Mr F. A. Johnson, and so soon as the debenture reached their hands to make it available to the Bank as further and additional security for the repayment by the Company of their whole indebtedness to the Bank. This obligation was thus contingent on the Company obtaining the debenture in question, and so only pretable after such a debenture had been obtained. In point of fact the Company succeeded in making an agreement with F. A. Johnson, under which he undertook to execute a debenture for £17,000 in their favour, and this debenture was duly executed and delivered to the Company. The Company never refused to implement their agreement with the Bank, but a long time was occupied in adjusting the deeds by which the transaction was to be carried out, and before these had been completed the Company went into liquidation. The question is whether the liquidator can now be compelled to put the Bank in the same position as if they had obtained an assignation to the debenture prior to liquidation.

It was conceded by counsel for the Bank that if the obligation had related to a debenture or other property belonging to the Company the failure to complete the security before liquidation would have been fatal to the Bank's claim. It was argued, however, that a different principle applies where an obligation has been given to assign property belonging to

¹ Blumer & Co., v. Scott & Sons, (1874) 1 R. 379, *per* Lord Ardmillan, at p. 386.

² Mansfield v. Walker's Trustees, (1833) 11 S. 813, *aff.* (1835) 1 S. & M'L. 203.

³ Tod & Hill's Trustee v. Union Bank, (1851) 14 D. 200; Stiven v. Scott & Simson, (1871) 9 Macph. 923; Gourlay v. Hodge, (1875) 2 R. 738; Bell's Com. (M'Laren's ed.), ii., 207; Goudy on Bankruptcy (3rd ed.), pp. 104 to 110; Companies (Consolidation) Act, 1908, (8 Edw. VII. cap. 69), secs. 208, 213.

Nov. 29, 1912. a third party, and that the moment they, in fact, obtained possession of such property the debtors held it in trust for the creditors in the obligation, and that the liquidator could not take advantage of the insolvent Company's failure to implement their duty as trustees. Reference was made to various cases as supporting this proposition, and specially to a dictum of Lord Westbury in the case of *Fleeming v. Howden*.¹ In the course of his opinion Lord Westbury said: "An obligation to do an act with respect to property creates a trust, and if a fiar bound to fulfil an obligation acquires or retains by means of his neglect of that duty a greater estate than he would otherwise have had, he is a trustee of such excess of interest for the benefit of the persons who would have been entitled to it if the obligation had been duly fulfilled." This observation was made in a case where, while the formal title to landed property remained in the bankrupt, at the time of his death he held it under a condition to denude in favour of the next heir, and the ground of the decision was that the estate could only vest in the trustee under the sequestration subject to this condition. It must be read *secundum subjectam materiam*, and is no authority for the view that every obligation by a person to do an act with respect to property creates a trust which is not affected by the bankruptcy of the obligor. If it were otherwise the dictum is in direct opposition to numerous decisions in which it has been held that an obligation of a general kind to give security or to assign specific securities "at any time required," even although implemented before sequestration, is challengeable under the Bankruptcy Statutes if implemented within sixty days of sequestration.—*Tod & Hill's Trustee v. Union Bank*²; *Stiven v. Scott & Simson*³; *Gourlay*.⁴

It is unnecessary here to consider whether, if the debenture had been actually assigned to the Bank before liquidation, it would have created a good security in their favour. It is enough that the security had not been completed at that date, and that, apparently, not from any unwillingness on the part of the Company to grant it, but simply because of delays in adjusting the deeds for which the Bank was chiefly responsible. In the case of *Mansfield v. Walker's Trustees*⁵ we have an excellent illustration of the effect which sequestration has on the power of a bankrupt to deal with his property even in implement of an obligation undertaken long prior to the sixty days. Lord Brougham, while assuming that a person not yet bankrupt may do certain acts, which he had previously actually bound himself to do, during the period of sixty days within which bankruptcy operates retrospectively under the Act of 1696, yet decided that he has no power to do any act affecting his property after his legal existence as owner has altogether ceased. If, therefore, this had been the case of an unincorporated company it is plain that the Company could not after sequestration have granted an assignation of the debenture in favour of the Bank, even although, if they had done so at any time before sequestration, the assignation might have been good. I cannot see that in this respect there is any difference between sequestration and liquidation. It is true that the Company remains vested in its own assets, but the liquidator administers its whole

¹ 6 Macph. (H. L.), at p. 121.

² 2 R. 738.

³ 14 D. 200

⁴ 1 S. & M'L. 203.

⁵ 9 Macph. 923.

affairs, and his duty is to distribute its assets substantially as they fall to be Nov. 29, 1912. distributed under the Bankruptcy Act of 1856 (Companies (Consolidation) Act, 1908, section 213). The other cases referred to, such as *Watson*,¹ *Scotland v. Millar*,² and *Graeme's Trustee*,³ are all cases where, while the formal title was in the bankrupt at the date of his sequestration, the beneficial interest in the property was already vested in the person who claimed to take it out of the sequestration, and were decided upon the footing that the trustee takes the property of the bankrupt *tantum et tale* as it stood vested in him. They have obviously no application to the facts here, for the debenture which the Company obtained from F. A. Johnson was beneficially vested in them at the date of the liquidation. No doubt they had undertaken a contractual obligation to assign this debenture to the Bank to the extent of some £14,000, but a contractual obligation is not equivalent to a trust, and while they might have been sued to implement it they could have conferred a valid title on any third party to whom they might have chosen to transfer it. I have therefore no difficulty in reaching the same conclusion as the Lord Ordinary, and substantially on the grounds which he has expressed more shortly.

On the other question, that the Bank, although no parties to the agreement between the Company and F. A. Johnson, had a *jus quæsitum* which entitled them to claim the benefit of the agreement to the extent of the bills referred to in the schedule, I also agree with the Lord Ordinary, and have nothing to add to the reasons which he has assigned.

LORD GUTHRIE.—I am of the same opinion on both points. The reclaimers first maintained that the obligation, undertaken by Hutchison, Main, & Company, to obtain a debenture for £17,000 by F. A. Johnson over his assets, to be available to the reclaimers as security for £12,000 (afterwards alleged to have been increased to £14,000), was an inseparable part of a transaction, under which they parted with golf balls to the value of £2000 in exchange for the obligation in question. On this assumption, founding on the fact that Hutchison, Main, & Company actually got delivery of the debenture, although no assignation was ever executed, they assimilated the case to that of an agent, who, having received money for investment, and having invested it and obtained a bond or other security therefor, becomes bankrupt before the actual security writ is handed over. But, apart from the essential difference between the two cases, arising from the execution, in the one case, of a deed in favour of the creditor, and the absence of any such deed in the other, I do not think the averments of parties, read along with the documents produced, raise any such question. Both parties concur in stating (Answer 7 and Reply 7) that, when the reclaimers agreed to release the golf balls in favour of the British Linen Bank, they agreed to take "in lieu thereof" (these are the words both of reclaimers and respondents on record) bills for £3000 by Hutchison, Main, & Company on F. A. Johnson. No doubt, the reclaimers seem to allege, in Answer 11, that their surrender of the golf balls was on the faith of the arrangement, not only as to the bills for £3000 being handed to them, but

¹ 6 R. 1247.² 19 R. (H. L.) 43.³ 15 R. 691.

Nov. 29, 1912. also that they should obtain the debenture for £17,000 ; but this is denied by the respondents, who say, in reply, that "the security of the said debenture was not offered as a part of the arrangement concluded on 3rd February 1910 for the . . . transference of said goods to the British Linen Bank and the substitution of undiscounted bills in lieu thereof." I read the letter of 3rd February 1910, from the respondents' agents to the reclaimers' Glasgow manager, taken along with both parties' averments as to the antecedent arrangement about the surrender of the golf balls, and the absence of any reference to the golf balls and the substituted bills in the agreement No. 43 of process, in accordance with the view presented by the respondents.

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But, even if the reclaimers' view of the arrangement is correct, their case seems to me to fail. I agree with Lord Salvesen that it cannot be supported by an unqualified application of the broad proposition, stated by Lord Westbury in *Fleming v. Howden*.¹ That is sufficiently clear from an admission made by the reclaimers. They did not dispute that they would have no case, if the obligation in question had related to property of the respondents' own. But, read literally, Lord Westbury's generalization would equally cover such a case. I may add, in reference to this admission of the reclaimers, that it seems to me that the elements of contingency and futurity, which are necessarily involved in such an obligation as the one in question, make the present case *a fortiori* of the one conceded by the reclaimers.

The respondents must bring up their case either to one of principal and agent or to one of fiduciary relation. Neither is averred on record, nor do the circumstances which are averred seem to me to involve, on principle or on authority, either the one case or the other. The relations were those of debtor and creditor, in which the creditors, instead of making their position immediately impregnable, chose, through their own fastidiousness about technicalities connected with the deed assigning the debenture actually in the hands of their debtors, to allow their opportunities to secure themselves by a completed security to pass.

On the question of *jus quesitum*, I think the Lord Ordinary was right in rejecting the reclaimers' claim. It was maintained that, although the reclaimers were not expressly named in the agreement No. 43 of process, their interests were sufficiently recognised by the reference in the preamble, and in article 5, to their bills set forth in the schedule. I think the respondents are right in their contention that the reference to these bills is merely for identification.

LORD JUSTICE-CLERK.—Your Lordships have so fully and clearly stated the circumstances in which this case arose, that I feel it unnecessary to recapitulate them. I concur in the opinions of your Lordships. To me it appears to be clear that at the date of the liquidation the debenture in question was still held by the Company, and that the Bank had no right to it, but had only a right to enforce a contract by which the Company was bound to assign the debenture to the Bank. Nothing can be more certain than that,

¹ 6 Macph. (H. L.), at p. 121.

in similar circumstances in the case of an individual becoming a bankrupt, a Nov. 29, 1912. company in the position of the Bank here could not possibly make good a preferential right on the subject as in this case, it being plainly an asset not made over while the person becoming bankrupt could do so legally to the prejudice of his other creditors. It lies upon the Bank to show that any different legal rule is to be applied where the insolvency is that of a limited company, as distinguished from a private individual or from a private firm. It is difficult to see that there can be any distinction in principle. The protection of the general body of creditors against non-completed preferences is as great in the case of a liquidation of a company unable to continue business from financial weakness as it is in the case of bankruptcy. No equitable or reasonable ground for a difference can be suggested, and none was pleaded so as to be even plausible. Having read your Lordships' opinions, I express my concurrence in the views expressed in them.

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THE COURT adhered.

TODD, MURRAY, & JAMIESON, W.S.—DAVIDSON & SYME, W.S.—Agents.

DUNCAN, GALLOWAY, & COMPANY, LIMITED, Pursuers (Respondents).— No. 36.

M'Lennan, K.C.—W. Mitchell.

DUNCAN, FALCONER, & COMPANY AND OTHERS, Defenders

(Reclaimers).—*Blackburn, K.C.—Chree, K.C.—Forbes.*

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Repetition—Sale—Extent of subjects sold—Error in fact innocently induced by seller—Repetition of price—Interest.

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In 1902, by a minute of sale, a firm of quarrymasters, who had a lease of a quarry, sold the goodwill of their business, their interest in the lease, and the buildings on the ground "in so far as belonging to" the sellers "or for which they are entitled to receive value or allowances at the termination of their occupancy." The sellers believed that certain buildings on the ground belonged to them or that they were entitled to receive allowances therefor at the termination of the lease, and they represented this to the purchasers. The purchasers accepted the representation without inquiry, the price of the buildings was adjusted by a valuator and paid accordingly, and the purchasers entered into, and continued in, possession of the whole subjects. At the termination of the purchasers' occupancy in 1908, it was ascertained that some of the buildings included in the valuation belonged to the landlord, and that nothing was payable to the tenants in respect thereof.

In an action at the instance of the purchasers against the sellers for repetition of the price paid for these buildings, *held* that the pursuers were entitled to repetition (with interest at 3 per cent from the date of payment), in respect that the money had been paid by the pursuers under an error in fact induced by the defenders.

On 17th March 1911 Duncan, Galloway, & Company, Limited, brought an action against Duncan, Falconer, & Company, quarrymasters, Arbroath, and James Wright and another, the individual partners of that firm, concluding for payment of £360, 14s. 8d., with interest at the rate of 5 per cent from 1st September 1902 until payment.

2D DIVISION.
Lord Hunter.

By agreement of purchase and sale, dated 17th July 1902, the defenders sold to the pursuers, *primo*, the goodwill of the business of

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quarrymasters carried on by the defenders at Carmyllie Quarries in Forfarshire; *secundo*, the tenants' part of the lease or leases held by them, whether written or verbal, current or held by tacit relocation, of (1) Carmyllie Quarries and pertinents thereof, (2) the farm of Slade and pertinents thereof, and (3) any other ground adjacent to the said quarries and farm, and all benefits of tenants under said lease or leases, or rights of occupancy, of the said quarries and farm; *tertio*, certain engines and machinery in or about said quarries; *quarto*, "the sheds, houses, and railways in, on, or about the said quarries, and all other railways used in connection therewith, in so far as belonging to" the defenders, "or for which they are entitled to receive value or allowances at the termination of their occupancy"; *quinto*, the crops, stocking, threshing-mill, and other articles on said farm and lands, so far as belonging to the defenders; and *sexto*, certain manufactured stones and quarried rock, all as these (*primo* to *sexto* inclusive) should exist at the close of 26th July 1902. The price of the subjects described under heads *tertio* and *quarto* was to be fixed by a referee, and was payable on 1st September 1902.

At the date of the agreement the defenders held the quarry and ground "with the houses and whole buildings on the premises" under a lease from Lord Dalhousie for nineteen years expiring at Martinmas 1880, after which the subjects were held from year to year by tacit relocation referable to the lease. After the sale the landlord agreed to accept the pursuers as tenants in room of the defenders, under the same conditions and stipulations, and the pursuers continued to occupy the subjects till 1908.

The parties averred;—(Cond. 5) "The houses and buildings sold to the pursuers by the defenders, under said head *quarto* of the agreement, included the following, viz.:—Double shed for facing machines, office, blacksmith's shop, tool furnace, and mechanic's shop, 61 feet by 17 feet, with grey slate roof. The defenders, at the time of the sale, represented to the pursuers that these subjects belonged to them, and a list of houses and buildings, including these subjects, was prepared by the defenders and submitted by them to the said George Anderson for valuation under said agreement as houses and buildings belonging to them and sold by them to the pursuers under said head *quarto* of the agreement. These houses and buildings were accordingly valued by him in terms of the remit to him under the agreement, and he fixed the price thereof, under said remit, at the sum of £320, 10s. This sum was paid by the pursuers to the defenders on 1st September 1902. Both pursuers and defenders were under the erroneous belief, at the dates of said sale and payments, that the defenders were owners of said buildings and others, and it was their intention that they should form part of the subjects sold. In any view, it was an implied condition of the contract between the parties that the defenders had a right to sell the said buildings and others. . . ." (Ans. 5) "Admitted that the defenders believed that they were entitled to be paid valuation for, or to remove, the buildings mentioned, and that they were pointed out to, and valued by, Mr Anderson on that footing. *Quoad ultra* denied." (Cond. 6) "Although the defenders believed that they were truly owners of said buildings and others set forth in condescendence 5, and represented to Mr Anderson (the valuator) and to the pursuers that they were owners thereof, said subjects were truly the property of the landlord and formed part of the subjects of which the pursuers obtained possession from the land-

lord under their lease. The defenders' said representations were unfounded in fact. The ownership of said subjects was never transferred by the defenders to the pursuers. The defenders also included in said valuation, as forming part of said houses and buildings and others referred to in head *quarto* of said agreement, a railway which connected the quarry workings with the Caledonian Railway Company's system, and they represented to the said valuator and to the pursuers that it was their own property and fell under the subjects sold to the pursuers under head *quarto* of the agreement. It was accordingly valued by the said George Anderson in terms of said remit. Said representation was unfounded in fact. The defenders, as well as the pursuers, were, at the dates of said sale and payment, in the erroneous belief that the portion of said railway, erroneously included, belonged to them. Only a part of said railway, which was valued as aforesaid, truly belonged to the defenders, the remaining portion, extending to 87 yards, having been the property of the Caledonian Railway Company, who claimed it successfully at the expiry of the pursuers' lease, in the knowledge and with the consent of the individual defenders, who were cognisant of, and participators in, the whole negotiations with reference to the ownership of said railway. The proportion of the price paid by the pursuers for the portion of the said railway, erroneously included among the subjects of sale, was £40, 4s. 8d., which sum was, under the *bona fide* belief on the pursuers' part, induced by the misrepresentations of the defenders that the whole of said railway belonged to them, paid by the pursuers to the defenders on 1st September 1902. . . ." (Ans. 6) "Admitted that the defenders believed that they were entitled to remove, or to be paid according to valuation for, the subjects mentioned. . . . Admitted that 79 yards or thereby of the railway, of the value of £36, 2s. 3d., belonged to the Caledonian Railway Company. Admitted that the valuation of said buildings and railway was paid or accounted for by the pursuers to the defenders. *Quoad ultra* denied. . . ." (Cond. 7) "At the expiry of the pursuers' lease in the year 1908, the said landlord claimed the main block of buildings and others at said quarries, being those specified in condescendence 5. . . . As a result of . . . negotiations, the landlord's claim to have always been owner of said buildings and others, and the claim of the railway company to have always been proprietor of a portion of the railway sold by the defenders as aforesaid were conceded both by the pursuers and by the defenders, without reservation. In point of fact, the claims of both the landlord and the railway company were well founded, and they were also entitled to prevent the removal of said buildings and erections by the pursuers, or anyone. Said buildings and erections were not severable trade fixtures, either at common law or by special contract." (Ans. 7) "Admitted that, on the expiry of the pursuers' tenancy in 1908, the landlord disputed his liability to pay valuation for the buildings mentioned in condescendence 5, that various meetings took place, and that the pursuers and the defenders ultimately conceded that he was not bound to pay valuation. Admitted that the pursuers and the defenders also conceded that the railway company owned part of the railway paid for by the pursuers. . . ." (Cond. 8) "The defenders thus never made good the obligation undertaken by them in said agreement to convey and deliver said buildings and erections and portion of said railway to the pursuers in ownership, and they are therefore in breach of contract, and

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The pursuers pleaded;—(1) The defenders having broken their contract with the pursuers, are liable in damages for the breach. (2) The pursuers having suffered loss, injury, and damages to the extent sued for, in consequence of the defenders' said breach of contract, decree should be granted as concluded for. (3) It having been an implied condition on the part of the defenders in the contract of sale founded on that the defenders had right to sell the subjects condescended on, and the defenders having failed to implement said conditions, the pursuers are entitled to decree as concluded for. (4) *Separatim*, the said buildings and others, and portion of railway, having been included in the subjects of sale, and the pursuers having paid the price of the same to the defenders, and the said subjects not having been conveyed or delivered to the pursuers, they are entitled to repetition of the price, with interest. (5) The defences, other than the defence proponed in plea 4 for the defenders, are irrelevant and ought to be repelled.

At the debate on the reclaiming note the pursuers added by amendment the following plea;—(6) The pursuers are entitled to repetition, with interest as concluded for, of the sum paid by them to the defenders as the price of the subjects specified in the condescendence in respect that—(1) The defenders represented to the pursuers that the said subjects fell to be included in the sale by the defenders to the pursuers contracted for by articles first (*quarto*) of the agreement of 17th July 1902. (2) The pursuers paid said price to the defenders on the faith of, and under error induced by, the said representation. (3) The said representation was untrue, and the said subjects were not made over by the defenders to the pursuers.

The defenders pleaded, *inter alia*;—(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the action. (4) In any event, the sum sued for is excessive. *Et separatim* the pursuers are not entitled to interest before Martinmas 1908.

On 31st January 1912 the Lord Ordinary (Hunter) after hearing parties in the procedure-roll, pronounced this interlocutor:—"Sustains the fourth plea in law for the pursuers: Decerns against the defenders, conjointly and severally, for payment to the pursuers of the sum of £356, 12s. 3d. in full of the conclusion of the summons, with interest at the rate of 3 per cent from 1st September 1902; finds the defenders liable to the pursuers in expenses, and remits," &c.*

* "OPINION.—By agreement of purchase and sale, dated 17th July 1902, the pursuers purchased from the defenders the goodwill of the business of quarrymasters, carried on by the latter at Carmyllie Quarries in Forfarshire; the tenants' rights in certain leases; and also [Art. 1 (4)], 'the sheds, houses, and railways, in, on, or about the said quarries, and all other railways used in connection therewith, in so far as belonging to' the defenders, 'or for which they were entitled to receive value or allowances at the termination of their occupancy.' The amount to be paid by the pursuers was, in terms of article 4 of the agreement, fixed by arbitration, and the price paid. Both parties to the agreement were under the belief that all the subjects so valued and paid for belonged to the defenders, or, at all events,

The defenders reclaimed, and the case was heard before the Second Division (without Lord Dundas) on 5th and 6th November 1912. Nov. 29, 1912.

Argued for the reclaimers;—(1) The ground of the pursuers' action as originally laid was breach of contract. This was untenable, because the defenders never contracted to sell the buildings and railway in question. Even if the defenders had possessed the right to remove the buildings, they could not have sold them until the landlord's claims were satisfied.¹ But they had not even that right; the buildings were not within the description of the subjects sold, and the property in them never passed to the pursuers. The pursuers had no claim for indemnity in respect of eviction—the only remedy for breach of warrandice²—since the pursuers could not be evicted from subjects which were never conveyed to them. *Pari ratione* the pursuers had no claim in respect of the defenders' failure to deliver the subjects, since the subjects were never for sale. The pursuers now

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that they were entitled to receive allowances therefor on the termination of their occupation of the subjects. This was not in fact the case. The pursuers' tenancy expired in 1908, and it was then found that certain of these subjects belonged to the landlords, and that part of the railway belonged to the Caledonian Railway Company. In the present action the pursuers seek to recover from the defenders the amounts so paid by them.

"The defenders maintain that the pursuers are not entitled to repetition, because both parties were in error upon a question of law. They contend that the subjects of sale, under article 1 (4) of the agreement, were the tenants' rights in the buildings situated on the ground contained in the leases that were being assigned, and that the purchaser took the risk of what might be found in law to belong to the tenants. I do not think this view of the agreement is sound. It appears to me that the defenders sold certain subjects pointed out to the valuator as being the tenants' property. In my view, therefore, the sale so effected involved warrandice that the subjects belonged to the defenders, or at all events, that they had a claim for their value on the termination of occupancy.

"The defenders, however, maintain that the agreement must be interpreted as a whole, and that, as there is no case of fraud, the pursuers can only recover by setting aside the whole agreement, which is now impossible, as restitution cannot be made. In this connection they found upon the second part of the first clause, which deals with the payment of £70 for the tenants' right in the leases. They maintain that the amount so fixed would, or might, have been different if parties had known that the subjects for the price of which repetition is now claimed did not belong to the defenders. I do not think this argument is sound, because it appears to me that the subjects covered by the 4th subclause of article 1 of the agreement are severable from the other subjects dealt with. In a case of sale, indemnification falls to be made where there is partial, just as where there is total, eviction.

"The question of the extent to which the pursuers ought to be indemnified falls to be considered. The pursuers ask for repetition of the money paid by them, with interest upon the amount so paid at the rate of 5 per cent from 1st September 1902 until paid. It was strongly argued for the defenders that the pursuers would be fully indemnified by receiving payment of the value of the buildings as at Martinmas 1908. That is all, they say, that the pursuers would have got if the defenders had imple-

¹ *Smith v. Harrison & Co.'s Trustee*, (1893) 21 R. 330, *per* Lord President Robertson, at p. 333.

² *Walsh v. Russell*, (1894) 21 R. 769.

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maintained—as stated in the plea added by amendment—that the price had been paid in error, and that they were entitled to repetition. Admittedly there had been error, shared in by both parties, but it was an error in law, as to the legal rights of the defenders under the lease, and this did not support a claim for repetition.¹ Even if it fell to be regarded as an error in fact, the pursuers were barred from claiming repetition, since they had the means of ascertaining the truth before concluding the transaction.¹ The contract must be read as a whole, and as *restitutio in integrum* was now impossible, the loss should be allowed to rest where it had fallen. (2) If the pursuers had a claim at all, it was not to repetition of the price, but only to indemnification for the loss they had sustained, and the measure of this was the value of the buildings at the termination of the pursuers' occupancy in 1908. Up to that date they had continued to possess the subjects, and all that they lost was the price which they would have got from the landlord for the buildings if they had in fact been included in the sale, as both

mented the terms of the agreement of 1902. In the ordinary case of eviction the subjects are valued as at the date of eviction, but this rule is by no means universal, as is seen from the case of *Cairns*, (1870) 9 Macph. 284, where the purchaser was found entitled to repetition of the price paid, on accounting for the rents drawn by him during the period of possession. In the course of his judgment the Lord Justice-Clerk said: 'The inclination of my opinion is that warrandice in the contract of sale implies an obligation in the case of eviction to render back the price for which no equivalent was given, whatever further claims it may confer upon the purchaser.' That statement was not the ground of judgment, but the case shows that repayment of the price may be the proper means of indemnification where the purchaser has to have recourse against the seller under warrandice, express or implied. In the present case I think that there ought to be repetition of the price paid by the pursuers to the defenders for the subjects which were erroneously valued in 1902.

"It remains for me to deal with the question whether the pursuers are or are not entitled to interest upon this amount. The considerations and arguments dealing with claims for interest are to be found, as Lord Shaw said in the recent case of *Greenock Harbour Trustees v. Glasgow and South-Western Railway Company*, 1909 S. C. (H. L.) 49, stated with compendious accuracy in the judgment of Lord Fraser in the case of *Blair's Trustees v. Payne, &c.*, (1884) 12 R. 104. It is there pointed out that interest, in the absence of express stipulation, is due upon money lent. This rule would appear equally to apply where money has been paid in error, and the use thereof has been enjoyed by one not otherwise entitled thereto. Against this it was said that the pursuers had had possession of the subjects they erroneously thought they were purchasing, and that the use of the subjects might be set against the interest claimed. If possession had been due to the defenders I should have given effect to this plea, but, for the period, at all events, after the termination of the first year of their tenancy, the possession of the pursuers is traceable to the landlords and not to the defenders. To some extent it may have been different at the beginning of their possession, because they had to make arrangement with the defenders as to acquiring the tenants' interest under the lease. I do not think, however, that I can exclude the claim for interest, but, in the whole circumstances of the case, I shall limit it to 3 per cent. If parties are agreed that the sum sued for represents the amount paid by the pursuers in respect of the property erroneously valued, as to which the error to which I have referred existed, I shall give decree therefor, with interest at 3 per cent from the date of payment."

¹ *Wilson & M'Lellan v. Sinclair*, (1830) 4 W. & S. 398.

parties believed them to be. The case of *Cairns v. Howden*,¹ referred Nov. 29, 1912, to by the Lord Ordinary, was a case of eviction, and had no application in the circumstances of this case. The action should be dismissed as irrelevant; or, alternatively, proof should be allowed of the value of the buildings as at 1908.

Duncan,
Galloway, &
Co., Limited,
v. Duncan,
Falconer &
Co.

Argued for the respondents;—The Lord Ordinary had come to a right conclusion, and on the right ground. This was a typical case of property sold and not delivered. The pursuers' case might also be presented as a *condictio indebiti*. The price of the buildings had been paid by the pursuers under the error, induced by the defenders, that they were included in the subjects of sale. In these circumstances the pursuers were entitled to repetition of the price.² They were also entitled to interest on the price since the date of payment. The defenders could not set off possession of the buildings against interest on the price, since after Martinmas 1902 the pursuers held from the landlord and not from the defenders.

At advising on 29th November 1912,—

LORD SALVESSEN.—In this case I have come to be of opinion that the Lord Ordinary has reached a sound conclusion, although I do not altogether agree with him in the grounds of his judgment. He has sustained the fourth plea in law for the pursuers, which proceeds upon the footing that the buildings, the price of which the pursuers now seek to recover from the defenders, were included in the subjects of sale under the agreement made between the parties of 17th July 1902. On referring to the agreement, however, I am quite clear that they were not so included. Under head *Quarto* of the first article the defenders sold to the pursuers the sheds, houses, and railways in or about the quarries, but they did so only "in so far as belonging to the parties of the first part [the defenders], or for which they are entitled to receive value or allowances at the termination of their occupancy." Now, it is common ground that the buildings, &c., of which the price is in question, although believed by the parties to fall under this clause did not in fact do so, as they were the property of the landlord, and there was no agreement with him that the tenants should receive any allowances in respect of them when their lease terminated. The legal position of the matter, therefore, was that the pursuers were entitled to enforce the agreement in every respect, but were not liable to pay for these buildings. What actually happened was that the defenders represented to the pursuers that these buildings were their property, and they were valued in terms of the fourth article of the agreement, and paid for accordingly. The true ground of action, therefore, was that the price had been paid under an error in fact, induced by the defenders' innocent misrepresentations, and this has now for the first time been embodied in a plea in law which we allowed the pursuers to add to their record.

I think there are sufficient materials upon record to enable us to sustain this new plea and to give effect to it by ordaining the defenders to repay the sum sued for (subject to the small deduction to which the Lord Ordinary

¹ (1870) 9 Macph. 284.

² *Balfour v. Smith & Logan*, (1877) 4 R. 454; *Dalmellington Iron Co., Limited, v. Glasgow and South-Western Railway Co.*, (1889) 16 R. 523.

Nov. 29, 1912. has already given effect). The case falls within the principles laid down in *Balfour*¹ and the *Dalmellington Iron Company*.² In the former case the Lord President (Ingria) said: "It is quite true that a party having made a payment in error must, before he can recover, show that the error was not induced by his own fault, but was due to adverse circumstances or to the proceedings of the other party." The facts admitted here bring the case within the last of these alternatives. The defenders represented in good faith that the buildings in question fell under head *Quarto* of the first article of the agreement, and this representation was accepted without inquiry and acted on by the pursuers, and it was not until their own lease terminated that they discovered their error. In the second case cited it was held that the pursuers were entitled to repetition, although information was in the possession of their manager which would have enabled him at the time to have discovered the mistake, for this information was not present in fact to his mind at the time of payment, and was not of such a character that it ought to have been present. Here all that can be said is, that, if the pursuers had taken legal advice and had studied the lease which they took over, they might have discovered that stone and lime buildings erected on the ground of which they were tenants were in law the property of the landlord, and that, apart from agreement, they could have no claim to an allowance from him at the termination of the lease. There is no suggestion that they actually knew they were paying for subjects for which they were not liable, and they might quite well have thought that there was some collateral agreement under which the landlord recognised the defenders' right to these buildings, which had been erected by their authors, and had agreed to take them over at valuation. On this ground I think that a clear case for repetition of the price is made out.

In this view it becomes unnecessary to consider what would have been the position if the defenders had actually professed to sell subjects which did not belong to them. Mr Chree's main argument proceeded on the assumption that there had been a sale of heritage of which the pursuers had obtained possession, and from which six years later they had been evicted by the true owner. As I have already pointed out there was no such sale so far as the buildings in question are concerned, and while the possession of the subjects might be attributed to the defenders' lease until its expiry a few months later, from the time tacit relocation took place the pursuers owed their right of occupation entirely to the act of the landlord in permitting the lease to be renewed. But the defenders' rights under the lease were transferred under head *Secundo* of article 1 of the agreement, and for these rights the parties contracted that £70 should be paid by the pursuers. It is nothing to the purpose that the pursuers have been fortunate enough to induce the landlord to take over at valuation certain workmen's houses which under the lease itself they were entitled to erect and to remove before the expiry of the lease. If these subjects fall under head *Secundo* they have already been paid for; if, on the other hand, they fell under head *Quarto* a claim might conceivably arise at the instance of the defenders against the pursuers, on the footing that they were never valued,

¹ 4 R. 454.² 16 R. 523.

and that they are still entitled to an allowance in respect of them. Having Nov. 29, 1912.
 in view the conduct of the parties themselves I cannot regard this as a very
 hopeful claim, but in any event it does not affect the right of the pursuers Duncan,
 to repetition of the price of other subjects for which they paid under a Co., Limited,
 mistake induced by the defenders' representations. v. Duncan,
 Falconer, &
 Co.

On the question of interest I was at first disposed to think that it would
 have been more equitable that no interest should be allowed except from Lord Salvesen.
 the date when the error was discovered, on the footing that the pursuers
 enjoyed possession of the subjects until that time without having paid
 extra rent for them. I am unable, however, to resist the view of the Lord
 Ordinary, that the pursuers' possession of these subjects was in law
 attributable not to the defenders but to the landlord, and that therefore
 the claim for interest is well founded at the moderate rate at which the
 Lord Ordinary has assessed it, and to which the pursuers offer no objection.
 I cannot, however, refrain from thinking that the case would never have
 reached us if the pursuers had pleaded their case properly upon record, for
 there is not one of the pleas, as they originally stood before the amend-
 ment, that I could have given effect to. The two first are based on breach
 of contract, which is obviously out of the question, and the third and
 fourth on the view that the buildings in question formed parts of the
 subjects sold under the contract, and that therefore it was implied that the
 sellers had a good title to them. The real ground of action is sufficiently
 averred upon record, but was not expressed in any plea, and the argument
 which was maintained with much plausibility by the defenders would not,
 I think, have been stateable except on this view. I propose that we should
 penalise the pursuers by finding neither party entitled to expenses in the
 Inner House, and *quoad ultra* that we should affirm the interlocutor of
 the Lord Ordinary, with the variation that we sustain the sixth instead of
 the fourth plea in law for the pursuers.

LORD GUTHRIE.—I concur. The reclaimers presented an unanswerable
 argument against the Lord Ordinary's judgment, in so far as it sustains the
 fourth plea in law for the pursuers. That plea proceeds on the footing that
 the buildings and part railway in question were included in the subjects of
 sale by the defenders to the pursuers. But what was sold under the fourth
 article of the agreement of 17th July 1902 was only buildings and rail-
 ways "in so far as belonging to" the defenders, or for which they were
 entitled to receive value, or allowances, at the termination of their occu-
 pancy. Now, it is common ground that the buildings and part railway in
 question were neither the property of the defenders, nor were the defenders
 entitled to receive value, or allowances, for them from the landlord, at the
 termination of their occupancy. The case has been put on a proper basis
 by the new plea, Plea 6, tendered by the respondents at the end of the dis-
 cussion before us, and for which, fortunately for them, there are sufficient
 averments on record. In view of the late period at which this plea was
 added, I think Lord Salvesen's proposal as to the expenses of the Inner
 House discussion will do justice between the parties.

In sustaining the respondents' new plea, we negative the contention on
 the merits which was strongly urged by the reclaimers, namely, that the

Nov. 29, 1912. error being one of law, in an erroneous construction of the contract, or in an erroneous application of its scope, the pursuers are without remedy, or, alternatively, this remedy is limited to what their rights would have been had the defenders fulfilled their contract. I concur with Lord Salvesen in thinking that, whatever the source of the error may have been in the case of the reclaimers, the respondents' error was purely one of fact. The Lord Guthrie. question, left unascertained in the fourth article, as to which buildings and railways did and which did not belong to the defenders, and which buildings and railways they were entitled to receive value or compensation for, was one in the knowledge of the reclaimers. They pointed out the buildings, and the part railway, to which this case relates, to the valuator, as in the one category or the other, and the respondents had no reason to suspect that they were mistaken in their selection.

The other main argument for the reclaimers, founded on the alleged impossibility of separating the fourth article from the other provisions of the agreement, proceeds on the same fallacious view. The respondents' success does not depend on any attack on the terms of article 4. What they are complaining of is the erroneous way in which the reclaimers applied that article.

On the question of interest, I think the Lord Ordinary has taken the right course, although, had he given five instead of three per cent, I should not have felt inclined to disturb his judgment.

The LORD JUSTICE-CLERK concurred.

THE COURT pronounced this interlocutor :—" Refuse the reclaiming note: Adhere to the said interlocutor [of 31st January 1912] reclaimed against with this variation: Recall the said interlocutor in so far as it sustains the fourth plea in law for the pursuers, and in lieu thereof sustain the sixth plea in law for the pursuers, and decern: Find no expenses due to or by either party since said 31st January 1912."

ADAIR & GALLOWAY, S.S.C.—ALEX. ROSS, S.S.C.—Agents.

No. 37.

JAMES ALEXANDER DONALD, Petitioner (Respondent).—

A. O. M. Mackenzie, K.C.—Lippe.

Nov. 29, 1912.

ALEXANDER DONALD, Objector (Appellant).—*Morison, K.C.—Aitchison.*

Donald v.
Donald.

Sheriff—Process—Challenge of validity of will ope exceptionis—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), First Schedule, Rule 50—"Cause"—Petition.

Rule 50 of the First Schedule to the Sheriff Courts (Scotland) Act, 1907, enacts :—"When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof."

In a petition in the Sheriff Court, under sec. 10 of the Conveyancing Act, 1874, for completion of title to lands belonging to a deceased person by his heir-at-law, objections were lodged by the executor and general donee of the deceased under a will executed by him. The petitioner in answer sought to set aside the will, averring

that it had been impetrated by the objector from the deceased by fraud and circumvention. Nov. 29, 1912.

Held that, notwithstanding the terms of Rule 50, the will could not, even so far as constituting a bar to the granting of the petition, be competently set aside by way of exception in that process; and process *sisted* to allow the petitioner to bring an action of reduction. Donald v. Donald.

Observed by Lord Salvesen:—"I think it must be implied in Rule 50 that the objection which may be stated and maintained by way of exception is one which the Sheriff can finally dispose of, and that his judgment will supersede the necessity of bringing a reduction of the deed challenged."

Held, further, that the petition and answers constituted a "cause" within the meaning of Rule 50.

In April 1912 James Alexander Donald, Glasgow, presented a petition under section 10 of the Conveyancing (Scotland) Act, 1874,* for completion of his title to certain lands. The lands were the property of Alexander Donald (hereinafter referred to as Alexander Donald *primus*), who died on 18th October 1911 without having taken infirmament. 2D DIVISION. Sheriff of Stirling, Dum-barton, and Clackmannan.

A minute of objections to the petition was lodged by Alexander Donald (hereinafter referred to as Alexander Donald *secundus*), Hardgate, Duntocher, who stated that under the will of Alexander Donald *primus*, dated 17th October 1911, he was appointed executor-nominate and general donee; that as such general donee he had been confirmed executor-dative by the Sheriff at Dumbaron; that he had entered into possession and management of the deceased's estate; that he was in right of the whole heritable property which belonged to the deceased at his death; and that in the circumstances the petitioner had no right or title to make or insist in his application, which should accordingly be dismissed.

The petitioner lodged answers and a statement of facts in which he alleged that the will founded on by the objector had been impetrated by him from the deceased, while weak and facile, by fraud and circumvention, in circumstances upon which he condescended in detail.

The objector pleaded;—(1) No title to sue. (4) Reduction *ope exceptionis* being incompetent in the present proceedings, the prayer of the petition should be refused, with expenses.

The petitioner pleaded;—(1) No title to object. (2) The said pretended settlement having been impetrated from the deceased while he was weak and facile in mind and easily imposed upon, by the fraud and circumvention of the objector, to the lesion of the said deceased Alexander Donald and his heir-at-law, should be set aside *ope exceptionis*. (3) The deceased Alexander Donald at the date of the granting of the said alleged settlement having been incapable of giving instructions as to the disposal of his means and estate, the said pretended settlement should be reduced and set aside *ope exceptionis*, with expenses.

On 10th July 1912 the Sheriff-substitute (Macdiarmid) pronounced this interlocutor:—"Repels the pleas in law for the objector and the first plea in law for the petitioner: Finds the answers relevant: Allows parties a proof of their respective averments relative to the will dated 17th October 1911, the petitioner to lead."

The objector, Alexander Donald *secundus*, appealed to the Court of

Nov. 29, 1912. Session, and the case was heard before the Second Division (without Lord Dundas) on 29th and 30th October 1912.

Donald v.
Donald.

Argued for the objector;—The question of the validity of the will could not competently be dealt with in the present process. Rule 50 of the Sheriff Courts Act, 1907,¹ did not apply, for none of the conditions of the rule had been satisfied. What the objector really relied on was not the will, but his decree of confirmation thereunder, and a decree of Court was not a “deed or writing” within the meaning of the rule.² Nor was the present process a “cause.” It was a mere administrative proceeding instituted under, and still regulated by, section 10 of the Conveyancing Act, 1874,³ and the special code of procedure prescribed by the Titles to Land Act, 1868,⁴ section 27 and following sections. The rules of the Sheriff Courts Act, 1907, which expressly applied to “procedure in the ordinary Court,” had no application to such a proceeding as this, and that fact was expressly recognised by Rule 1. Further, neither Rule 50 in the Act of 1907 nor section 11 of the Act of 1877,⁵ which it re-enacted, made reduction competent in the Sheriff Court.⁶ It was obviously inconvenient to entertain objections to the validity of a will otherwise than by way of a reduction, for a reduction would be *res judicata* against all parties, while a decision in this process would not be binding on anyone except the parties thereto. The provisions of Rule 50 applied only where a document such as a receipt or a discharge was produced in evidence.⁷ It must be a document the validity of which could be considered and determined by the Sheriff in the cause before him. It was impossible to determine the validity of a will in the absence of all the beneficiaries and other parties interested in reducing or maintaining it. In any case, in a petition for service under section 10 of the Conveyancing Act, 1874, the validity, as distinct from the construction, of a will was not a question which could competently be determined.⁸

Argued for the petitioner;—The terms of Rule 50 were very wide and perfectly unambiguous. They admitted of no doubt that the validity of the will could be questioned in the present process, at any rate to the effect of enabling the Sheriff to disregard it as an answer to the petition. The will was a “deed or writing,” and it was the will which was the basis of the objection, not the confirmation.⁹ The case of *Leggat Brothers v. Gray*¹⁰ had therefore no application. The will was “founded on” by the objector, because it was the foundation of his case. It was none the less “founded on” because it was produced in answer to the petitioner’s claim.¹¹ Rule 50 was not limited to deeds produced in evidence, for such deeds could be objected to *ope exceptionis* at common law and apart from statute.¹²

¹ 7 Edw. VII. cap. 51, First Sched., Rule 50 (quoted in the rubric).

² *Leggat Brothers v. Gray*, 1912 S. C. 230.

³ 37 and 38 Vict. cap. 94.

⁴ 31 and 32 Vict. cap. 101.

⁵ Sheriff Courts (Scotland) Act, 1877 (40 and 41 Vict. cap. 50).

⁶ *Dickson v. Murray*, (1866) 4 Macph. 797.

⁷ *Neil v. McNair*, (1901) 3 F. (J.) 85, *per* Lord Moncreiff, at p. 89.

⁸ *Sim v. Duncan*, (1900) 2 F. 434.

⁹ *Roberts v. Fettes*, (1901) 18 S. L. Rev. 290.

¹⁰ 1912 S. C. 230.

¹¹ *Dickson v. Murray*, 4 Macph. 797, *per* Lord Justice-Clerk Inglis, at p. 799.

¹² *Dickson v. Carter*, (1878) 5 R. 1023.

Further, the present process was a "cause." "Cause" was equivalent to "action," which included every civil proceeding competent in the ordinary Sheriff Court,¹ and had been held to include a petition for *cessio*.² The word "cause" was used in the same sense in section 39 of the Act of 1907, and in Rules 65 and 68. A note of any evidence led would be taken under section 33 of the Titles to Land Consolidation Act, 1868. The proviso in Rule 1 of the Act of 1907 merely affected the form of the initial writ, and did not alter the nature of the process or exclude it from being a "cause." This was not a mere administrative proceeding, but corresponded to the old inquest before a jury. The whole of the conditions under Rule 50 being thus satisfied, it followed that the rule applied to the present case, and that an action of reduction was unnecessary. The same view had been taken on a construction of the corresponding section of the Sheriff Courts Act of 1877.³ The objector could adduce no argument except the argument from convenience, and that was irrelevant where, as here, the terms of the statute were clear and unambiguous. In any case, it was well recognised that a deed might in certain circumstances be set aside or disregarded for some purposes without being reduced for all purposes, and it was not necessary that all the parties having an interest under the deed should be convened in the process.⁴

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Donald.

At advising on 29th November 1912,—

LORD JUSTICE-CLERK.—[After narrating the facts]—In this petition the question is raised whether the title produced by Alexander Donald, viz., the settlement already referred to, can be set aside by way of exception without the petitioner taking steps to have it set aside in a proper process of reduction. Both parties stated pleas of objection to the opposite party's title, and the Sheriff-substitute has repelled those pleas, and has allowed the parties a proof of their averments.

Objection was taken to the petition as not being a "cause," but this objection seems to me to be ill-founded. I cannot hold that the petition is not an "action," and if an "action" then it is a "cause." Under the Sheriff Courts Act, 1907, action is defined as including "every civil proceeding competent in the ordinary Sheriff Court" (section 3). I have therefore no doubt that this objection is unsound. Further, it appears to me that the contention that Rules 50 and 51 of the Sheriff Courts Act, 1907, cannot be grafted on to the procedure prescribed in the Titles to Land Act, 1868 (section 27 *et seq.*), applicable to petitions under section 10 of the Conveyancing Act, 1874, is erroneous. The objection is also taken that as confirmation has been obtained on the settlement the petitioner is endeavouring to set aside a decree of Court. I agree with the Sheriff-substitute that this contention is unsound. It is the will that is challenged, and the case of *Leggat Brothers*⁵ has no application.

But although I hold that these contentions of the objector, as he is called

¹ Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 3 (*d*).

² *Crozier v. Macfarlane & Co.*, (1878) 5 R. 936.

³ 40 and 41 Vict. cap. 50, sec. 11; *Roberts v. Fettes*, 18 S. L. Rev. 290; *Petition Gardiner*, (1886) 3 S. L. Rev. 100.

⁴ *Dickson v. Carter*, 5 R. 1023; *Nivison v. Howat*, (1883) 11 R. 182.

⁵ 1912 S. C. 230.

Nov. 29, 1912. in the process, cannot receive effect, it is a different and separate question whether the petitioner, whose right to be infest as heir-at-law is challenged by the production of the settlement cutting down his title, can in this process be allowed to challenge that settlement by way of exception, on the ground that being a "deed or writing" it can be dealt with as falling within the scope of Rules 50 and 51 of the Sheriff Courts Act, 1907. The Sheriff-substitute has held that the will itself can be set aside in this process. In that I cannot agree with him. The purpose of allowing documents produced in a process to be set aside *ope exceptionis* was to prevent unnecessary complications and delays in procedure when adminicles of evidence were put forward, and their genuineness or validity was challenged, as for example in a question where a claim for payment was met by the production of a receipt. Here the attack which is made is upon a document which is not merely a piece of evidence but is the very foundation of the defence set up by the objector to the petitioner's being declared infest. If allowed and successful it would not and could not be *res judicata* in other proceedings. That being so, it is evident that the rules of the Act, which were intended to simplify procedure and prevent delays, might, and indeed would, if applied to the setting aside of the settlement in this particular proceeding, lead to complication, trouble, and expense rather than to the facilitating of procedure. The contention of the petitioner here would practically set aside the law by which reduction is not competent in the Sheriff Court, for it is plain enough that if the contention to which the Sheriff-substitute has given effect were sound, every debtor, when sued by an executor, could have a trial for setting aside the executor's title, and practically there might be a succession of inquiries in different Sheriffdoms. It is, I think, plain that no such thing was intended by the Legislature, and although the rule has been in operation for nearly half a century no such thing has ever occurred.

In my opinion the law by which documents may be set aside *ope exceptionis* in the course of proceedings—which has been most beneficial in its operation—was never intended, and is not in the enactments so expressed as, to apply to a document forming the basis of a party's alleged right of action or the basis of a defence against an attack on title, in neither of which cases could a decision on exception have any effect beyond the then proceeding litigation. It could not invalidate the document. The statutory change in the law was intended to enable a Judge, even in the inferior Court, to take out of the way what might be brought forward in a process, so as to exclude it from being of weight in the proceeding before him. The intention was to enable the Judge to purge out what might be produced to affect his mind, if, for instance, it could be shown that the deed was not what it bore to be, or was invalid for want of formalities in signature, or was vitiated by erasure. It was never intended to give the power to consider questions of weakness and facility in the case of a will or settlement, which would be setting up a different process inside a process, a course which would have the very opposite effect from the intention of the statute—namely, to simplify procedure.

It appears to me that the interlocutor of the Sheriff-substitute should be recalled, and that procedure in the case should be sisted to admit of the

petitioner, if so advised, taking proceedings in the proper Court to have the Nov. 29, 1912, settlement in question brought to the test of reduction.

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Donald.

LORD SALVESSEN.—This is an application presented under the Titles to Land Act, 1868, and the Conveyancing Act of 1874 in which the petitioner asks the Sheriff to find that certain facts are proved with regard to his relationship to the deceased Alexander Donald, and that he is entitled to procure himself infest in two heritable properties, belonging to the deceased but to which he had only a personal right. The petition was presented in the knowledge that the respondent is executor-nominate and general disponee of Alexander Donald under a will dated 17th October 1911, which is *ex facie* regular, and that he had been confirmed as such by the Sheriff of the county of Dumbarton. The petitioner is fully aware that standing the will in question he has no title at all to present the petition, and accordingly he challenges the validity of the will in the present process. He makes averments which the Sheriff-substitute has held to be relevant, to the effect that at the date of executing the will the deceased was weak and facile, and that it was impetrated from him by the respondent. The interesting question of procedure is whether it is competent in a process of this kind to set aside the will so far as it constitutes a bar to the granting of the crave of the petition. The Sheriff-substitute has held, although with some hesitation, that it is competent, and has accordingly allowed parties a proof of their respective averments relative to the will dated 17th October 1911, the petitioner to lead. It is this judgment which has been brought under review.

It was conceded by the petitioner's counsel that an action of reduction of a will cannot competently be brought in the Sheriff Court, but reliance is put upon Rule 50 of the First Schedule to the Sheriff Courts (Scotland) Act, 1907, which is in these terms: "When a deed or writing is founded on by any party in a cause all objections thereto may be stated and maintained by way of exception without the necessity of bringing a reduction thereof." This rule, which has the force of statute, only slightly differs from section 11 of the Sheriff Courts Act of 1877, the terms of which I quote for the purpose of comparison: "When in any action competent in the Sheriff Court a deed or writing is founded on by either party, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof." The argument for the petitioner to which the Sheriff-substitute has given effect is that the will in question is a "deed or writing," that the petition is a "cause" within the meaning of the rule, and that the will is founded on by a party in that cause. It is therefore maintained that the course which the Sheriff-substitute has sanctioned is expressly within Rule 50, and that, whatever inconvenience may result in any particular cause from the application of the rule, the Act of Parliament must be given effect to.

The objector's counsel argued that the petitioner was in effect trying to set aside the decree of confirmation, and that it was decided in the case of *Leggat Brothers*¹ that this is incompetent *ope exceptionis*, as a decree of

¹ 1912 S. C. 230.

Nov. 29, 1912. Court is not a "deed or writing" within the meaning of Rule 50. I agree with the Sheriff-substitute in rejecting this argument. What the petitioner is challenging is not the decree but the probative will on which it proceeds, and that a will regularly executed is a deed I think it is impossible to deny. Then again it was maintained that the rule applies only to actions in the ordinary Court of the Sheriff, and that a proceeding for completion of title is not an action in the ordinary Court. On this point also I am against the objector. The word "cause," although not defined by the statute, must, I think, be held to be equivalent to "action," and an action is defined as including every proceeding competent in the ordinary Sheriff Court. The very fact that Rule 1 exempts petitions like the present from the provision that they shall be commenced by initial writ appears to me to imply that the procedure otherwise shall be regulated by the First Schedule except in so far as it is prescribed by the statutes mentioned. No doubt it is a point in favour of the objector that there is no provision for making up a proper record in a petition for completion of title as there is in an ordinary Sheriff Court action, and that the Sheriff is entitled to dispose of the case summarily. *Prima facie* it would seem very inconvenient to try the validity of a will in an action where it was not imperative to have articulate statements as to the grounds on which it was attacked, and answers thereto. I am, however, unable to resist the view that this petition is a proceeding in the ordinary Sheriff Court as distinguished from the Small-Debt Court, or to find any substantial distinction between the meaning of the words "cause" and "action."

There remains, however, the question whether the will is founded on by a party in the cause within the meaning of Rule 50. In my opinion it is not. The object of section 11 of the former Act of 1877 and of Rule 50 was, I take it, to prevent a multiplication of procedure, and the cases in which it has been most frequently applied are where claims have been made which the defender pleads have been discharged under a writing which he produces. Such a receipt or discharge may no doubt be set aside by way of exception, but it is not, as Lord Moncreiff pointed out in the case of *Neil v. M'Nair*,¹ the foundation of the process, or, as here, the entire basis of the defence. Nor has it ever been held that section 11 or Rule 50 applies where the judgment of the Sheriff cannot be *res judicata* as to the validity of the deed or writing, or where the interests of other parties who are not parties to the cause, and cannot be compelled to appear, are concerned. I think it must be implied in Rule 50 that the objection which may be stated and maintained by way of exception is one which the Sheriff can finally dispose of, and that his judgment will supersede the necessity of bringing a reduction of the deed challenged. If it were otherwise, instead of obviating procedure, the section would have the effect of multiplying it. It so happens that in the present case the only person who is interested in maintaining the will is the objector; but a finding by the Sheriff in this action adverse to him as to the validity of the will would not prevent him recovering the moveable estate from persons indebted to the deceased, and there might conceivably be as many attempts to set

¹ 3 F. (J.) 85.

aside the will as there were actions raised against debtors to the estate. Nov. 29, 1912.

The importance of this is all the more apparent from the consideration that, by section 45 of the 1907 Act, Rule 50 is applicable to small-debt procedure. Donald v. Donald.

A person who, like the objector, is general donee and executor of a deceased person might have to face a challenge of the will in his favour in every small-debt action by means of which he sought to ingather the estate, and, as the Sheriff sitting in the Small-Debt Court is final, different judgments might be pronounced. The unfortunate executor, however, would have no means of silencing once and for all challenges of this nature, for I have never heard of an action of declarator being raised to declare that a will duly executed, and on which confirmation has proceeded in favour of the executor-nominate, was a valid title of administration. The result of sustaining the Sheriff's judgment would be, that, while an action of reduction of the will itself is admittedly incompetent in the Sheriff Court, what amounts to a partial reduction of it might be granted in any number of actions which the executor was compelled to raise with a view to the due administration of the estate, or in which he was sued by persons who laid claim to some part of the deceased's estate, to which, but for the will, they would be entitled. The difficulties are further increased if we conceive of the common case in which the executor or trustee is not himself beneficially interested in the estate, but where there are a number of legatees or beneficiaries. In an application such as the present the will might in fact be set aside so as to oust the true beneficiaries of the heritage without their having an opportunity of maintaining its validity. I think the Legislature did not contemplate any consequences so extraordinary and anomalous, but what it did contemplate was the production of a document in the course of a process the validity of which could be effectively determined in that process as between the only persons interested, and where such determination would obviate once and for all the necessity of an action of reduction.

On these grounds, therefore, I have come to the conclusion that the Sheriff-substitute has erred, and that we ought to recall the interlocutor appealed from. The objector expressed his willingness that an opportunity should be given to the petitioner, if so advised, to raise an action of reduction in a competent Court, and expressed his consent to the present action being sisted until it was seen whether the petitioner was prepared to take advantage of this opportunity. That proposal appears to me to be reasonable, and I think we ought to sist this process for a fortnight in order to give the petitioner such an opportunity.

LORD GUTHRIE.—I am of the same opinion.

THE COURT pronounced this interlocutor:—"Sustain the appeal, and recall the interlocutor appealed against; sist process to allow the petitioner, if so advised, to raise an action in any competent Court to reduce the trust-settlement alleged to have been granted by the deceased Alexander Donald; sist process accordingly for fourteen days from this date, and continue the cause."

No. 38.

LAWRENCE MELVILLE, Appellant.—*W. T. Watson.*DAVID ADAMSON, Respondent.—*Blackburn, K.C.—M. P. Fraser.*

Dec. 2, 1912.

Melville v.
Adamson.*Election Law—Lodger franchise—Procedure—Failure of claimant to appear after citation by objector—Discretionary power of Sheriff to refuse adjournment and admit claim.*

A person on the county register of voters for the current year as a lodger claimed to be entered on the roll for the ensuing year in respect of his occupancy of the same lodgings. His claim was opposed, though no specific objection was stated to it; and he was cited to appear at the Registration Court, but was not present. The agent of the objector moved for an adjournment in order that the claimant might be cited of new, but admitted that he was unable to state any change of circumstances with regard to the claim, or any new facts not before the Court when the claimant was formerly admitted.

Held that the Sheriff was entitled, in the exercise of his discretion, to refuse the adjournment and admit the claim.

Registration
Appeal Court.
Lord Dundas.
Lord Mac-
kenzie.
Lord
Skerrington.

At a Registration Court for the Eastern Division of the county of Perth, held at Perth on 2nd October 1912, David Adamson junior, Adylinn, Newton Street, Blairgowrie, claimed to be entered upon the Register of Voters for the division as a lodger in respect of his occupation of a bedroom at that address.

The Sheriff (Johnston) admitted the claim and, at the request of the objector, Lawrence Melville, stated a case for appeal.

The case set forth:—"The claimant was upon the Roll for the current year as a lodger in respect of occupation of this room. The claim was opposed on behalf of Lawrence Melville, solicitor, Errol, registered as a voter in said division; but no specific ground of objection to the claim was stated. An execution of citation of the claimant to attend the Court was produced. The claimant was not present. The agent for the objector moved for an adjournment in order that the claimant might be cited of new. I stated that I would grant an adjournment if the objector's agent was in a position to state that there was a change of circumstances or new facts not before the Court when the claimant was formerly admitted, which he desired to prove by securing the attendance of the claimant. The agent replied that he was not in a position to make such a statement. According to the course of practice which has long prevailed in the sheriffdom, a lodger claimant, who claims for the first time in respect of the premises, is not admitted to the Roll if he is objected to and fails to allow his opponent to sift his claim by attending the Court when required to do so. It was not suggested that the applicant had not been objected to on the occasion of his first admission. I refused an adjournment and admitted the claim."

The question of law was:—"Whether I was entitled to refuse an adjournment and admit the claim?"

The case contained a list of thirty-six other claimants for the lodger franchise, the circumstances of whose cases were precisely similar to those of Adamson.

The case was heard before the Registration Appeal Court on 2nd December 1912.

Argued for the appellant;—When a claimant who had been cited failed to appear at the Registration Court the proper course of procedure for an objector was to move for an adjournment of the diet,

and to cite the claimant to appear at the adjourned diet, either under second diligence or under a second citation, with certification that if he did not appear he would be held as confessed. This had been laid down in practically these words by Lord Ardwall in *Forrest v. MacIntyre*.¹ Accordingly the Sheriff ought to have granted the adjournment craved. The course adopted by the Sheriff was in effect to make the declaration annexed to the claim conclusive evidence of the claimant's qualification, whereas under the statute it was only *prima facie* evidence.² The Sheriff's decision was based upon a number of unwarranted assumptions. He assumed, in the first place, that the original claim had been opposed; in the second place, that the agent at present acting for the objector knew, or was bound to know, the grounds of the former objection; and, in the third place, that the objector either had no fresh evidence, or was not entitled to bring fresh evidence to prove his objection if the objection were the same and not a different one. There was nothing to prevent the objector either making a completely new case or attempting to prove the old case by better evidence.

Argued for the respondent;—The question of adjournment was one for the discretion of the Sheriff, and so long as he had not exercised that discretion in an arbitrary manner the Court would not interfere.³ The objector in the present case had virtually admitted that there were no new facts in the case, and had not suggested any ground for supposing that there had been any mistake or error in the former proceedings when the claimant was admitted. The objector's action here was apparently merely a vexatious attempt to harass his opponents.

LORD DUNDAS.—[After narrating the facts]—Now, I cannot say that the position taken up by the Sheriff was unreasonable, still less that it was illegal. The question of granting or refusing an adjournment is primarily one for the discretion of the Sheriff, and unless there are strong reasons for doing so, this Court will not interfere with that discretion. This was pointed out by Lord Ardwall in the recent case of *Forrest*,⁴ and my brother Lord Mackenzie there said (at p. 504), using language with which I entirely agree, "I should be slow to interfere with the exercise by the Sheriff of his discretionary power to grant or refuse an adjournment, unless a clear case of oppression were made out, which it is unnecessary to discuss here."

In the present case the claimant was on the Roll; he had *prima facie* a right to be there. The objector moved for an adjournment, but he did not support or explain his motion upon any specific ground. I do not think that a party is entitled to obtain an adjournment as matter of right, for the mere asking, in order just to see how things may turn out, or in the hope, and perhaps expectation, that the claimant may fail to appear at the adjourned diet, and may be held as confessed by the Sheriff. I think that very anomalous and unfair results might follow in Registration Court

¹ 1911 S. C. 496, at p. 501.

² Registration Amendment (Scotland) Act, 1885 (48 and 49 Vict. cap. 16), sec. 14.

³ *M'Kee v. Orr*, (1905) 8 F. 320, Lord Kinnear, at p. 321; *Forrest v. MacIntyre*, 1911 S. C. 496, Lord Ardwall, at p. 502.

⁴ 1911 S. C. 496.

Dec. 2, 1912. practice, if the appellant's contention was broadly sustained. Of course, if any specific case of hardship, or of anything approaching to oppression, could be alleged, it would be a different matter; but there is nothing of that sort here. I am for answering the question put to us in the affirmative.

Melville v.
Adameon.

LORD MACKENZIE.—I am of the same opinion. The question in this case is whether the Sheriff was entitled to refuse an adjournment. If he was not, then he was bound to grant one. Now, we have pointed out in various cases in this Court that the question of the reasonableness of a motion for an adjournment is always in the discretion of the Sheriff; and, unless a strong case is made out of unreasonable and unjust exercise of that discretion, this Court will not interfere.

It follows from the appellant's argument that, even in the case of a lodger who has been on the Roll for ten years consecutively, if an objector appears and says, "I object," without giving any explicit grounds for his objection, the Sheriff is bound, on a motion being made, to grant an adjournment to enable the objector to substantiate the objection which he has not defined. It is clear that the practical working of the Registration Courts would be greatly hampered if we gave any encouragement to such an idea. Previous cases make it apparent that there is a practice of citing claimants in order to gain some advantage, although the objector has no facts to justify his objection. I am therefore against giving countenance to any such general right of objectors. At the same time, there is no risk to legitimate objectors. For it is easy to come into Court with a specific ground of objection; and if, where such ground is stated, the Sheriff takes a course which prevents any legitimate objection being proved, then this Court would interfere. A claimant is sometimes cited by the objector to appear and all that is hoped is to gain some advantage from questioning him, or to get him struck off the Roll if he does not answer to the citation. In these Courts, it is well known, the business is actually conducted by the same agents year after year, and although any member of the public may appear, in practice that does not happen. I think that no encouragement should be given to the practice, to which I have referred, of objecting without any specific ground for doing so merely in the hope that the claimant will lose his vote by failing to appear in answer to a citation. In each case, whether the circumstances reasonably warrant a motion for adjournment is a question for the Sheriff's discretion. I therefore agree with the judgment proposed by your Lordship.

LORD SKERRINGTON.—I had some difficulty about this case during the discussion, but what has fallen from your Lordships has removed my doubts, and I therefore concur.

THE COURT answered the question in the affirmative.

ALEX. RAMSAY, S.S.C.—RUSSELL & DUNLOP, W.S.—Agents.

WILLIAM CRUICKSHANK (Mrs Garden's Executor) AND OTHERS,
Second Parties.—*Kemp—Macgregor.*

No. 39.

MRS AGNES GARDEN OR MORE AND OTHERS, Third Parties.—
Chree, K.C.—Dykes.

Dec. 3, 1912.

MRS ANNE M'GILLIVRAY OR GARDEN, Fourth Party.—*J. Macdonald.*

Garden's
Executor v.
More.

Succession—Destination to "heirs, executors, and assignees"—Mutual settlement.

A husband and wife executed a mutual settlement by which, "for the mutual love and affection which we bear to each other," the husband assigned and disposed to his wife, "in case she shall survive me, and to her heirs, executors, and assignees whomsoever," the whole estate of which he should die possessed, and the wife assigned and disposed to her husband, "in case he shall survive me, and to his heirs, executors, and assignees whomsoever," the whole estate of which she should die possessed. The spouses reserved power "to us and each of us during our joint lives to alter or revoke these presents." In exercise of this reserved power the husband made a will, in which, after providing for certain legacies, he bequeathed his whole moveable estate to his wife. The wife made no further testamentary disposition. The husband died first, and after the wife's death a question arose as to the destination of her property, which consisted solely of the estate which she had taken under her husband's will.

Held that the bequest by the wife in the mutual settlement to her husband, and to his heirs, executors, and assignees, was conditional upon his survival of her, and that, as he had predeceased, the destination did not take effect, and her property fell to her heirs *in mobilibus ab intestata*.

Baillie's Executor v. Baillie, (1899) 1 F. 974, followed.

Succession—Testament—Precatory Trust.

A testator bequeathed his moveable estate to his widow, and stated in his will his "desire" that at her death some part of the estate should go to his brothers' and sisters' families—"In particular, I should like not less than £50 sterling left to" his brother's widow, "and I desire that my wife may make a settlement providing for this." The testator's widow having died intestate, *held* that her executor was not bound to give effect to the testator's request.

JAMES GARDEN, sheepdealer, Aberlour, and Mrs Elizabeth Cruick-1st Division.
shank or Garden, his wife, on 20th November 1905 executed a mutual settlement in the following terms:—"We, James Garden, sheepdealer, Aberlour, and Mrs Elizabeth Cruickshank or Garden, wife of the said James Garden, considering it a duty incumbent on us to settle our affairs so as to prevent disputes after our respective deaths, and for the mutual love and affection which we bear to each other, have agreed to grant these presents in manner after written—that is to say, I, the said James Garden, do hereby give, grant, assign, and dispose to and in favour of the said Elizabeth Cruickshank or Garden, in case she shall survive me, and to her heirs, executors, and assignees whomsoever, All and Sundry my heritable and moveable estate, of whatever nature or denomination the same may be, which shall belong and be addebt to me at the time of my decease, with the whole writs, vouchers, and securities thereof; and in like manner, I, the said Elizabeth Cruickshank or Garden, give, grant, assign, and

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dispose to and in favour of the said James Garden, in case he shall survive me, and to his heirs, executors, and assignees whomsoever, All and Sundry my heritable and moveable estate, of what kind and denomination soever, which shall belong or be addebt to me at the time of my death, with the whole writs, vouchers, and securities of the same; and for the rendering this deed more effectual, we do hereby nominate and appoint the survivor of us to be the sole executor and universal legatory of such one of us as shall predecease, reserving always to us and each of us our respective liferents of the estates and effects above conveyed, with full power to us and each of us during our joint lives to alter or revoke these presents; and we dispense with delivery; and we consent to registration hereof for preservation. In witness whereof," &c.

In exercise of the reserved power of revocation, Mr Garden executed a last will and testament on 26th May 1909. He appointed trustees, conveyed to them his whole heritable and moveable estate, and directed them, after payment of debts and expenses, to make over to his wife all his free moveable estate. He further directed them to convey his heritage to a certain beneficiary, to whom he also left the fee of certain bank shares, but directed that his widow was to enjoy the liferent both of the heritage and of the bank shares. The will contained the following clause:—"It is my desire that at my wife's death some part of such estate as she may die possessed of should go to the families of my brothers and sisters, in particular I should like not less than £50 sterling left to the widow of my brother Alexander Garden, New Elgin, or her family, if she predeceases my wife, and I desire that my wife may make a settlement providing for this. I withdraw all former wills, and consent to the registration hereof for preservation. In witness whereof," &c.

Mr Garden died on 27th April 1911, and Mrs Garden died on 17th August of the same year. She never executed any writing of a testamentary nature other than the above-mentioned mutual settlement, and up to the date of her husband's death she was not at any time possessed of separate estate, the whole property of which she died possessed having been acquired by her under her husband's will.

Mr Garden's trustees, after paying the debts and expenses and satisfying the specific bequests, retained in their hands the residue of his estate, amounting to about £825, as questions had arisen as to the destination of this fund after Mrs Garden's death.

A special case was accordingly presented, the parties being (1) Mr Garden's trustees; (2) Mrs Garden's executor-dative and her heirs *in mobilibus*; (3) Mr Garden's heirs *in mobilibus*; (4) Mrs Agnes M'Gillivray or Garden, the widow of the testator's brother Alexander.

The second parties contended that the residue, being estate *in bonis* of Mrs Garden at the date of her death and the provisions by her in the mutual settlement having lapsed by the predecease of her husband, fell to her heirs *in mobilibus ab intestata*. The third parties contended that the mutual settlement, *quoad* the provisions made by the said Mrs Garden therein, was still operative, and that, on a sound construction thereof, they, as heirs *in mobilibus ab intestato* of Mr Garden, were entitled to the free residue of the estate of the said Mrs Garden. The second and third parties further contended that, on a sound construction of Mr Garden's last will and testament, the fourth party was not entitled to any payment from Mrs Garden's

estate. The fourth party contended that, on a sound construction of Dec. 3, 1912. the said last will and testament, she was entitled to have paid to her out of Mrs Garden's estate the sum of £50 sterling.

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The following were the questions of law:—“(1) Did the said Mrs Elizabeth Cruickshank or Garden die intestate, with the result that the second party, the said William Cruickshank, as her executor-dative, is now entitled to her whole moveable estate for the purpose of distributing it between himself and the other second parties as her heirs *in mobilibus ab intestata*? or (2) Did the bequest by the said Mrs Elizabeth Cruickshank or Garden, contained in the said mutual disposition and settlement, remain operative, notwithstanding the predecease of her husband, with the result that the third parties—the heirs *in mobilibus* of the said James Garden—are now entitled to the said moveable estate as conditional institutes in the bequest? or (3) Does the provision by the said James Garden in his said last will and testament, desiring his widow to leave £50 sterling to the widow of his brother, Alexander Garden, constitute that sum a debt upon the estate of Mrs Garden, and entitle the fourth party to payment thereof out of her executry estate?”

The case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Skerrington) on 9th November 1912.

Argued for the second parties;—(1) The question of the succession to Mrs Garden's estate was settled by the decision in *Baillie's Executor v. Baillie*.¹ The bequest in the mutual settlement expressly bore to be “for the mutual love and affection which we bear to each other.” It was intended therefore solely as a testamentary provision for the surviving spouse, and could not be held to import a conditional institution of his heirs, executors, and assignees if he predeceased. (2) With regard to the £50 legacy, it was not expressed as a condition upon which the wife was to take the husband's estate, and was therefore not a precatory trust. It was a mere recommendation which she had not carried into effect, and accordingly her executor could not act upon it.²

Argued for the third parties;—(1) The intention of the mutual settlement was “to prevent disputes after our respective deaths,” an expression which differentiated it from the deed which was under consideration in *Baillie's* case.¹ The settlement here was intended to regulate the succession to both spouses. There were really two settlements, and, as Mrs Garden had not exercised the power of revocation, her part of the settlement remained operative, and her husband's executors were entitled to the succession as conditional institutes. If *Baillie's* case¹ was indistinguishable, it required reconsideration, as the Court there had wrongly proceeded upon the case of *Findlay v. Mackenzie*,³ which dealt with a bond of provision to a wife in implement of the husband's natural obligation to support her. Here and in *Baillie's* case¹ the Court was dealing with the succession to the wife, who was under no obligation to provide for her husband; and effect ought to be given to the earlier cases of *Boston*

¹ (1899) 1 F. 974.

² *Barclay's Executor v. M'Leod*, (1880) 7 R. 477; *Hamilton's Trustees v. Hamilton*, (1901) 4 F. 266; M'Laren on Wills and Succession (3rd ed.), sec. 634.

³ (1875) 2 R. 909.

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v. *Horsburgh*,¹ *Halliburton, &c.*,² and *Clelland v. Allan*.³ (2) As to the legacy of £50, they adopted the argument of the second parties.

Argued for the fourth party;—(2) The expression of the testator's "desire" amounted to a condition binding upon the wife as a precatory trust. The present case was stronger than either *Barclay's*⁴ or *Hamilton's*.⁵ In *Barclay's* case⁴ the bequest was weakened by the words "I hope"; moreover the amount of the legacy was not specified. In *Hamilton's* case⁵ the expression of desire was coupled with the words "I do not think they [my children] will object," which prevented the desire being construed as a bequest.

At advising on 3rd December 1912,—

LORD PRESIDENT.—[After narrating the facts and reading the terms of the mutual settlement]—It is, of course, quite settled that mutual settlements like the one which I have just read are really testamentary and nothing else, and no one has argued to the contrary. Accordingly, after the husband's death, the wife took, not in respect of his mutual settlement, but in respect of his will, and she being dead and the estate having been *in bonis* of her, the natural result would be that it goes to her executors. But an argument was presented to us that the old mutual settlement acted, so to speak, as her will, and that by that mutual settlement she had disposed of all estate of which she might die possessed in favour of her husband and his heirs, executors, and assignees whomsoever; and that the husband being dead, the husband's heirs and executors came in as conditional institutes.

I do not think I need say more than that, in my opinion, the question is absolutely disposed of by the case of *Baillie's Executor v. Baillie*,⁶ and unless we are prepared to overrule that case—which we cannot do—I do not think we could decide otherwise. And I am bound to say that, although there is upon the authorities, and especially upon the older authorities, some difference, it seems to me that the rule in *Baillie's* case⁶ is most consonant with common sense. An old couple like this, leaving mutual fortunes to each other, do it entirely out of what the settlement says, viz., "mutual love and affection to each other," and they really do not think of each other's heirs at all.

The only other point was this, whether there was a right in the widow of the husband's brother, Alexander Garden, to get £50? I think there is no such right. It is quite possible to constitute a precatory trust which is binding upon an executor; but if estate is left to a person not as an executor but as a beneficiary, then it must be left with a clearly expressed condition in order to bind him.

Accordingly I propose that we should answer the first question in the affirmative and the second and third questions in the negative.

LORD JOHNSTON concurred.

The Lord President intimated that LORD SKERINGTON, who was absent at advising, also concurred.

¹ (1781) M. 8099.

² (1884) 11 R. 979.

³ (1891) 18 R. 377.

⁴ *Barclay's Executor v. McLeod*, 7 R. 478.

⁵ *Hamilton's Trustees v. Hamilton*, 4 F. 266.

⁶ 1 F. 974.

LORD KINNEAR and LORD MACKENZIE were present when the case was Dec. 3, 1912. advised.

Garden's
Executor v.
More.

THE COURT answered the first question of law in the affirmative, and the second and third questions in the negative.

SHARPE & YOUNG, W.S.—CUTHBERT & MARCHEANK, S.S.C.—
GEORGE FORSYTH, Solicitor—Agents.

THE TRUSTEES AND MANAGERS OF SCOTT'S HOSPITAL, Petitioners.—
Fleming, K.C.—Lippe.

No. 40.

Dec. 3, 1912.

Trust—Administration—Powers of trustees—Power of investment limited by trust-deed—Application to nobile officium of the Court for enlarged power.

Scott's
Hospital
Trustees.

A testator by his trust-settlement, after directing that a hospital should be endowed with the residue of his estate, stated it to be his "particular desire" that the money devoted to this purpose should be, and remain, invested in landed property, and that if any portion of such property should be sold, the proceeds should be invested in the purchase of other land. The trustees presented a petition to the *nobile officium* of the Court for power to sell a portion of the estate, and to invest the proceeds in "approved trust securities," by which method of investment they stated that a considerably larger income would be obtained than by the purchase of land.

The Court *refused* the petition, *holding* that they had no power to grant a relaxation of the specific restrictions on investment contained in the trust-deed.

ON 18th July 1912 the trustees and managers of Alexander Scott's Hospital, who were also the trustees under the settlement of Alexander Scott, who died in 1833, presented a petition to the Court for authority, under its *nobile officium*, to sell the lands of Craibstone in the county of Aberdeen, which formed part of the trust-estate, and to invest the proceeds "in approved trust investments." 2D DIVISION.

Alexander Scott by his settlement directed the residue of his estate (including the lands of Craibstone) to be devoted to erecting and endowing a hospital to be called "Alexander Scott's Hospital." The settlement further provided:—"And in respect it is my particular desire and intention that the residue of my means and estate which is to be applied for the purpose of this said mortification shall be vested and secured on landed property of such description as may be likely to produce the best and surest revenue, and to continue permanently fixed and settled on such landed property in all time thereafter: It is hereby provided that in case it shall appear to my said trustees above named, or those to be assumed as aforesaid, after they have maturely and deliberately considered the matter and had some experience of the yearly returns and probable increase of value from the wood and otherwise of my said estate of Craibstone, that it is not likely to be such a beneficial investment for the purposes of the mortification as some other landed property, it shall in that event be in the power of my trustees (after the expiration of the liferent provision in favour of my spouse or under the burden thereof) to sell and dispose of the said lands and estate of Craibstone by public roup or private bargain. . . . And thereafter my said trustees shall be bound and obliged as soon as conveniently can be done to invest and lay out the said residue and remainder of my estate in the

Dec. 3, 1912.

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purchase of other lands situated in the county of Aberdeen, if such can be reasonably had, and failing thereof, in any of the adjoining counties, and shall settle and secure the lands so to be purchased by a deed or deeds for the purposes of the mortification for the said hospital allenary."

The petitioners stated that they had received an offer for the purchase of Craibstone at a price which, if invested in approved trust securities, would increase the income of the trust-estate by over £200 per annum, and that it would not be profitable to reinvest the proceeds in the purchase of landed property as directed by the settlement.

In 1868 and 1905 private Acts of Parliament had been obtained by which the Trustees and Managers of Scott's Hospital were incorporated and further powers of administration conferred on them, but no change was thereby made on the powers of investment.

The petition was unopposed.

On 3rd September 1912 the Court remitted to Mr Walter Finlay, W.S., to report.

In his report the reporter indicated the view that the powers craved would be expedient in the interest of the trust, but suggested a doubt as to the competency of granting them, and referred to the undernoted authorities.¹

The case was heard before the Second Division on 3rd December 1912.

Counsel for the petitioners, besides referring to the authorities quoted by the reporter, cited the case of *Trustees of Cawin's Hospital*² to illustrate the effect of the restrictions contained in the trust-deed.

LORD JUSTICE-CLERK.—I fear that it is not within our power to do what is asked in this petition, and I think it is very much to be regretted, seeing that what is proposed is a very desirable thing indeed. But the donor of this estate has so very clearly expressed himself that we cannot do otherwise than follow his direction. In his deed he expressed himself to the effect that if, as he authorised, the estate of Craibstone was at any time parted with and converted into money then, as soon as convenient thereafter, his trustees should be bound and obliged to invest and lay out the residue and remainder of his estate in the purchase of other lands situated in the county of Aberdeen if such could be obtained without serious difficulty, and failing such, in any of the adjoining counties, to be settled and secured for the purposes of the mortification. Now, that is a very distinct and clear direction. I do not think it is in the power of this Court, merely because we think it expedient, to set aside the direction of the truster, against which nothing can be said except that it may not be possible to invest the money again in land so as to get the same or a better return than was got from Craibstone.

Dealing with the petition in that way, I think we must just follow what has been done in previous cases; and as the Lord President says in the case of *Berwick*,³—"The powers of trustees are defined by the trust-deed,

¹ Noble's Trustees, 1912 S. C. 1230; Berwick, (1874) 2 R. 90; Kinloch, (1859) 22 D. 174; Sharpe, (1823) 2 S. 203; Hiddleston's Trustees, (1906) 13 S. L. T. 705.

² (1842) 4 D. 556.

³ 2 R. 90, at p. 92.

and the Court will give no higher power. The trustees are not entitled to come to the Court for advice. If they have not the power given them by the deed, it is not competent for us to give it them." I do not think here the case is so serious as it might be in certain conceivable circumstances ; because, undoubtedly, there is a very easy mode of getting this matter settled, viz., by Provisional Order, though that would cost perhaps a little more money than would be expended in endeavouring to get a decision here. If we realise that the investment which is proposed would be one which would yield nearly a third more income than at present, it is very plain that the expense of getting a Provisional Order, which in a case like this would almost certainly be unopposed, would very soon be covered by the additional advantage obtained by investing this money in securities instead of in land.

Dec. 3, 1912.
 Scott's
 Hospital
 Trustees.
 Lord Justice-
 Clerk.

On the whole matter, while expressing the view that this is a very desirable proposal if we had the power to sanction it, which I regret we have not, I think we must dismiss the petition.

LORD DUNDAS.—I agree. I think the words of the trust-deed are so clear and specific that we have not the power to authorise the petitioners to invest the balance of the funds which they hope to receive in ordinary trust securities : I am afraid they are tied up to investment in land. I share your Lordship's regret in the matter, because it seems clear from the petition and the report that the sale to the North of Scotland College of Agriculture would be a good and proper transaction for the trustees to carry through ; and one would think that what they desire to do with the balance of the price is very sensible ; but I am afraid we have no power to sanction it. I am glad, however, to think that the petitioners can probably get what they want by another method.

LORD SALVESSEN.—I am of the same opinion. The footing upon which this proceeding is brought is that the trustees are under obligation, in terms of the truster's direction, if they sell Craibstone, as they are authorised to do, immediately to invest the proceeds in another landed property in the county of Aberdeen or the adjacent counties, and on the footing that it will be a more beneficial investment than if they should continue to hold Craibstone. They ask us to relieve them of that obligation imposed upon them by the truster.

If this case rested entirely upon the trust-disposition and settlement I think it would be incompetent for us to grant the application in the circumstances averred merely for the purpose of increasing the income of the trust, and not because the trust has in any respect become unworkable. It seems to me to be still more difficult when we find that there have been two Acts of Parliament by which this trust-disposition has been modified in important respects, but has not been affected as regards the point which is now before us. That looks very like an incorporation by Act of Parliament of the trust purposes which are not in terms affected by the Acts. I agree with both your Lordships in thinking that what the trustees propose to do under present conditions is eminently sensible ; but as they have got two Acts of Parliament in regard to this trust already I do not see why they

Dec. 3, 1912. should not obtain a third, especially looking to the extreme improbability of there being any opposition.

Scott's
Hospital
Trustees.

LORD GUTHRIE.—I am of the same opinion. The petition at first sight does not seem to raise the question which is really before us. It is titled a petition for authority to sell heritage; but it turns out that the trustees are not in any difficulty as to the sale of the heritage. The real question arises under that part of the prayer of the petition, in which the trustees ask authority to invest the proceeds of the sale of the heritage in approved trust investments. It seems to me that the question is really one arising on the terms of the trust-deed, as Lord Dundas put it; because, as I read the Acts of Parliament, especially the one quoted on page 3 of the petition, I think that, while introducing certain alterations, they say in effect that *quoad ultra* the trust-deed is to remain in full force. I concur in thinking that, whatever the truster's unexpressed intention may have been, the intention of the words of the trust-deed is unusually clear and comes to this, that for all time coming the estate of Craibstone was to remain as it was; or if it were sold the proceeds were to be permanently invested in landed property.

THE COURT refused the petition.

MACKENZIE & KERMACK, W.S., Agents.

No. 41.

JOHN PATERSON, Pursuer (Appellant).—*Blackburn, K.C.*—*J. R. Christie.*

Dec. 4, 1912.

ROBERT BROWN AND ANOTHER, Defenders (Respondents).—*D.-F. Dickson—Macmillan, K.C.—James Stevenson.*

Paterson v.
Brown.

Church—Seats—Allocation—Heritor—Family pew.

A right to a family pew in a parish church, created by allocation to a proprietor of lands in the parish, remains, until another allocation is made, with that proprietor and his successors, so long as they retain the major portion of the lands, whether they occupy the pew or not.

Observed (per the Lord President), "When there has been legal allocation the heritor's right to his family pew is exclusive . . . as to the right to sittings in it, and the right to furnish it, and to exclude all others at least until the bell for service has ceased to toll."

Church—Seats—Assignment of sittings—Proof.

Opinion (per the Lord President), that an assignment of sittings in a family pew can only be established by writing.

1st DIVISION.
Sheriff of
Lanarkshire.

ON 11th January 1910 John Paterson, residing in Greenock brought an action in the Sheriff Court of Lanarkshire at Glasgow, against Robert Brown, residing at Craighead, Blantyre, and Albert Edward Brown, residing at Beechcroft, Bothwell, craving the Court "To find and declare that the primary right to use the pew or seat, No. 94, in the area of the Parish Church of Bothwell belongs to the pursuer and his tenants in the said lands of Birkenshaw and others, and that exclusive of any right thereto, other than that of ordinary parishioners, on the part of the defenders or either of them; and that the pursuer has primarily the right of administration of the sittings in the said pew or seat; to interdict the defenders from using the said pew or

seat without permission from the pursuer, except to the extent to Dec. 4, 1912. which ordinary parishioners are entitled to do so, and from interfering with the pursuer in any way in his exercise of his said primary rights Paterson v. Brown. to use and administer the sittings in said pew or seat."

The pursuer averred ;—(Cond. 1) "The pursuer is heritably vest in the lands of Birkenshaw and others, in the parish of Bothwell and county of Lanark. The first defender is a wholesale spirit merchant, residing at Craighead, in the parish of Blantyre, and the second defender resides at Beechcroft, Bothwell, in the parish of Bothwell.

... " (Cond. 2) "At the last allocation of the seats in the Parish Church of the parish of Bothwell, which was made in accordance with the valued rent of the lands in the parish, there were allocated to the said lands of Birkenshaw the following sittings :—five sittings in pew No. 63, six sittings in pew No. 94 (being the whole pew), and nine sittings in pew No. 132 (being the whole pew). There have been attached to said pews for many years brass plates bearing the name 'Birkenshaw,' and the initials of the proprietor of the lands when the allocation was made. The lands to which the said sittings are allocated exceed 200 acres in extent." (Cond. 3) "Pew No. 94 has all along been the family pew of the proprietors of Birkenshaw, and as such was occupied by them, and those to whom they gave liberty of occupancy. The upholstery in it was their property." (Cond. 4) "Some years ago, as the late Mr James Paterson, the father of the pursuer, then the proprietor of Birkenshaw, was not permanently resident in the parish, the late Rev. Dr Pagan, who was then the minister of the parish, applied to him for liberty to grant sittings in pew No. 94. This liberty Mr Paterson granted, but only to Dr Pagan personally and during his own pleasure. He was not informed by Dr Pagan of the use made of the permission thus given. Denied that the first defender acquired any right in pew No. 94 in consequence of his having purchased or feued lands from the late James Paterson. The first defender's titles to such lands are referred to, beyond which no admission is made. He is called upon to produce said titles. Denied that the late James Paterson made an allocation in favour of the first defender of sittings in pew No. 94."

The defenders averred ;—(Ans. 4) "Denied, and averred a right to a portion of pew No. 94 was acquired by the senior defender years ago. For long the pew was unoccupied by any heritor, and was occupied by parishioners without specific title until about twelve years ago, when it was occupied by the defenders, and has since been occupied by them under the following circumstances :—The senior defender had feued from the late James Paterson (first) in 1872 1 rood 35 poles at Uddingston, part of his lands in the parish of Bothwell, and (second) in 1884 (a) 43½ poles, (b) 42 poles 5 yards, and (c) 3 roods 28 poles 4 yards, all parts of said lands in Uddingston in the parish of Bothwell. In 1884 the senior defender bought from the said James Paterson 2 acres 2 roods 2 poles 28 yards 8 feet, being other parts of the said James Paterson's lands in Uddingston in the parish of Bothwell. These lands so feued and purchased by the senior defender were and are parts of the lands in the parish of Bothwell which belonged to the said James Paterson in respect of which he was entitled to pew No. 94 in the Parish Church of Bothwell (if the same was allocated to him in or about 1834 when Bothwell Parish Church was rebuilt, which is not admitted). The senior defender's titles are produced and referred to. In virtue of said lands acquired

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by the senior defender he is entitled to some part of the pew No. 94 in the Parish Church of Bothwell as an heritor of the parish in trust for himself and his tenants. The senior defender built on said ground self-contained and other houses occupied by twenty tenants, whose rents are £787, as appearing on the Valuation-roll of the parish of Bothwell, a copy of which rent-roll is herewith produced. About twenty-two years ago the senior defender applied to the late James Paterson for an allocation to him of seats in the Parish Church in respect of said lands feued and purchased by the senior defender, and the said James Paterson allocated two sittings in pew No. 94 as a right or pertinent of the lands acquired by the said defender, with the further permission to use the rest of the pew No. 94 so long as the said James Paterson could not occupy it. This allocation was confirmed in writing, and was by the senior defender intimated to Dr Pagan, who stated that pew No. 94 was then occupied by William Ramsay, residing at Moss Park, Bothwell. Dr Pagan asked the senior defender as a favour not to dispossess Mr Ramsay, as he was an elder and a generous supporter of the church, and in respect thereof the senior defender did not exercise his rights in said pew No. 94 until Mr Ramsay removed to London about twelve years ago, since which time the defenders have occupied the same. The letter referred to has been mislaid and has not yet been found."

The pursuer pleaded ;—(1) The primary rights to use and administer the sittings in the said pew No. 94 being attached to the lands in which the pursuer is heritably vest, and the pursuer being thus entitled to exercise the said rights on behalf of himself and his tenants, to the exclusion of any right on the part of the defenders other than that of ordinary parishioners, decree of declarator and interdict should be granted as craved. (2) The defenders, or either of them, having no right or title to take possession of the said pew No. 94, interdict should be granted as craved. (3) Said pew No. 94, being the family pew of the pursuer, duly allocated to the lands in which he is heritably vest, he is entitled to the peaceable possession thereof to the exclusion of the defenders. (4) The church of the parish of Bothwell having been built prior to the year 1868, and the first defender not being on the roll of valued rent heritors of the said parish, or a valued rent heritor thereof, he is not entitled to an allocation of sittings in said church in respect of his ownership of the subjects mentioned in the defences. (5) *Separatim*, the defenders, having been offered by the pursuer accommodation in either of the seats allocated to the lands of Birkenshaw other than pew No. 94, are bound to rest satisfied with such accommodation while it is available for them. (6) The defences are irrelevant.

The defenders pleaded, *inter alia* ;—(4) The senior defender having right and title as an heritor to two sittings in the pew in question, the action is incompetent, and should be dismissed, with expenses. *Separatim*, the senior defender having right and title as an heritor to an unallocated portion of the pew in question, the action is incompetent, and should be dismissed, with expenses. (5) The defenders as parishioners being entitled to occupy any vacant seat in the parish church, the action is incompetent.

On 28th March 1910 the Sheriff-substitute (Thomson) granted declarator and interdict as craved.

The defenders appealed, and on 30th July 1910 the Sheriff (Millar) recalled the interlocutor appealed against, and dismissed the petition.

The pursuer appealed, and the case was heard before the First Dec. 4, 1912 Division on 19th and 20th June 1911.¹

On 13th July 1911, the Court, having ascertained from counsel at the bar that the pursuer did not renounce probation, recalled the interlocutors of the Sheriff and Sheriff-substitute *hoc statu*, and allowed parties a proof with reference to the averments in articles 2 and 3 of the condescendence.

Thereafter proof was led before Lord Mackenzie, the import of which is stated in the opinion of the Lord President, *infra*, pp. 296 *et seq.*

The case was further heard before the First Division (without Lord Johnston) on 20th November 1912.

The argument was opened by the respondents, who contended :—Independently of any question of a past allocation, the possession by the respondents of the pew in question, which had been proved, fell to be continued as the *status quo* until disturbed by a new allocation. Subsisting possession of pews in a parish church by feuars in the parish, or parishioners, could not be disturbed except by a new allocation of the whole area of the church.² In any event, the Court could not grant decree in the terms sought. There was no such thing as a "primary right" known to the law; and the interdict craved was in such terms as to be unenforceable.

Counsel for the appellant were not called on.

At advising on 4th December 1912,—

LORD PRESIDENT.—The present action is raised by the pursuer as proprietor of the lands of Birkenshaw, and as such a heritor in the parish of Bothwell, and his object is to vindicate his right to pew No. 94 in Bothwell Parish Church. It is resisted by the defenders, who assert a right to two sittings in said pew. The senior defender is not resident in the parish, but he is a feuwar holding a title from the pursuer's predecessor to four acres of land occupied by tenement houses which he lets out. The junior defender is resident in the parish of Bothwell, but not upon the lands of Birkenshaw.

The pursuer avers that pew No. 94 was allocated to the lands of Birkenshaw as the family pew. He states that he wishes to occupy the said pew and had requested the defenders (who had occupied it under temporary permission given by the pursuer's father to the then minister, and by him communicated to the defenders) to remove some cushions, &c., therefrom. This the defenders refused to do, and the action became necessary. The defenders assert their right to sittings in the pew—(1) upon the ground of a so-called allocation by the pursuer's father; (2) upon the right *quoad* the senior defender as a feuwar; and (3) upon the right *quoad* the junior defender as a parishioner.

¹ The following authorities were cited :—*Peebles v. Jardine*, (1903) 5 F. 932; *St Clair v. Alexander*, Nov. 21, 1776, F. C., M. App. "Kirk," No. 1, 2 Hailes, 719; *Duke of Roxburghe*, (1876) 3 R. 728, Lord President Inglis, at p. 734; *Duke of Abercorn v. Presbytery of Edinburgh*, (1870) 8 Macph. 733; *Macdonell v. Duke of Gordon*, (1828) 6 S. 600; *Duncan's Parochial Law*, 151.

² *Earl of Marchmont v. Earl of Home*, (1776) 2 Hailes, 734, M. App. "Kirk" No. 2; *St Clair v. Alexander*, Nov. 21, 1776, F. C., M. App. "Kirk" No. 1.

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The learned Sheriff-substitute, upon the fact of the allocation to the pursuer's author being (although not admitted on record) conceded at debate, and no writing being produced to evidence an "allocation" by the pursuer's father to the defenders, granted decree of declarator and interdict as craved. An appeal was taken to the Sheriff, who recalled that interlocutor and dismissed the petition. The learned Sheriff held that though the pursuer averred that pew No. 94 had been allocated to Birkenshaw, and that it "had all along been" (i.e., from the time of the allocation) the family pew, that was not an averment that the pew had been allocated as a family pew; and he went on to say, though no proof had been allowed, that there was no evidence that this was a family pew. Treating it as a non-family pew, he therefore held that the senior defender had a right in it as a feuar, and that therefore no declarator or interdict in the terms asked could be granted.

When the case, being appealed, came before your Lordships, at the first hearing you were satisfied that the Sheriff's reading of the averments in Conds. 2 and 3 was much too narrow and could not be supported; and that it was also out of the question to decide the case upon the footing that no evidence of No. 94 being a family pew had been produced, when no opportunity of producing such evidence had been afforded. Your Lordships therefore recalled *hoc statu* the interlocutor before mentioned and allowed the parties a proof of the averments as to No. 94 being a family pew. That proof was taken before Lord Mackenzie and is now before your Lordships, and counsel have been heard upon the import thereof.

The proof in my opinion establishes with absolute certainty that the seats in Bothwell Parish Church were allocated in 1834, and that pew No. 94 was allocated to the proprietor of the lands of Birkenshaw as the family pew. The evidence of Mr Sewell, the clerk to the heritors, with the relative document No. 39 of process—a document entitled "Sittings in Bothwell Parish Church"—would in my opinion be enough. The original heritors' minute-book is lost. But No. 39 comes from an almost equally good source. It is produced by the session-clerk. Once the allocation is finished, the session has more to do with the actual occupation of the church than the heritors. So that I cannot doubt that No. 39 was a correct copy of the original minute. Now it bears on the face of it that No. 94 is a family pew. The method of an allocation has been settled for all time since the decision in 1776 of *Earl of Marchmont v. Earl of Home*,¹ and it is not too much to say that almost every parish church in Scotland has been so allocated. Now that method was that each heritor, according to his valuation, had first a choice of a family pew, and then a second choice of so many more pews or seats as made up his share of the total area proportional to his valuation. This allocation bears on the face of it that things were gone about in this manner. Look at the list:

1. His Grace the Duke of Hamilton, by Robert Brown, Esq., and Robert Rutherford, Esq., W.S., the whole centre seat of gallery, No. 119; also in Nos. 120, 121, 122, 126, 127, 128, 18.
2. Walter Frederick Campbell, Esq., of Woodhall, by Mr Webster, his factor, No. 98; also in Nos. 95, 96, 97, and so on.

¹ 2 Hailes, 734, M. 7924, and App. "Kirk" No. 2.

Then 16. Andrew Jack, Esq., of Uddingston, No. 94; also in Nos. 132, Dec. 4, 1912.
63.

So that in every case we have first of all a pew allocated and then the expression "also in," which shows to my mind as clearly as anything can be that this allocation was according to the rule laid down in *Marchmont*,¹ namely, that you first got the family pew and then made up the total allotted seats in other pews.

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Ld. President.

Now Andrew Jack was the predecessor in title of the pursuer, and it is under his settlement that the pursuer takes his estate of Birkenshaw, Uddingston. I may say in passing that a sort of attempt in cross-examination to confuse the matter by suggesting that the estate of Birkenshaw proper does not correspond to the old possessions of Andrew Jack, who is not designed as of "Birkenshaw," but as of "Uddingston," is really quite beside the mark to anyone who is at all acquainted with the practice of Scots nomenclature. At the time of an allocation each heritor has his portion of the area allocated to him in proportion to his total share of the valued or real rent as the case may be (all the older allocations were on valued rent *de facto*), quite irrespective of the names of his lands in title deeds, and of the fact whether they consisted of one old estate or a congeries of various estates. As to his name, that would be as he was called at the time, and anyone who knows anything of Scotland can recall instances where at different times of a family history the territorial name of the family would be different. For instance, the Stewarts of Grandtully came to be commonly designated as the Stewarts of Murthly after Murthly became the chief family seat, though Grandtully was their oldest possession and was still in the family.

But the evidence does not end there. In the seats allocated to Andrew Jack there is a plate, "A. J. Birkenshaw," which is there to this day. Then in the evidence of Mrs Paterson, who is eighty years old, having been born in 1831, we have a history of the occupation of the pew 94 during the days of Mrs Jack, the widow of Andrew Jack, and under his settlement liferentrix of his estates, and then through the time of Walter Paterson, Mrs Jack's brother, and finally of James Paterson, the husband of the witness and father of the pursuer. There is, besides her testimony, ample testimony of other old people that No. 94 was occupied during all her time by Mrs Jack. Indeed there is no testimony the other way. It is true that there is evidence to the effect that Walter Paterson for many years sat in pew 63, being in disagreement with his brother. But Walter Paterson was only proprietor of the estate for a year, for Mrs Jack did not die until 1867, and Walter died in 1868. By the time he succeeded he had probably become accustomed to 63, and his early death scarcely left him time to change. Anyway, until the year 1882 the pew No. 94 seems not to have been occupied by any but Patersons. In that year they went away from the parish, and permission was given to Dr Pagan, the minister, to put other people in the seat, of which permission he availed himself. This is also borne out by the testimony of Mrs Pagan, widow of the minister, and by the lists of the actual condition of the occupation of the

¹ 2 Hailes, 734, M. 7924, and App. "Kirk" No. 2.

Dec. 4, 1912. seats produced by her and written in her deceased husband's handwriting. These show Patersons in exclusive possession up till 1875, and in occupation after 1878, the date of the heading of the list, for obviously the deletions would be made subsequently—probably in 1882. This book is, of course, no testimony as to legal right, but is good evidence as to actual occupation. It also bears out historically the occupation by Walter Paterson of No. 63.

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Now, if one comes to the conclusion that No. 94 is the family pew allotted to the proprietor of the lands of Birkenshaw, it seems to me that the case is virtually ended. The mere fact that since 1882 the family has not used it can make no difference. A right to a family pew created by allocation remains with the lands as the family pew until another legal allocation, and is not lost because the family do not sit there. There are many family pews in parish churches which are not used by the family, but that does not affect the legal right, or prevent the proprietor of the lands vindicating his right if he wishes to sit there.

Now, what is the defence proposed? It is, first, that a so-called "allocation" of two sittings in No. 94 was made by the father of the pursuer to the senior defender when he feued four acres of the estate. I say "so-called," for allocation is quite an improper word for such an arrangement. Allocation means allocation to a heritor by the heritors as a body by agreement, or by the Sheriff on a petition. But, treating the grant as an assignment by the pursuer's father to the senior defender of two sittings in No. 94, I agree with the Sheriff-substitute that such an arrangement could only be established by writing, and no writing is produced. Further, from the evidence I am satisfied that no such arrangement was ever contemplated. *Per se* it would be most unlikely that the proprietor of Birkenshaw should assign to a feuar of four acres two seats in his family pew of seven sittings in all. But on the evidence I have no doubt that the pursuer's account is correct, viz., that after the family had for the time left the parish they allowed the minister to have the disposal of the seats, and that it was he who permitted the defender to use them—a use which he has long ago given up, and which he does not really wish to continue.

Failing that argument, the next defence is based upon the senior defender's position as a feuar. Now, it is quite true that the family seat is not a piece of independent property; it cannot be separately conveyed away from the estate, and if the estate is parted with as a whole it will pass as part and pertinent without mention in the conveyance. But to feu four acres out of an estate of 200 is not to part with the whole, and so long as the major part of the estate remains with the original proprietor and his successors the family pew remains with it, until a new allocation. All this is distinctly stated by Mr Duncan in his work on Parochial Ecclesiastical Law, and is amply borne out by the authorities there cited. Counsel for the defenders sought to rely upon the case of *St Clair v. Alexander*.¹ But in the *St Clair* case¹ a large portion of the estate had been feued out and practical possession of certain seats allowed to the feuar. In this state of affairs no exclusive possession was adjudged to any of the parties involved,

¹ 2 Hailes, 719, M. App. "Kirk," No. 1.

St Clair of Roslin, Miss Alexander of Rosebank, and David Wilson of the Dec. 4, 1912.
 Roslin Inn. But the whole point of the case, as clearly brought out in the ^{Paterson v.}
 opinion of the Lord President as given in Hailes' report and in the inter- ^{Brown.}
 locutor as given in Morison, was that there never had been a legal allocation ^{Ld. President.}
 of the church; that consequently nothing but occupation could be looked
 at, and that that occupation had been common to all the parties concerned.

That when there has been legal allocation the heritor's right to his family
 pew is exclusive, is absolutely certain. When I say exclusive I mean
 exclusive as to the right to sittings in it and the right to furnish it, and to
 exclude all others at least until the bell for service has ceased to toll.
 Whether after that a person without a seat is entitled to seek admittance to
 an unoccupied seat has never been decided and need not be decided now,
 for I entirely agree with Mr Duncan, who says that a person who has a
 sitting of his own which he is entitled to occupy cannot insist upon enter-
 ing someone else's pew which is partially occupied, and the pursuer has all
 along been willing that the defender should have a sitting in any of the
 pews allotted to Birkenshaw except No. 94. The whole meaning of a
 family seat is that it is to be for the exclusive use of the family; the whole
 practice of churches—and some of your Lordships as well as myself are
 entitled to appeal to an experience of over fifty years in such a matter—is
 all the same way. The passage of Lord President Inglis's judgment in the
Jedburgh case,¹ which denies exclusive use to a heritor and his family, is
 relative, not to a family pew at all, but to the total area given to a heritor
 in the allocation of the total space in the church.

The other defender, who is a parishioner, i.e., lives in the parish but
 never enters the church, has really no defence at all, for if he could assert a
 right, allocation would be an empty ceremony.

It only remains to consider what should be the form of the decree to
 be granted. The procedure here, which has been started in the form
 now imperative in the Sheriff Court by initial writ, is not calculated to
 suggest exact words for the conclusions of a declarator. I am of opinion
 that there should be declarator of the pursuer's right to pew No. 94 as
 his family pew, and a negation of any right on the part of the defenders
 to sittings therein. By a sitting is merely meant a right to go there and
 exclude others before service begins, and it does not touch the question of
 the rights of anyone to ask for a vacant seat in order to occupy it during
 worship. And in view of the attitude and actings of the defenders, I think
 there should be interdict against their putting furnishings or books into the
 pew or entering themselves therein at any time previous to the commence-
 ment of public worship. In view of the perfectly reasonable offer which
 was made by the pursuer before litigation in the letter of 2nd July 1909
 and which the defenders refused, I think the litigation was necessary and
 justified, that the defenders have been wrong all through, and that conse-
 quently they must be held liable in expenses in all the Courts.

The Lord President intimated that LORD KINNEAR, who was absent at
 advising, concurred.

Dec. 4, 1912. LORD MACKENZIE concurred.

Paterson v. Brown. LORD JOHNSTON was present when the case was advised.

THE COURT pronounced an interlocutor in the following terms:—
 “Find and declare that the pursuer, John Paterson, has right to the pew No. 94 in the area of the Parish Church of Bothwell as his family pew, and that the defenders have no right to any sittings therein: Therefore interdict the defenders from putting furnishings or books into said pew, or entering thereinto at any time previous to the commencement of public worship,” &c.

ROSS SMITH & DYKES, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

No. 42. JAMES WILSON, Pursuer (Appellant).—*Constable, K.C.—J. H. Henderson.*

Dec. 5, 1912. JOHN SHEPHERD, Defender (Respondent).—*J. R. Christie—Fenton.*

Wilson v. Shepherd.

Interdict—Property in soda-water bottles—Participation in illegal use of property.

An aerated water manufacturer sought to interdict a drysalter from putting paraffin oil into bottles belonging to the pursuer. The pursuer averred that bottles belonging to him, and marked with his name, were lent by him to his customers in the course of his trade, and were brought to the defender by persons coming to purchase paraffin oil, and that at their request the defender put paraffin oil into the bottles, in the knowledge that the bottles were the property of the pursuer and that the pursuer objected to such a practice since it injured them for use in his business.

Held that the pursuer had relevantly averred participation by the defender in a wrongful use of the pursuer's property, which, if proved, would form a good ground for interdict against him; and proof *allowed*.

2D DIVISION. Sheriff of the Lothians and Peebles. ON 1st November 1911 James Wilson, aerated water manufacturer, Edinburgh, brought an action in the Sheriff Court at Edinburgh against John Shepherd, drysalter, in which (as amended) he craved the Court “to interdict the defender by himself, or by others acting for him or under his instructions, from putting paraffin oil or other liquid into bottles sent out by the pursuer to his customers, and embossed ‘James Wilson, Edinburgh,’ and known by the defender to be the property of the pursuer.”

The pursuer averred:—(Cond. 1) “The pursuer, who is a member of the Edinburgh and District Aerated Water Manufacturers’ and Beer Bottlers’ Defence Association, is an aerated water manufacturer, and carries on business at Gilmore Park, Edinburgh. The defender is a drysalter, carrying on business at 52 Fountainbridge there. . . .” (Cond. 2) “The pursuer, in carrying on his said business, is in the habit, in conformity with the universal custom of the trade among aerated water manufacturers in Edinburgh and throughout Scotland, of lending his bottles containing aerated waters manufactured by him to his various customers on the understanding that said bottles are, when empty, to be returned to the pursuer, whose property they remain, and that no other use is to be made of them. This practice

is well known to the defender. To facilitate the recovery of his bottles the pursuer uses bottles embossed, moulded, engraved, or otherwise impressed or marked with his name or his name and address, so as to be identified as the property of the pursuer. Said bottles are also stoppered with screw stoppers bearing the pursuer's name and address. The said bottles are expressly made for the pursuer and, as is well known to the defender, are never sold or alienated by him, but only lent to his customers as above described. The explanations in answer are denied. To ensure the return of bottles it is the practice of the trade, and of the pursuer, to charge a small deposit on each bottle so lent, which is repaid on the return of the bottles. This charge in no way represents the price of the bottle, nor is the transaction one of purchase and sale. Further, as a matter of convenience and by mutual agreement, aerated water manufacturers frequently collect each other's bottles from customers and take them to the Bottle Exchange, an organisation through which the bottles are subsequently distributed among their proper owners. It is for this purpose only that aerated water manufacturers accept, or are entitled to accept, bottles belonging to other manufacturers, and this practice in no way affects the rights of property in the bottles." (Cond. 3) "It has come to the knowledge of the pursuer that the defender for some time past has been filling bottles of the kind mentioned and belonging to the pursuer with paraffin oil and other liquid, and has been selling or supplying paraffin or other liquid contained in such bottles to his customers or the public. He also fills such bottles when tendered to him over the counter by customers who request him to fill them with paraffin oil or other liquid which they have come to buy. Such use by the defender of the pursuer's bottles is made without his authority or consent, and in knowledge of the fact that the bottles belong to the pursuer, and that the pursuer objects to such use being made of them." (Cond. 4) "In particular it is averred that the defender wrongfully filled pursuer's bottles with paraffin oil on the following dates, viz. :—[then followed averments of sales of paraffin oil by the defender on 30th and 31st October 1911 to Samuel Waugh and Andrew Forrest, both of whom were acting on the instructions of Peter Hope]. With reference to the statement in answer, explained that the pursuer having reason to suspect that the defender was making an improper use of his bottles complained to the Edinburgh and District Aerated Water Manufacturers' and Beer Bottlers' Defence Association, of which he is a member, that the Association instructed Peter Hope, its inspector, to investigate the matter, and that on the occasions mentioned Hope, in order to ascertain if the defender was in the habit of using the bottles in the manner complained of, instructed Waugh and Forrest, his assistants, to purchase paraffin from the defender and to tender the pursuer's bottles to be filled with it. At the time the defender did not know that Waugh and Forrest had any connection with the said Association or with the pursuer, and he dealt with them as strangers in the belief that they were independent members of the public. He did not know and did not ask whether the pursuer had consented to his bottles being filled with paraffin." (Cond. 5) "The defender was well aware that he was making an improper and illegal use of the pursuer's property, and one which was against the pursuer's wishes. The defender had previously been in the habit of filling aerated water bottles belonging to members of

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the said Association with paraffin and other liquids, and had been warned against the practice. In particular, on 7th October 1909, the defender filled with paraffin oil a large quart, embossed, aerated water bottle belonging to a member of the said Association and tendered to him by the said Samuel Waugh, and on 14th October 1909 the secretary of the said Association wrote to the defender in the following terms:—[a letter from the secretary objecting to the practice, and threatening interdict, and a letter from the defender in reply undertaking not to repeat the offence were here printed]. The acts of the defender which are complained of, and against a repetition of which interdict is sought, are in breach of the undertaking contained in said letter. On 10th March 1910 a printed placard or bill was delivered to the defender, intimating that proceedings would be taken against any person filling aerated water or beer bottles with paraffin oil or other similar liquids." (Cond. 6) "The use by the defender of bottles belonging solely to the pursuer, and embossed or marked as aforesaid, is both at common law and according to the custom of the trade a violation of the pursuer's right of property in said bottles, and is therefore wrongful and illegal. The defender is well aware of the fact that the pursuer and other aerated water manufacturers and brewers and beer bottlers in Edinburgh and district do not sell or alienate the bottles stamped with their name, and that no one can acquire a right of property in them or is entitled to make improper use of them without the consent of the owners." (Cond. 7) "By the defender's illegal actings the bottles are damaged most seriously for future use as aerated water bottles, and when they revert to the possession of the pursuer damage is done to other bottles in the wash-tub, causing the pursuer great trouble and expense. The pursuer's claim for damages in respect thereof is reserved. The pursuer, in view of the defender's disregard of the previous warnings referred to, is under serious apprehension that the defender will continue to use as his own property, or otherwise damage, bottles belonging to the pursuer as aforesaid, and in these circumstances the present action has been rendered necessary."

The defender averred:—(Ans. 2) "Not known and not admitted. Explained that it is the custom in the trade for shopkeepers who supply aerated waters to charge purchasers for the bottles in which such waters are contained. Said bottles thus become the property of the purchasers. Further, according to the custom of the trade, the said shopkeepers either purchase from manufacturers of aerated waters the bottles supplied, and receive repayment of the price on return of the bottles, or pay the price of such bottles as they do not return to the said manufacturers; and further, the aerated water manufacturers accept plain bottles and the embossed bottles of other manufacturers, whether members of the said Association or not, in exchange for their own embossed bottles supplied to customers."

The pursuer pleaded, *inter alia*;—(1) The defender having illegally and unwarrantably, and after having been warned of the illegality of his said acts, and in breach of his undertaking as condescended on, filled and used, and the pursuer being apprehensive that he will continue to so fill and use without his authority, bottles belonging to the pursuer, and embossed or marked with his name and address, and bearing his name and address on screw stoppers, all as condescended on, the pursuer is entitled to interdict as craved. (2) The pursuer having sustained and having reasonable cause to apprehend that he

will continue to sustain loss and damage through the unwarrantable and illegal acts of the defender as condescended on, is entitled to interdict, with expenses, as craved. Dec. 5, 1912.

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The defender pleaded, *inter alia*;—(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the initial writ, the action should be dismissed, and the interim interdict recalled, with expenses.

On 31st January 1912 the Sheriff-substitute (Guy) sustained the first plea in law for the defender and dismissed the action.

The pursuer appealed, and the case was heard before the Second Division (without Lord Dundas) on 8th and 15th November 1912.

Argued for the appellant;—The pursuer had averred a relevant case for inquiry. It was not disputed that the defender's customers were making a wrongful use of the pursuer's bottles when they brought them to be filled with paraffin oil. In putting the oil into the bottles, the defender also was making use of them, since that was an act committed by him in the exercise of his trade. Alternatively, he was participating in the wrongful use made by those who brought the bottles.¹ On either view he was liable to be interdicted. The question whether the defender had any duty to inquire as to the ownership of the bottles did not arise in this case, since the pursuer averred, and was prepared to prove, actual knowledge on the part of the defender. The defender could not avoid decree by challenging the pursuer's title to the bottles; or at least, having raised the question, could not object to its being decided in this action. As a matter of fact there could be no doubt on the point, since the bottles originally belonged to the pursuer, and he had done nothing to lead the defender to suppose that he had parted with the property in them.² It was immaterial that the only instances of actual filling were instances where the defender had been "trapped" into doing the act complained of. All that the pursuer required to show was "reasonable grounds of apprehension" that a wrong would be committed,³ and as evidence of this a "trap" was as good as a genuine sale. Such a method of procuring evidence was recognised in practice,⁴ and in the case of *Burns v. Turner*⁵ the session papers showed that the only offence committed was a "trap" sale to an agent of the Bottlers' Association, as in the present case.

Argued for the respondent;—The pursuer's case depended upon his having a right of property in the bottles. This was a disputed fact, and could not be decided in an action of interdict where the proper contradictor was not present. In any case interdict could not be granted because no instance was alleged in which the proprietary rights of the pursuer had been invaded,⁶ and there were no grounds for apprehending that such an invasion would take place.⁷ The only

¹ *Barr & Co. v. Mair & Dougall*, (1904) 21 R. P. C. 665, *per* Lord Kyllachy, at p. 669.

² *Mitchell v. Heys & Sons*, (1894) 21 R. 600; *Solomon v. Attenborough*, [1912] 1 Ch. 451.

³ *Hay's Trustees v. Young*, (1877) 4 R. 398, *per* Lord Ormisdale, at p. 401.

⁴ *Bass, Ratcliff, & Gretton, Limited, v. Laidlaw*, (1886) 13 R. 898; *Montgomerie & Co. v. Young Brothers*, (1904) 41 S. L. R. 241.

⁵ (1897) 25 R. (J.) 38, 2 Adam, 450.

⁶ *Warrand v. Watson*, (1905) 8 F. 253.

⁷ *Hay's Trustees v. Young*, 4 R. 398, *per* Lord Gifford, at p. 402.

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cases of filling averred were cases in which the owner of the bottles consented to the filling, in order to "trap" the defender, and this would not support a crave for interdict.¹ There was no averment of any specific instance of an intention to infringe the pursuer's rights.² The pursuer allowed the bottles to leave his possession and could not thereafter complain if they ceased to be treated as his property. The defender dealt with the bottles at the request of the person having the actual possession, and had no duty to inquire who was the true owner or whether the owner had consented to their being used for paraffin oil.³ If there was any question of wrongful use of the pursuer's property, the guilty person was the customer who brought the bottle to be filled, not the defender, for he never made use of the bottle at all. The damage, if any, to the pursuer was done by the customer, in returning the bottle to the pursuer unwashed. In any event the terms of the interdict in the crave of the initial writ were too wide.⁴ *

At advising on 5th December 1912,—

LORD SALVESSEN.—I confess that my first impression of this case was that the Sheriff-substitute had reached a sound conclusion, but after having had the benefit of a full argument, I have come to be of opinion that there is a case for inquiry. The pursuer has amended his crave for interdict so as to restrict it to cases where the defender by himself or others fills liquid into bottles which he knows to be the property of the pursuer and not of the persons who bring them to his shop. This amendment obviates a number of the criticisms which were directed against the crave as originally framed, but which appear to me to be more appropriate if and when interdict comes to be granted.

Even as the case is now presented, I agree with the Sheriff-substitute in holding that it is founded upon the right of property alone, and is not based upon the view that putting paraffin oil into a bottle made and used for aerated water practically destroys its commercial value. If the pursuer had desired to found his case on the latter view, he ought to have qualified the expression "or other liquid." This expression is not intended, and I think cannot be construed, as meaning liquid *ejusdem generis* with paraffin oil. The reason why the use of the pursuer's bottles as receptacles for paraffin oil is put in the forefront is to emphasise the interest which he has in preventing such use, for it was explained to us that it is for practical purposes impossible to eliminate all such bottles from the dozens that are washed together, and the failure to eliminate a single bottle may result in the others becoming tainted. If these averments are well founded the pursuer has a clear interest to insist on the interdict for which he seeks,

¹ Bass, Ratcliff, & Gretton, Limited, v. Laidlaw, 13 R. 898; Montgomerie & Co. v. Young Brothers, 41 S. L. R. 241.

² Woolley & Son v. Morrison, (1904) 6 F. 451.

³ Hollins v. Fowler, (1875) L. R., 7 E. & I. App. 757, *per* Blackburn, J., at p. 766.

⁴ Perth General Station Committee v. Ross, (1897) 24 R. (H. L.) 44; Pattison v. Fitzgerald, (1823) 2 S. 536.

* The terms of the interdict craved were amended in the course of the debate.

but his demand for interdict must still rest on the illegal or unauthorised Dec. 5, 1912.
use of his property.

Assuming the pursuer's averments to be well founded, I think it is plain Wilson v.
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that they disclose a relevant case against a customer who, after consuming Lord Salvesen.
the aerated waters which the pursuer supplies in the bottles embossed with his name, instead of returning the bottles and receiving back his deposit, proceeds to use them for other purposes. He has no right to retain the bottles after the contents have been consumed, and on tender of the deposit would have no defence to an action for delivery. There are, however, practical difficulties in the way of proceeding against customers, which are not so formidable when the action is taken against a retail merchant like the defender.

The real difficulty in the case is whether the unauthorised use of the pursuer's property is made by the customer alone, or whether in the circumstances averred the defender is not a party to it. It may be that the defender has no duty to inquire whether a bottle which a customer brings to him to be filled with paraffin oil is the property of that customer before complying with his request. On that matter I pronounce no opinion. In the ordinary case the possession of moveables implies property, but the pursuer offers to prove that the defender has been in the habit of filling bottles which he knew to be the property of the pursuer with paraffin oil although he has been warned not to do so, and has been informed of the injurious consequences which will in all probability result to the pursuer's trade. Now, I am unable to hold that such averments do not disclose a relevant ground of action. Assuming that the defender was the only dealer in paraffin oil in the district it is plain that without his active co-operation the injury of which the pursuer complains would not result. Further, it is the defender or someone in his employment who does the injurious act, that, namely, of putting paraffin oil into a bottle which he knows the customer has no right to use for that or any other purpose, and he does so in his own interest, as it enables him to effect a sale of a commodity in which he deals. I cannot in these circumstances hold that he is not a party to the use of the bottles, or that the pursuer is not entitled to a remedy against him.

It was further argued that as the only cases specifically averred on record as justifying the application were cases where the pursuer had sent men in his own employment to the defender's premises to have bottles belonging to himself filled with paraffin oil, he could not found upon these cases, as he must be held to have consented to the defender complying with his own request. I cannot assent to this argument. It is distinctly averred that the defender was ignorant that the messengers were pursuer's employees, and that he dealt with them as strangers. These cases are merely put forward as tending to prove that the defender followed a practice of filling customers' bottles with paraffin. But there is a further answer which I think is conclusive. In the defences the right to continue this practice is strenuously maintained, and it may be assumed that the defender will continue to do what he maintains to be within his rights, and what is certainly in accordance with his interests. There is thus a nice question of right to be determined which may quite well be tried in an interdict, for that is the

Dec. 5, 1912. appropriate remedy to prevent an apprehended wrong, even if no similar wrong has actually been committed. Assuming the averments in answer 2 to represent the defender's views, the pursuer has every reason to believe that he will act upon these views however detrimental such actings may be to the pursuer's trade.

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These last observations practically negative another argument which was presented, namely, that the question of right ought to have been determined in a declarator and not in a process of interdict. The circumstances may turn out to be such that the Court would deem it inexpedient to pronounce an interdict, but nevertheless there is the highest authority for holding that what is practically a declaratory finding as to the rights of the pursuer may competently be pronounced in a process of interdict although interdict is refused—*Perth General Station Committee v. Ross*.¹ I think, therefore, that we ought to recall the interlocutor of the Sheriff-substitute and remit to him to allow parties a proof of their averments.

LORD GUTHRIE.—I concur in thinking that this case must be sent to proof. The appellant avers that the respondent, for the purposes of his business, has for some time been filling paraffin into aerated water bottles brought to him by customers to be so filled, knowing that these bottles belonged at the time to the appellant; that the appellant forbade any use of his bottles by anyone, except in connection with his business as an aerated water manufacturer; and that the persons who presented the bottles to be filled with paraffin had no right to tender them for these purposes. It is not denied that the appellant, on similar averments, would have a good ground of action against the customers. But if the elements of knowledge above mentioned are established, it seems to me that there will be good ground for interdict against the respondent, as a person without whose active participation the alleged wrongful use of the complainer's property would not have taken place.

Whether the interdict should be limited, and, in particular, should be confined to the case of a liquid which is injurious to the use of the bottles by the appellant for the purposes of his business (in which case alone, it may be, the appellant would be able to show sufficient interest to entitle him to the remedy craved), need not now be determined.

On the two other questions raised at this stage of the case, I concur in Lord Salvesen's opinion.

LORD JUSTICE-CLERK.—I concur. I have all along been of opinion that this was a case for inquiry.

THE COURT sustained the appeal, recalled the interlocutor appealed against, and remitted the cause to the Sheriff to allow the parties a proof of their respective averments, and to proceed.

J. MILLER THOMSON & Co., W.S.—JAMES G. BAYSON, Solicitor—Agents.

¹ 24 R. (H. L.) 44.

COUNTY COUNCIL OF DUMFRIES, Pursuers (Respondents).—

No. 43.

*Clyde, K.C.—Hon. W. Watson.*PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF LANGHOLM, Defenders (Appellants).—*Wilson, K.C.—Morton.*

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Process—Appeal—Competency—Appeal against interlocutory judgment under Rivers Pollution Prevention Act, 1876 (39 and 40 Vict. cap. 75), sec. 11—Leave to appeal—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 28.

The Rivers Pollution Prevention Act, 1876, sec. 11, enacts that either party in any proceedings under the Act may appeal in the form of a special case from the decision of the Sheriff "in point of law or on the merits, or in respect of the admission or rejection of any evidence"; and that all enactments relating to appeals from decisions of Sheriffs and to the conditions of such appeals shall apply to an appeal in proceedings under the Act in the same manner as if such "appeal related to a matter within the ordinary jurisdiction of the Court."

The Sheriff Courts (Scotland) Act, 1907, sec. 28, has the effect of excluding appeal to the Court of Session against an interlocutory judgment of a Sheriff, unless, *inter alia*, leave to appeal has been granted by him.

Held (diss. Lord Salvesen) that the provisions of the latter section apply to appeals in proceedings under the Rivers Pollution Prevention Act, 1876; and that, accordingly, an appeal by special case against a decision of the Sheriff repelling certain preliminary pleas in such proceedings was incompetent as, although the Sheriff had himself stated the special case, leave to appeal had not been formally obtained.

THE COUNTY COUNCIL OF THE COUNTY OF DUMFRIES brought an action in the Sheriff Court at Dumfries against the Provost and Magistrates of the burgh of Langholm. The pursuers craved the Court to find that the defenders were committing an offence within the meaning of the Rivers Pollution Prevention Act, 1876, by permitting sewage to flow into the River Esk or its tributaries, and to ordain them to abstain from doing so.

2D DIVISION.
Sheriff of
Dumfries and
Galloway.

The defenders pleaded, *inter alia*;—(1) No title to sue. (2) The action is irrelevant. (3) The pursuers' statements regarding pollution are lacking in specification, and ought not to be remitted to proof.

On 29th January 1912 the Sheriff-substitute (Campion) pronounced an interlocutor repelling these pleas and granting leave to appeal; and the defenders having appealed, the Sheriff (Fleming), by interlocutor dated 29th February 1912, adhered.

Against this interlocutor the defenders appealed by special case to the Court of Session. As the pursuers declined to adjust the special case with the defenders, it was adjusted by the Sheriff on the application of the defenders.

The question of law in the case was:—"Was I right in repelling the first, second, and third pleas in law for the defenders and appellants, or any and which of them?"

The respondents having objected to the competency of the appeal,*

* The Rivers Pollution Prevention Act, 1876 (39 and 40 Vict. cap. 75), enacts:—Sec. 11 (as applied to Scotland by sec. 21). "If either party in any proceedings before the [Sheriff Court] under this Act feels aggrieved by the decision of the Court in point of law or on the merits, or in respect of the admission or rejection of any evidence, he

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the case was sent to the Short Roll under reservation of the question of competency. Counsel were heard on the competency of the appeal and on the merits before the Second Division (without the Lord Justice-Clerk) on 13th November 1912.

Argued for the respondents;—The appeal was incompetent. (1) Section 11 of the Rivers Pollution Prevention Act, which allowed appeal, but only in the form of a special case, applied only to summary orders restraining the commission of an offence, pronounced in terms of section 10 of the Act. There was no appeal competent against interlocutory judgments; if it were otherwise, the door would be open to deliberate obstruction by means of a multiplicity of appeals. In the case of *County Council of Lanark v. Magistrates of Airdrie*,¹ on which the appellants founded, the appeal was from a decision as to the substantial merits of the case. It afforded no authority for the view that appeal might be taken from interlocutors that were not final; and that view was inconsistent with the policy of the Act. (2) In any case, section 11 of the Act provided that all the enactments as to Sheriff Court procedure should apply to such appeals; and this introduced section 28 of the Sheriff Courts (Scotland) Act, 1907.² By that section, as the appellants had not obtained leave to appeal, the appeal was incompetent. The fact that the Sheriff had settled the special case on the application of the appellants was not equivalent to obtaining leave to appeal; and the appeal had not been noted as required by the Sheriff Courts Act.³

Argued for the appellants;—(1) Section 11 of the Rivers Pollution Prevention Act did not exclude appeals against interlocutory judgments; and the observations in the opinions in *County Council of Lanark v. Magistrates of Airdrie*,¹ and the subsequent history of that case⁴ showed that the right of appeal under the Act was not in any

may appeal from that decision to the [Inner House of the Court of Session]. The appeal shall be in the form of a special case to be agreed upon by both parties or their attorneys, and if they cannot agree, to be settled by the [Sheriff] upon the application of the parties or their attorneys. . . . Subject to the provisions of this section, all the enactments, rules, and orders relating to proceedings in actions in [Sheriff Courts], and to enforcing judgments in [Sheriff Courts] and appeals from decisions of the [Sheriffs], and to the conditions of such appeals, and to the power of the superior Courts on such appeals, shall apply to all proceedings under this Act, and to an appeal from such action in the same manner as if such action and appeal related to a matter within the ordinary jurisdiction of the Court. . . ."

The Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), enacts:—Sec. 28. "Subject to the provisions of this Act it shall be competent to appeal to the Court of Session against a judgment of a Sheriff-substitute or of a Sheriff, but that only if the value of the cause exceeds £50; and the interlocutor appealed against is a final judgment, or is an interlocutor . . . (c) against which the Sheriff or Sheriff-substitute, either *ex proprio motu* or on the motion of any party, grants leave to appeal: Provided that any exclusion or allowance of appeal competent under any Act of Parliament in force for the time being shall not be affected by this or the preceding section."

¹ (1906) 8 F. 802.

² 7 Edw. VII. cap. 51.

³ Sheriff Courts (Scotland) Act, 1907, First Schedule, Rule 93.

⁴ (1907) 44 S. L. R. 915, *aff.* 47 S. L. R. 508, [1910] A. C. 286. Reference was also made to *Magistrates of Portobello v. Magistrates of Edinburgh*, (1882) 10 R. 130.

way limited except as to the mode of appealing. (2) The provisions of section 28 of the Sheriff Courts Act¹ did not apply to the appeals specially provided for under the Rivers Pollution Prevention Act, and leave to appeal, therefore, was not required. The present appeal was in the same position as an appeal under the Workmen's Compensation Act, 1906,² and leave to appeal was not required in that case. But even if leave to appeal were held to be necessary, the settlement of the case by the Sheriff on the application of the appellants was equivalent to the granting of leave to appeal.

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At advising on 5th December 1912,—

LORD DUNDAS.—We have here an appeal in the form of a special case stated by the Sheriff of Dumfries and Galloway under the Rivers Pollution Prevention Act, 1876. The respondents (pursuers in the Sheriff Court proceedings) are the County Council of the county of Dumfries. The defenders (appellants) are the Provost, Magistrates, and Councillors of the police burgh of Langholm. An objection to the competency of the appeal is taken by the respondents. The interlocutor of the learned Sheriff which the appellants seek to bring under our review is dated 29th February 1912. The Sheriff thereby adhered to an interlocutor of the Sheriff-substitute (which repelled certain preliminary pleas for the defenders directed against the pursuers' title to sue, and the relevancy and specification of their averments), and remitted the case to the Sheriff-substitute to proceed. The objection to the competency is that this interlocutory appeal, though it is in the form of a special case as directed by the Rivers Pollution Act, cannot be entertained because it is brought without leave asked of and granted by the Sheriff. I think the objection is well founded, and must be sustained.

The Rivers Pollution Act, 1876, which, though applicable to Scotland, is conceived to a great extent in language presumably more familiar to an English than to a Scots lawyer, enacts (section 10) that the County Court (Sheriff Court) having jurisdiction in the place where any offence against the Act is committed, may "by summary order" require any person to abstain from the commission of such offence, and may require him to perform any statutory duty in respect of which he is in default, subject to such conditions as the said Court may think right to insert in the order, with power to the Court, previous to granting such order, to remit to skilled persons to report. Section 11 enacts that "if either party in any proceedings before the County Court" (Sheriff Court) "under this Act feels aggrieved by the decision of the Court in point of law or on the merits, or in respect of the admission or rejection of any evidence, he may appeal" to either Division of the Court of Session. "The appeal shall be in the form of a special case"; and there are further provisions, which I shall presently quote, as to the mode of procedure in such appeal. Reading these sections, I should infer the policy of the Act to be that the appeal in the form of a special case is intended to bring up "the decision" of the lower Court, with all or any of the pleas in law, or on the facts as found by the Sheriff, after the substance of the case has been determined. The

¹ 7 Edw. VII. cap. 51.

² 6 Edw. VII. cap. 58, Second Schedule, 17 (b).

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"decision" is to be "by summary order." It is obvious that it may often be to the interest of defenders who are charged with some offence under the Act to avail themselves, for the mere sake of delay and putting off the evil day, of every right of appeal they can legally resort to. If the appellants' argument is correct, there might be a series of appeals by way of special case brought, as matter of right, upon successive points of law, fact, or procedure. I do not think the Act contemplated this.

Apart, however, from considerations of general policy, it seems to me that we must decide this question of competency having regard to section 11 of the Rivers Pollution Act and to the existing legislation as to appeals to this Court from the Sheriff Court. I think that section 11 must be read as one consistent whole, and not, as was suggested, to the effect that the first part of it, which I have already quoted, gives an absolute statutory right of appeal in no way limited or affected by what is contained in the later part of the section which I now quote. It provides that "subject to the provisions of this section"—i.e., as I read these words, subject to the appeal being duly taken in the form of a special case—"all the enactments, rules, and orders relating to proceedings in actions in County" (Sheriff) "Courts . . . and to the conditions of such appeals, and to the power of the Superior Courts on such appeals, shall apply to all proceedings under this Act, and to an appeal from such action in the same manner as if such action and appeal related to a matter within the ordinary jurisdiction of the Court." In other words, an appeal from the Sheriff Court under section 11 is declared to be subject, apart from the special form in which it must be stated, to all enactments relating to appeals in ordinary Sheriff Court actions. Now, the Sheriff Courts (Scotland) Act, 1907 (section 28) defines what interlocutors other than "a final judgment," may be appealed to this Court; and these, besides interim decrees for payment and decrees of sist, are interlocutors "against which the Sheriff or the Sheriff-substitute, either *ex proprio motu* or on the motion of any party, grants leave to appeal." The proviso which follows has in my judgment no application here; for the Rivers Pollution Act makes no "allowance of appeal" except subject to the provisions above quoted. It seems to me clear that an interlocutory appeal like the present, though stated in the form of a special case, is not competent without leave.

The appellants sought to derive aid from what happened in *County Council of Lanark v. Magistrates of Airdrie*.¹ All that that case decided was that in proceedings under the Rivers Pollution Act an appeal in ordinary form is incompetent; it must be in the form of a special case. The Sheriff's interlocutor which it was there sought to review, though not technically a "final judgment," disposed substantially of the merits of the case, for he found that the defenders admitted that they were permitting sewage matter to fall or flow into the streams condescended on, and were thus committing an offence under the statute; repelled nine out of the ten pleas in law for the defenders; reserved meanwhile their eighth plea and, before making a remit as directed by section 10 of the Act, appointed parties to be heard as to the terms of the remit. The First Division held that the appeal was

incompetent. The Lord President in the course of his opinion made Dec. 5, 1912. observations which seem to me to harmonise with what I have said as to the presumed policy of the Act and the scope and effect of an appeal in the form of a special case. But the present appellants found upon some *obiter dicta* in the opinion of Lord M'Laren. His Lordship pointed out that the interlocutor, not being a final judgment on the merits, could not, as the legislative provisions about appeals then stood, be appealed in the ordinary course, but towards the conclusion of his opinion he stated the view that "the Act does not limit the remedy to one appeal only, for on a question of the rejection of evidence, if the appeal were successful, the case would have to go back to the Sheriff for the evidence to be completed." So far I agree with Lord M'Laren, but I do not gather that he meant that if objection is taken in the course of a proof in the Sheriff Court to the admission or rejection of evidence, the proof must there and then be adjourned until an appeal in the form of a special case upon that objection is decided by this Court, and be thereafter resumed. I apprehend that, the objection being duly noted, the proof would proceed, and the objection could be subsequently considered—either separately, if it were the sole matter of appeal, or along with such other points in law or on the merits as it was desired to bring up for review—by an appeal in the form of a special case afterwards properly presented to this Court. I agree with Lord M'Laren that if the appeal were successful upon a point as to evidence which the Sheriff had improperly rejected, the case would have to go back to the Sheriff Court, and that a second appeal might, in that event, be necessary, and would be competent. But Lord M'Laren went on to say that he considered that, the Sheriff having disposed of a point of law, the appellants' remedy under the circumstances was by means of an appeal in the form of a special case. That question, however, as his Lordship expressly added, was not before the Court, which had no special occasion to consider section 11 closely in relation to the kind of question with which we are now dealing. Lord Kinnear, after summarising the provisions of the section, said: "But that is all to be 'subject to the provisions of this section'; that means that a party is to have the benefit" (and I venture to interpolate "and be subject to the inconveniences, if any") "of all the existing enactments, provided he takes his appeal in the form provided by this section, and not otherwise." This seems to be entirely in accordance with my view of section 11 already expressed. Lord Kinnear added: "I therefore think that in this form the appeal is incompetent, but the appellant's remedy is not thereby taken away, for he can raise all his points on appeal by way of special case, on a proper application to the Sheriff for that purpose." I understand his Lordship to mean that, though the appeal as presented was incompetent, the appellants might competently raise all their points on an appeal by special case brought at the proper time for that purpose. The subsequent history of the *Airdrie* case¹ discloses that the Sheriff's interlocutor was in fact subsequently brought under the review of the First Division and the House of Lords by an appeal in the form of a special case, but no question of competency was raised or considered.

¹ See 44 S. L. R. 915, *aff.* 47 S. L. R. 508, [1910] A. C. 286.

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Lord Dundas.

I think nothing that was said or done in the *Airdrie* case¹—to which I have referred at such length on account of the insistent arguments upon it at our bar—affords any warrant for the proposition that, as matters stood prior to 1907, an interlocutor dealing solely with preliminary points such as title to sue and relevancy could competently form the subject of an appeal to this Court under section 11 of the Rivers Pollution Act. It seems to me doubtful whether any interlocutor other than a final judgment could have been so brought up for review, and some confirmation of that view is found in the procedure adopted by a very experienced Sheriff of Midlothian in the *Portobello* case.² Sheriff Davidson added a note to his interlocutor stating that he had “decerned in the matter of expenses at this stage to enable the defenders to appeal the case immediately.” But however this may be, the present question must, as I think, be decided upon a construction of the existing Act of 1907 and of section 11 of the Rivers Pollution Act; and construing these enactments, I think it is reasonably clear that an interlocutor such as we have here to consider cannot be appealed against without leave, even in the form of a special case. There is no hardship in this result, for the whole pleas of parties can always be brought up as matter of right at the proper time, and if peculiar reasons pointed to the advisability of a special case upon preliminary questions alone, the Sheriff might grant leave for such an appeal; or the course prescribed at the close of section 11 of the Rivers Pollution Act might be resorted to, and an application made at the initial stages of the proceedings, for their removal into the Court of Session, as was done in the recent *Midlothian* case.³

I should, perhaps, notice in conclusion a suggestion rather faintly made by the appellants’ counsel to the effect that, if leave was necessary here, it must be held to have been granted as matter of inference, from the fact that the Sheriff has stated a case. This, I think, will not do at all. An appeal must be duly noted in writing (see Rule 93 in the First Schedule to the Act of 1907), and when the Sheriff’s leave is necessary, and he is willing to grant it, he must do so in writing. Here there is no written note of appeal, and no signification in writing by the Sheriff that he either grants or refuses leave to appeal. I infer that the learned Sheriff desired to leave the whole question of competency for the decision of this Court.

For the reasons now stated, I think we must sustain the objection to the competency of this appeal.

The case was sent to the Summar Roll to be heard, reserving the question of competency. For the sake of convenience, and to avoid unnecessary expense, we heard counsel upon the merits of the appeal. It may be permissible, especially as one of your Lordships is of opinion that the appeal is competently before us, to say in a word that the appellants’ case appeared to me to possess no merits at all. The argument in support of it was in my judgment, and I believe in that of both my brethren, barely stateable.

¹ 8 F. 802.

² 10 R. 130, at p. 133.

³ *Midlothian County Council v. Pumpherston Oil Co., Limited*, (1902) 4 F. 996, (1903) 5 F. 700.

LORD SALVESEN.—I cannot help regretting that a difficult question of Dec. 5, 1912. competency should have been raised in an appeal which admits of easy decision on its merits; but as we cannot proceed to consider the merits until we have held the appeal competent, and as the argument against the competency was strenuously maintained, it is our duty to decide it.

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The right of appeal in proceedings before the Sheriff presented under the Rivers Pollution Prevention Act, 1876, depends upon the construction of section 11. The First Division in the *Airdrie* case¹ held that these provisions are exhaustive and exclude the common law right of appeal. A statutory form of appeal by way of a special case is provided instead. Provided this form of appeal is used, any party aggrieved by "the decision of the Court in point of law or on the merits, or in respect of the admission or rejection of any evidence, may appeal from that decision" to the Court of Session. It was maintained that this clause must be read along with the previous section, which deals with the Sheriff pronouncing an order requiring a person to abstain from the commission of an offence under the Act and the conditions on which it is granted, and that "the decision of the Court" referred to in section 11 means either a final decision, or, at all events, one which settles the main controversy between the parties. I am unable so to read it. Such a decision would be a decision on the merits, but the appeal allowed embraces decisions on points of law in addition to decisions on the merits. In the present case the Sheriff has repelled a plea of no title to sue, which is a decision on a point of law. It can therefore, in my opinion, be properly brought up for review by means of a special case.

The view that I have arrived at appears to me to be in accordance with the opinions of Lord M'Laren and Lord Kinnear in the case I have already referred to. After referring to the terms of the Act, Lord M'Laren said: "I think it follows that the Act does not limit the remedy to one appeal only, for on a question of the rejection of evidence, if the appeal were successful, the case would have to go back to the Sheriff for the evidence to be completed. But here the Sheriff has disposed of a point of law; and if I were entitled to advise the appellants, I should advise that their remedy under the circumstances was by means of an appeal in the form of a special case"; and Lord Kinnear, after holding that an appeal in common form was incompetent, said: "But the appellant's remedy is not thereby taken away, for he can raise all his points on appeal by way of special case, on a proper application to the Sheriff for that purpose."

It is interesting to note that Lord M'Laren's advice was taken; and an appeal by way of special case was afterwards presented and entertained without objection, under circumstance which are, in my opinion, indistinguishable from those that are present here. No doubt the point that was argued before us was not taken; and the observations of the two Judges quoted above were *obiter*, so that there is no binding decision on the matter; but I agree with these observations, and I think the subsequent history of the *Airdrie* case² shows that they were understood by the parties as substantially settling the question of the competency of an appeal on a point of law before there had been inquiry.

¹ 8 F. 802.

² 44 S. L. R. 915, *aff.* 47 S. L. R. 508, [1910] A. C. 286.

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Lord Salvesen.

I would only add further that a decision on the merits may involve questions of law as well as questions of fact; but I think the Act intended to give a right of appeal on incidental questions of law which might arise before the merits were reached. There can be no better illustration of this than a decision repelling or sustaining a plea of no title. I am not moved by the suggestion that it is inconvenient to have appeals to this Court from interlocutory judgments, and that the right of appeal is liable to be abused for the sake of obtaining delay. The same observation might be made with regard to the provisions of the recent Sheriff Courts Act, which represents the mature views of the Legislature as to the decisions of the Sheriff which it is considered desirable should be appealable to the Court of Session. But the inconvenience is not all on one side. Nothing, for instance, could be more unfortunate than that there should be inquiry into the merits when it might turn out in the end that the pursuer had no title to sue.

It is not necessary, however, further to elaborate this matter, as I understand both your Lordships to hold that this appeal is incompetent on the second ground argued, namely, that the Sheriff has not granted leave to appeal, and that the interlocutor appealed against, if it had been pronounced in an ordinary action, would not have been appealable without such leave. I fully recognise that such a restriction upon the right of appeal where the decision is not final might be very desirable, as the Sheriff would presumably not grant leave unless he considered there was a real question of law to be decided, and so mere dilatory appeals would be excluded. The question, however, is whether the proviso at the end of the section introduced this limitation on the statutory right of appeal already conferred by the earlier part. When one turns to the Sheriff Courts Act, 1907, I think it will be found that no provision is made for an appeal in the form of a special case. The rules of procedure connected with appeals, so far as they were founded on by the respondents, all deal with appeals in ordinary course. Where an interlocutor is appealable to the Court of Session without leave, all that the appellant has to do is to write upon the interlocutor sheet or on a separate paper a note of appeal. He does not need to consult the Sheriff; and when the note of appeal has been duly signed, the process is transmitted by the Sheriff-clerk to the Court of Session. Where the interlocutor is one which requires leave, the appellant must ask and obtain leave within four days of its signature. This procedure does not appear to me to be applicable to an appeal in the form of a special case. I understand that your Lordships are prepared to hold that an application for a special case should take the place of an application for leave to appeal. I see no warrant for so adapting the language of the Sheriff Courts Act to circumstances to which it does not apply. It is only after the parties have failed to agree on the form of a special case that under the Rivers Pollution Prevention Act an application falls to be made to the Sheriff to state a case. If parties agree, the Sheriff is not asked to intervene, and there is no time limit within which the case falls to be adjusted. I fail to see, therefore, how the rules relating to an appeal of a totally different kind can be made applicable to this special form. On the same footing, it would seem to follow that if the appealing days prescribed for an ordinary appeal have expired before the special case has been adjusted, the appeal would be

incompetent. The ordinary rules prescribed by the Sheriff Courts Act Dec. 5, 1912. become still more difficult to apply in the case of an appeal founded on the rejection or admission of evidence. Is the statutory right of appeal to ^{Dumfries} County Council v. ^{Langholm} Magistrates. depend in this case also on leave being granted? I apprehend that would be to take away the right of appeal expressly conferred in probably a majority of the cases to which it applied. It was suggested that the proof before the Sheriff would have to be stopped so as to admit of a special case being presented to determine the validity of the Sheriff's finding on the question of his rejection or admission of the evidence. I do not agree. I think the Sheriff would continue to take the proof so far as he held it competent; although in the ordinary case it might be well for him to delay issuing his decision until he ascertained whether his rulings were sound, or whether further evidence required to be led, otherwise he might find himself in the position of having issued a decision on a proof which had only partially been led, or allowed his mind to be influenced by evidence which he ought not to have admitted. This serves to illustrate how impossible it is to apply a code of procedure, designed to regulate the recognised mode of appealing the judgment of an inferior Court, to an appeal on specific grounds and in a form which I understand is only recognised in this particular statute.

I regret, therefore, that I am unable to concur with the majority of your Lordships in holding that this objection to the competency is well founded. It is not for the Court to legislate so as to create a new code of procedure applicable to a case for which the Sheriff Courts Act of 1907, which now regulates appeals in ordinary cases, makes no provision. If the latter clause of the section is read as your Lordships propose, it really takes away the right of appeal conferred by the statute on points of law, or on the admission or rejection of evidence, unless the Sheriff grants leave to appeal within a given number of days after his interlocutor has been pronounced. I may add that the alleged advantage from so construing the section is really more apparent than real; because I think it may be assumed that parties will not agree upon a special case, and, failing agreement, that the Sheriff will not state such a case unless there is some genuine question of law for the decision of a superior Court. On these grounds I am of opinion that this objection to competency also fails.

On the merits, all I need say is that I entirely agree with the opinion of the Sheriff as expressed in his note, and indeed I think the argument for the appellants was barely stateable.

LORD GUTHRIE.—I agree with your Lordship in the chair. This case was sent to the Roll to be heard on the merits, reserving the question of competency. Being of opinion that the case is not competently before the Court, we are not in a position to consider, still less to decide, the merits. But it is right to say that my impression is, not only that the appeal was unfounded, but that the only objection brought before us was so plainly unstateable that I should have been surprised had the Sheriff, if the request had been made to him, granted leave to appeal.

The question of competency depends on section 11 and section 21 (5), (6), (7) of the Rivers Pollution Act of 1876 and section 28 (c) and Rules 92 and 93 of the Sheriff Courts Act of 1907.

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Lord Guthrie.

The appellants say that, under the first paragraph of section 11 of the 1876 Act, they got an unqualified and unconditional right to appeal such judgments as those of the Sheriff-substitute of 29th January 1912 and of the Sheriff of 29th February 1912, by way of a special case prepared and adjusted as this one has been. They contend that the provisions of the fourth paragraph (read along with section 21), under which "all the enactments, rules, and orders relating to proceedings in [the Sheriff Courts of Scotland], and to enforcing judgments in [Sheriff Courts], and appeals from decisions of the [Sheriffs], and to the conditions of such appeals, and to the power of the superior Courts on such appeals, shall apply to all proceedings under this Act, and to an appeal from such action in the same manner as if such action and appeal related to a matter within the ordinary jurisdiction of the Court," do not apply to or qualify or control the absolute right of appeal contained in the first paragraph of section 11.

If the appellants are wrong in this view, they do not seriously dispute that, before the interlocutors in question could be appealed from the Sheriff to the Court of Session, leave to appeal would be required, which could be granted *ex proprio motu* or on an application for leave to appeal, in terms of section 28 (c). It was suggested indeed, rather than argued, that the Sheriff's signature of the present stated case implied, or was equivalent to, leave to appeal having been granted by him. But, apart from the fact that the respondents have throughout kept open their objection to the competency of the stated case, there is no provision in the statute, if leave to appeal be necessary, for any equivalent to the regular procedure.

I cannot assent to the appellants' view. I see no reason to think it probable, and it seems to me to be in plain opposition to the terms of section 11. It is true that there are no qualifications and conditions in the first paragraph of section 11. But that paragraph is only part of a section, and the whole section must be read together. It is true also that the qualifications and conditions, in the fourth paragraph of the section, are prefaced by the words "subject to the provisions of this section." But it does not appear to me that these words introduce any difficulty. They would only have done so if there had been any insuperable difficulty in reading the condition in question consistently with the second paragraph of the section, or any intolerable hardship caused by so doing. I confess I see neither insuperable difficulty nor intolerable hardship, or any difficulty or hardship at all. Taking the section as a whole, I read it as allowing an appeal in the form of a special case against an interlocutory judgment in a prosecution under the Act, but only on leave to appeal having been got by the ordinary statutory method.

It was said that the respondents' contention was inconsistent with the case of the *County Council of Lanark v. Magistrates of Airdrie*.¹ But the point was not taken in that case.

THE COURT dismissed the appeal as incompetent, and remitted the case to the Sheriff to proceed as accords.

WEBSTER, WILL, & Co., W.S.—NORMAN M. MACPHERSON, S.S.C.—Agents.

CHARLTON & BAGSHAW, Pursuers (Appellants).—*Clyde, K.C.*—

No. 44.

Hon. W. Watson.

THOMAS LAW & COMPANY, Defenders (Respondents).—*Constable, K.C.*

Dec. 5, 1912.

—*James Stevenson.*

Charlton &
Bagshaw v.
Law & Co.

Ship—Bill of lading—Seaworthiness—Exemption in bill of lading from liability for latent defect—Effect of incorporation in bill of lading of Australian Sea Carriage of Goods Act, 1904.

A bill of lading contained a stipulation that "any latent defects in the hull and tackle shall not be considered unseaworthiness, provided the same did not [result from want of due diligence of the owner . . . or manager." By a "clause paramount" it was provided that the bill of lading was "to be read and construed as if every clause therein contained which is rendered illegal or null or void by the [Australian] Sea Carriage of Goods Act, 1904, had never been inserted therein." By that Act it is provided that in every bill of lading a warranty of seaworthiness shall be implied, and that any clause in a bill of lading, whereby any obligation to exercise due diligence, and to properly equip the ship, to make her seaworthy, and to make the ship's hold fit for cargo, is lessened or avoided, shall be null and void.

Held, that the incorporation of that Act in the bill of lading did not render the stipulation as to latent defects null and void; and that it was open to the shipowners, sued for damages to the cargo arising from unseaworthiness due to defects in the ship, to establish as a defence that the defects were latent and did not result from want of due diligence on their part.

ON 17th January 1912 Charlton & Bagshaw, cornbrokers, Liverpool, brought an action in the Sheriff Court at Glasgow against Thomas Law & Company, shipowners, Glasgow, in which they claimed payment of £202, 10s., in respect of damage to a cargo of wheat carried by the defenders in their ship "Elginshire," from Sydney to Liverpool, under bill of lading dated 11th April 1911, of which the pursuers were endorsees and holders.

The bill of lading contained the following clauses:—"Clause Paramount.—This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null or void by the Sea Carriage of Goods Act, 1904, had never been inserted therein or had been cancelled or eliminated therefrom prior to the execution hereof, and is issued subject to all the terms and provisions of, and to all the exemptions from liability contained in, such Act.*

* The Sea Carriage of Goods Act, 1904 (Australia), enacts:—

"5. Where any bill of lading or document contains any clause, covenant, or agreement whereby—

"(b) any obligations of the owner or charterer of any ship to exercise due diligence, and to properly man, equip, and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe, for their reception, carriage, and preservation, are in any wise lessened, weakened or avoided; . . .

that clause, covenant, or agreement shall be illegal, null, and void, and of no effect. . . .

"7. The owner, charterer, master, or agent of a ship shall not—

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Lord Guthrie.

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I cannot assent to the appellants' view. I see no reason to think it probable, and it seems to me to be in plain opposition to the terms of section 11. It is true that there are no qualifications and conditions in the first paragraph of section 11. But that paragraph is only part of a section, and the whole section must be read together. It is true also that the qualifications and conditions, in the fourth paragraph of the section, are prefaced by the words "subject to the provisions of this section." But it does not appear to me that these words introduce any difficulty. They would only have done so if there had been any insuperable difficulty in reading the condition in question consistently with the second paragraph of the section, or any intolerable hardship caused by so doing. I confess I see neither insuperable difficulty nor intolerable hardship, or any difficulty or hardship at all. Taking the section as a whole, I read it as allowing an appeal in the form of a special case against an interlocutory judgment in a prosecution under the Act, but only on leave to appeal having been got by the ordinary statutory method.

It was said that the respondents' contention was inconsistent with the case of the *County Council of Lanark v. Magistrates of Airdrie*.¹ But the point was not taken in that case.

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Dec. 5, 1912.

—*James Stevenson.*

Charlton &
Bagshaw v.
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Ship—Bill of lading—Seaworthiness—Exemption in bill of lading from liability for latent defect—Effect of incorporation in bill of lading of Australian Sea Carriage of Goods Act, 1904.

A bill of lading contained a stipulation that "any latent defects in the hull and tackle shall not be considered unseaworthiness, provided the same did not [result from want of due diligence of the owner . . . or manager." By a "clause paramount" it was provided that the bill of lading was "to be read and construed as if every clause therein contained which is rendered illegal or null or void by the [Australian] Sea Carriage of Goods Act, 1904, had never been inserted therein." By that Act it is provided that in every bill of lading a warranty of seaworthiness shall be implied, and that any clause in a bill of lading, whereby any obligation to exercise due diligence, and to properly equip the ship, to make her seaworthy, and to make the ship's hold fit for cargo, is lessened or avoided, shall be null and void.

Held, that the incorporation of that Act in the bill of lading did not render the stipulation as to latent defects null and void; and that it was open to the shipowners, sued for damages to the cargo arising from unseaworthiness due to defects in the ship, to establish as a defence that the defects were latent and did not result from want of due diligence on their part.

ON 17th January 1912 Charlton & Bagshaw, cornbrokers, Liverpool, brought an action in the Sheriff Court at Glasgow against Thomas Law & Company, shipowners, Glasgow, in which they claimed payment of £202, 10s., in respect of damage to a cargo of wheat carried by the defenders in their ship "Elginshire," from Sydney to Liverpool, under bill of lading dated 11th April 1911, of which the pursuers were endorsees and holders.

The bill of lading contained the following clauses:—"Clause Paramount.—This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null or void by the Sea Carriage of Goods Act, 1904, had never been inserted therein or had been cancelled or eliminated therefrom prior to the execution hereof, and is issued subject to all the terms and provisions of, and to all the exemptions from liability contained in, such Act.*

* The Sea Carriage of Goods Act, 1904 (Australia), enacts:—

"5. Where any bill of lading or document contains any clause, covenant, or agreement whereby—

"(b) any obligations of the owner or charterer of any ship to exercise due diligence, and to properly man, equip, and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe, for their reception, carriage, and preservation, are in any wise lessened, weakened or avoided; . . .

that clause, covenant, or agreement shall be illegal, null, and void, and of no effect. . . .

"7. The owner, charterer, master, or agent of a ship shall not—

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"Shipped in good order and condition by W. R. Cave & Co. on board the good ship 'Elginshire,' . . . forty-two thousand six hundred and seventy-seven bags wheat being marked and numbered as in the margin, and to be delivered (subject to the exceptions and stipulations hereinafter mentioned) in the like good order and condition. . . . (1) The following are the exceptions and stipulations referred to:—The Act of God, Perils of the Sea [and other usual exceptions]. . . . But nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage, or ventilation, or by improper opening of valves, sluices, and ports, or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being seaworthy when she sails on her voyage; but any latent defects in the hull and tackle shall not be considered unseaworthiness, provided the same did not result from want of due diligence of the owner, or any of them, or of the ship's husband or manager."

On the discharge of the cargo at Liverpool, part of the wheat was found to be damaged by seawater.

The pursuers averred:—"Said damage was caused by the said ship being in an unseaworthy and unfit condition at the commencement of said voyage to carry said cargo safely. In particular, the planking of the starboard side of the fore deck, in the neighbourhood of the forward hatchway, was much worn and very thin, and so decayed as to be unable to withstand the ordinary wear and tear of the voyage undertaken, and of the vessel working in a seaway, with the result that during the ordinary working of the vessel during the voyage water was admitted and damaged the wheat. Farther, there was not any dunnage protecting the goods on the middle stringer of the lower hold which it was necessary should have been there, and the dunnage in the neighbourhood of the foremast was quite insufficient to protect the goods from leaking through the mast coat. Farther, the ceiling not being grain tight, a quantity of loose wheat was found in the bilges damaged."

The defenders denied these averments, and averred;—"If any defect existed at the beginning of the voyage (which is denied), it was a latent defect, and not resulting from the want of due diligence on the part of the defenders or of the ship's husband or manager."

"(a) insert in any bill of lading or document any clause, covenant, or agreement declared by this Act to be illegal; or

"(b) make, sign, or execute any bill of lading or document containing any clause, covenant, or agreement declared by this Act to be illegal.

"Penalty: One hundred pounds.

"8. (1) In every bill of lading with respect to goods, a warranty shall be implied that the ship shall be, at the beginning of the voyage, seaworthy in all respects, and properly manned, equipped, and supplied.

"(2) In every bill of lading in respect to goods, unless the contrary intention appears, a clause shall be implied whereby, if the ship is at the beginning of the voyage seaworthy in all respects, and properly manned, equipped, and supplied, neither the ship nor her owner, master, agent, or charterer shall be responsible for damage to or loss of the goods resulting from—

"(a) faults or errors in navigation [and a number of other causes]."

The pursuers pleaded, *inter alia*;—(2) The defenders' statements are irrelevant. Dec. 5, 1912.

On 9th March 1912 the Sheriff-substitute (Fyfe) pronounced the following interlocutor:—"Sustains pursuers' second plea *quoad* the defence founded upon the following exception in the bill of lading:—'But any latent defects in the hull and tackle shall not be considered unseaworthiness provided the same did not result from want of due diligence of the owner or any of them or of the ship's husband or manager': Finds that this exception is ruled out of the contract by the terms of the Sea Carriage of Goods Act, 1904, which is incorporated in the bill of lading by the clause paramount: *Quoad ultra* repels pursuers' second plea: Allows a proof" &c. Charlton &
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The defenders appealed to the Sheriff (Millar), who, on 11th July 1912, pronounced the following interlocutor:—"Recalls the interlocutor of 9th March 1912, in so far as it sustains the pursuers' second plea in law *quoad* the defence founded upon the exception in the bill of lading therein narrated, and the finding that the exception is ruled out of the contract by the Sea Carriage of Goods Act, 1904, which is incorporated in the bill of lading by the clause paramount: *Quoad ultra* adheres to the said interlocutor: Allows both parties a proof of their averments, and remits the cause to the Sheriff-substitute for further procedure."*

* "NOTE.— . . . Under the common law a shipowner, apart from express stipulation, is liable in absolute warrandice of the ship as to seaworthiness—that is to say, he not only undertakes due diligence to make the ship seaworthy, but he is liable further for any latent defect in the ship which makes it unseaworthy. That absolute warrandice on the part of the shipowner may be varied by express agreement so as to limit, or even terminate, any warrandice on his part.

"In the bill of lading, which is the basis of the contract in the present case, the following exception is introduced among the others narrated in it:—'But any latent defects in the hull or tackle shall not be considered unseaworthiness provided the same did not result from want of due diligence of the owner or any of them or of the ship's husband or manager.' The reply of the pursuers is that this clause is struck at by the Sea Carriage of Goods Act, 1904, passed by the Parliament of the Commonwealth of Australia. This statute is introduced into the contract by the clause paramount, printed in red ink at the top of the bill of lading, which says:—[The Sheriff quoted the clause paramount]. The effect of that is that the words of the Sea Carriage of Goods Act are introduced into the bill of lading, and must be 'construed simply as words occurring in this bill of lading'—Lord Esher in *Dobell & Company v. Steamship 'Rossmore' Company*, [1895] 2 Q. B. 408. Excerpts from the Sea Carriage of Goods Act, 1904, have been produced, and the terms of the Act, so far as relating to this point, are given in Carver's Carriage by Sea (5th edition), at page 998. The section upon which both parties relied, although other sections were quoted by way of illustration, was section 5 (b):—[The Sheriff quoted the subsection]. It seems to me that the first part of that section expresses the nature of the obligation on the owner or charterer, and the second part the purpose for which that obligation is to be enforced. The obligation on the owner or charterer is to exercise due diligence and to properly man, equip, and supply the ship, and the purpose is to make and keep the ship seaworthy, and to make and keep the ship's hold, &c., fit and safe. In other words, the owner or charterer is to exercise due diligence and to properly man, &c., so as to make the ship seaworthy, and to make and keep the ship's hold, &c., fit and safe. The part of the clause as to properly

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The Sheriff having granted leave to appeal, the pursuers appealed to the Court of Session, and the case was heard before the Second Division (without the Lord Justice-Clerk) on 12th November 1912.

Argued for the appellants;—The defence of latent defect was irrelevant in view of the provisions of the Sea Carriage of Goods Act, 1904 (Australia), which was incorporated in the bill of lading by the clause paramount. (1) The Act, by section 8 (1), provided that an absolute warranty of seaworthiness should be implied in every bill of lading. By contrast with the terms of section 8 (2), where the words "unless the contrary intention appears" were inserted, it was evident that this was not a mere statement of the common law warranty of seaworthiness which might be superseded by contract, but an express enactment which the parties to a bill of lading had no power to alter. (2) In any event, section 5 (b) of the Act expressly annulled any contract which weakened the absolute warranty of seaworthiness. That section dealt with four separate classes of obligation, viz.:—(a) To exercise due diligence. (b) Properly to man, equip, and supply the ship. (c) To make and keep the ship seaworthy. (d) To make and keep the ship's hold, &c., fit for the carriage of goods. The class of obligations to make and keep seaworthy was not qualified by the phrase "to exercise due diligence," nor by the words "to properly man, equip, and supply." The seaworthiness of a ship was

manning, equipping, and supplying the ship does not apply to the exception in the bill of lading in question, and, therefore, we are left with the words 'any obligation of the owner or charterer to exercise due diligence, to make and keep the ship seaworthy, and to make and keep the ship's hold, &c., fit and safe.' The result of that examination of the clause is that section 5 declares that, where any bill of lading or document contains any clause, covenant, or agreement whereby any obligations of the owner or charterer of any ship to exercise due diligence to make and keep the ship seaworthy, and to make and keep the ship's hold, &c., fit and safe, is weakened, that clause, covenant, or agreement shall be illegal, null, and void, and of no effect. Now, if the clause only refers to exercising due diligence, that does not apply to a clause which exempts the owner from liability for a latent defect of which he had no knowledge and, therefore, could not have avoided by any diligence on his part. The clause in the bill of lading in question is one which does deal with latent defect, and, therefore, I do not think that the Sea Carriage of Goods Act declares it illegal, null, and void, and of no effect.

"The question may be illustrated by the effect given in the American Courts to the Harter Act, which has a similar clause to that in the Sea Carriage of Goods Act, although not exactly in the same terms. The Harter Act is set out on page 144 of Carver on Carriage by Sea, above referred to, and the section is section 2 of the Act. At section 103 (c) of his book, page 147, he says:—'On the other hand, there seems to be no prohibition of clauses framed to relieve shipowners of the absolute warranty of seaworthiness of the ship on sailing, which, under United States law as well as English law, is implied in the absence of express agreement, . . . thus an exception of latent defect in the hull or machinery has been held to be valid'; and he quotes two cases that have been decided in the United States to that effect. That opinion in Mr Carver's book supports the view which I have ventured to take. Accordingly, I think the interlocutor must be recalled in so far as it sustains the pursuers' second plea, and that a proof should be allowed to both parties of their averments."

a matter distinct from its manning, equipment, and supply.¹ *Macfadden v. Blue Star Line*² and "*Carib Prince*"³ were decided on the terms of the United States Act of Congress known as the Harter Act,⁴ and had no application, because that Act only required due diligence of the shipowner and did not impose an absolute warranty of seaworthiness. Dec. 5, 1912.
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Argued for the respondents;—The stipulation in the bill of lading that latent defects should not be considered unseaworthiness was valid. (1) Section 8 (1) of the Act merely stated the existing common law warranty which could be contracted out of; but even reading it as a clause in the contract, nothing in the Act, or in the bill of lading, made it incompetent for the parties to waive that clause, as they had done. Incorporation in a bill of lading of the Harter Act, which was in similar terms to the Sea Carriage of Goods Act, had no effect on the warranty implied at common law, and did not prevent contracting out of the common law warranty so as to exempt the owner from liability for latent defects.⁵ (2) The obligations referred to in section 5 (b) of the Act were obligations "to exercise due diligence" and "to properly man, equip, and supply the ship," in each case so as "to make and keep the ship seaworthy." To "make and keep" seaworthy was a higher obligation than that imposed at common law, and therefore it would naturally be qualified by the words "due diligence." On the appellants' construction of the section the word "and" after "diligence" was ungrammatical, and the exercise of "due diligence," regarded as a separate obligation, was so vague an expression as to be meaningless, especially when the subsequent clauses exhausted the shipowners' duty. The words "man, equip, and supply" raised no difficulty, because failure to do so properly would result in unseaworthiness.⁶ In construing the section there was a presumption in favour of the respondents' view, because (1) the Act was to be read as part of the bill of lading, and therefore must be construed consistently with the terms of the bill of lading, and so as to give effect to all of them, including the exemption of latent defects, if possible; and (2) by section 7 a penalty of £100 was imposed for any contravention of the Act, and therefore it ought to be construed as favourably as possible towards the respondents.

At advising on 5th December 1912,—

LORD DUNDAS.—The pursuers, a firm of cornbrokers in Liverpool, sue the defenders, who are shipowners in Glasgow, for £202, 10s., being loss and damage alleged to have been sustained by them on a parcel of wheat carried by the defenders' ship "*Elginshire*" from Sydney to Liverpool, under a bill of lading of which the pursuers are endorsees and holders.

¹ Owners of Cargo on Ship "*Maori King*" v. Hughes, [1895] 2 Q. B. 550, per Kay, L. J., at p. 558.

² [1905] 1 K. B. 697.

³ (1897) 170 U. S. Reports, 655.

⁴ 52nd Congress Sess. 2, c. 105 (1893), quoted in Carver on Carriage by Sea (5th ed.), at p. 144.

⁵ *Macfadden v. Blue Star Line*, [1905] 1 K. B. 697; "*Carib Prince*," 170 U. S. Reports, 655, at p. 661; Carver on Carriage by Sea (5th ed.), p. 147.

⁶ *Rowson v. Atlantic Transport Co.*, [1903] 1 K. B. 114, per Kennedy, J., at p. 116, aff. [1903] 2 K. B. 666.

Dec. 5, 1912. The defenders on record tender £125. The sum here at stake is therefore not a large one ; but a difficult and important question of construction is raised. If the case is to be fought out, there must admittedly be proof ; but the pursuers seek at this stage to exclude from probation a certain portion of the defenders' averments. The Sheriff-substitute decided this point in the pursuers' favour, but the Sheriff took an opposite view, and the pursuers have appealed.

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The pursuers aver (Cond. 4) that "said damage was caused by the said ship being in an unseaworthy and unfit condition at the commencement of said voyage to carry said cargo safely." The defenders (Ans. 4) deny this, and aver "that the vessel was in every respect seaworthy and fit to carry said cargo safely" ; but they further say that "if any defect existed at the beginning of the voyage, which is denied, it was a latent defect, and not resulting from the want of due diligence on the part of the defenders or of the ship's husband or manager." The defenders accordingly found upon the express exception in the bill of lading that "any latent defects in the hull and tackle shall not be considered unseaworthiness, provided the same did not result from want of due diligence of the owner (*sic*), or any of them, or of the ship's husband or manager." The pursuers retort by referring to the terms of the clause paramount, which I need not quote. They say that the exception about latent defects and due diligence is "illegal, null, and void, and of no effect," because it is, in the language of section 5 (b) of the Australian Act of 1904, a clause or covenant whereby the obligations of the owner "to exercise due diligence, and to properly man, equip, and supply the ship, to make and keep the ship seaworthy," &c., is "lessened, weakened, or avoided." The learned Sheriff has decided the point against the pursuers. I have come to the same result, but by a somewhat different line of reasoning.

The Sheriff has expressed, in a careful note, his view of the construction to be put upon section 5 (b) of the Act of 1904. The construction is a feasible one ; but I confess I should have great difficulty in adopting it as being what the Legislature meant in 1904, mainly owing to the terms of section 8 (1) of the Act, which, by the way, are equally imported into the contract by the concluding words of the clause paramount. Section 8 (1) enacts, apparently as a matter of public policy, that in every bill of lading a warranty shall be implied that the ship shall be at the commencement of the voyage seaworthy in all respects, and properly manned, equipped, and supplied. Subsection (2) deals with certain presumptions (in favour of the shipowner) which shall also be implied, unless the contrary intention appears. It rather seems to me that the scheme of the Act is that the absolute warranty of subsection (1) is not to be capable of avoidance or qualification, though the exceptions of subsection (2) might be waived by consent. It is true that the warranty of seaworthiness under subsection 1 is no more than what the common law recognises, and that such common law warrandice may be varied or excluded by agreement of parties. But it seems to me that the terms of subsection (1), in marked contrast to those of subsection (2), are absolute, and not merely "unless the contrary intention appears." I am disposed, therefore, to think that section 8 (1) presents a serious difficulty in the way of adopting the Sheriff's construction of section

5 (b), because its warranty of seaworthiness being, as I think, absolute and Dec. 5, 1912.
 indefeasible, any clause in the contract which bears to lessen or avoid the owner's obligation inherent in that warranty is by section 5 (b) null and void.
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After all, however, and this to my mind lies at the root of the whole Lord Dundas.
 matter, we are not here considering the effect of an Act of Parliament having the force of public law in limiting or annulling the agreement of private parties. The question is as to what the parties to this particular instrument, most unhappily framed as it is, intended to agree to by their contract. They have incorporated the Act, but have put their own interpretation on it, as they were entitled to do, in interpreting the word "unseaworthiness." The parties say and agree that it shall not include latent defects not arising from want of due diligence. So viewing the question, I think one must conclude, looking to the express and unambiguous terms of the clause in the bill of lading, that the parties cannot have intended its effect to be overridden by the incorporation, in quite general terms, of the whole provisions of the Act of 1904. I must say, however, that I do not admire the form of contract here resorted to. The bill of lading contains express clauses and stipulations; but it is prefaced (truly rather by way of postscript) by the clause paramount, which imports into the contract all the terms and provisions of an Act of Parliament *per aversionem*, and declares that the bill of lading is to be construed as if every clause in it which is rendered illegal, null, and void by that Act had never been inserted in it, or had been cancelled from it. It would surely have been simpler and more rational to adjust the bill of lading so as to show plainly on the face of its own language what it means, and what its stipulations and exemptions are meant to be. The mode in which this instrument is patched together seems to me to be in the highest degree complicated and clumsy, and calculated to give rise (as it has done) to dispute and litigation. It is to me surprising that it should be adopted or tolerated in the mercantile world.

I have said nothing about the Harter Act, or the decisions pronounced upon it. Its language is not the same as that of the Australian Act of 1904, its second clause is not identical with section 5 of the latter Act, and it does not seem to contain any clause corresponding to section 8 of the Act of 1904. It appears to me that it might be rash to proceed upon supposed analogies derivable from a different Act, or from decisions as to its language. I prefer to base my judgment upon a construction of the particular instrument before us.

On the whole matter I am of opinion, though not without some difficulty and hesitation, that we ought to affirm the interlocutor of the learned Sheriff, and send the case back to the Court below for proof.

LORD SALVESEN.—In this case I am of the same opinion as the Sheriff. The only point in controversy turns upon the construction of certain clauses in the Sea Carriage of Goods Act, 1904, passed by the Parliament of the Commonwealth of Australia. The apparent object of that Act was to prevent shipowners in charter-parties or bills of lading stipulating that they should be exempt from liability for loss or damage to cargo carried in their

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Lord Salvesen. vessels where it appeared to the Legislature of the Commonwealth that such exemptions were unreasonable or inequitable or contrary to public policy. In its general scheme the Act is therefore similar to the Harter Act—an Act of the Congress of the United States which came into force in 1893, and which has been the subject of construction in several cases both in the United States and in England. It was justly observed, however, in the course of the argument that the decisions with regard to the Harter Act have no proper application to the Act with which we are now concerned, as its language, although in some respects similar, is by no means the same. It is, however, permissible to observe that in the view of the framers of the Harter Act it was not deemed unreasonable that a shipowner should protect himself from liability in respect of the unseaworthiness of his vessel where due diligence had been used properly to equip, man, provision, and outfit the vessel, and to make her seaworthy and capable of performing her intended voyage. Accordingly, a bill of lading which, as in the present case, stipulates that any latent defects in the hull and tackle shall not be considered unseaworthiness, provided the same did not result from want of due diligence of the owners or any of them or of the ship's husband or master, is not struck at as an illegal stipulation under the Harter Act.

With these general observations I proceed to consider whether the stipulation to which I have just referred is rendered illegal by the Sea Carriage of Goods Act, 1904, which, by what is called the "clause paramount," is incorporated in the bill of lading, and is declared to govern the construction of the whole clauses therein contained. The two sections of the Act chiefly relied on were sections 5 (b) and 8 (1). I do not attach any importance to the latter, because it is merely expressive of the common law of this country, and I presume also of Australia. Now, our common law, although it implies a warranty of the seaworthiness of a vessel in every contract of carriage, does not prevent a shipowner from making an agreement with the shipper of goods for qualifying this warranty. There is no provision in section 8 (1) that any stipulation which qualifies the absolute warranty is to be treated as null or void; and I take it that the section is merely declaratory of the obligations of the shipowner with regard to the seaworthiness of his ship at the commencement of the voyage where parties have not expressly contracted with regard to this matter.

Section 5, however, deals with the case of a bill of lading, and provides that any clauses whereby "(b) any obligations of the owner or charterer of any ship to exercise due diligence and to properly man, equip, and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation are in anywise lessened, weakened, or avoided . . . shall be illegal, null and void, and of no effect." The argument for the appellants was that this section is to be construed as dealing with obligations of four different classes: to wit, obligations (first) to use due diligence; (second) to properly man, equip, and supply the ship; (third) to make and keep the ship seaworthy; and (fourth) to make and keep the ship's hold, &c., fit and safe for the reception, carriage, and preservation of cargo. On

this reading it is admittedly impossible to account for the "and" which Dec. 5, 1912, connects the first two clauses, and difficult to explain why so vague a clause as "to exercise due diligence" should stand by itself, more especially as any breach of the Act, by inserting in any bill of lading any clause, covenant, or agreement declared by the Act to be illegal, is a penal offence. The Sheriff has accordingly rejected this interpretation, and holds that the particle "to" in front of the clause "make and keep the ship seaworthy," &c., is to be construed as equivalent to "so as to." In my opinion that is the proper, as it is a perfectly natural, interpretation. The due diligence which the shipowner is called upon to exercise is diligence "to make and keep the ship seaworthy, and to make and keep the ship's hold fit and safe for cargo," and the same applies to the immediately succeeding clause, "and to properly man, equip, and supply the ship." Unless the subsection is so read, there is no standard of what constitutes "proper manning, equipment," and so on. The obligation in that case is an absolute one, and rightly so, because there is no difficulty in the shipowner ascertaining what is the proper crew to man his ship, or the equipment and supplies which are required that she may be seaworthy for the contemplated voyage. The other obligation is merely one of due diligence, for a defect constituting unseaworthiness may be latent and not capable of being discovered by ordinary care and vigilance. So read, the subsection as a whole is perfectly reasonable and is in line with the Harter Act, on which no doubt it was largely modelled. On the other view there would be an absolute obligation imposed upon the shipowner of keeping the ship seaworthy even when she had been injured on a voyage and could not be repaired while the voyage lasted, and any qualification of this absolute obligation in the bill of lading would be a penal offence. The common law obligation in such a case is just what is expressed in the clause, namely, that due diligence must be exercised to keep the ship seaworthy, but the common law is not so unreasonable as to exact performance of what may be impossible. On these grounds I have reached the same conclusion as the Sheriff, and I think we should adhere to the interlocutor appealed from.

LORD GUTHRIE concurred with Lord Dundas.

THE COURT dismissed the appeal, and affirmed the interlocutor of the Sheriff.

J. & J. Ross, W.S.—CAMPBELL FAILL, S.S.C.—Agents.

No. 45. WALTER BOWIE AND OTHERS (William Bowie's Trustees), Pursuers
(Respondents).—*Constable, K.C.—Russell.*

Dec. 5, 1912.

MRS ELIZABETH ASHWORTH HARRISON OR WATSON AND ANOTHER,
Defenders (Reclaimers).—*Morison, K.C.—MacRobert.*

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Agent and Client—Fraud of Agent—Liability of client—Bond left in custody of agent—Fraudulent discharge of bond by agent.

Sale of Heritage—Assignment of Writs—Right in Security—Bond fraudulently discharged handed to innocent purchaser of property—Right of purchaser to retain bond.

The purchaser of a certain property, burdened with a bond, paid the full price of the property, and received along with the disposition the bond and a forged discharge thereof from the seller's agent, who was also agent for the bondholders and had custody of the bond. On the agent's death it was found that he had embezzled the sum in the bond. In an action by the bondholders against the purchaser of the property for delivery of the bond,—

Held that the pursuers were entitled to delivery of the bond in respect (1) that the bond was not one of the property titles carried to the defender by the assignment of writs, (2) that the pursuers, having given their agent no authority to discharge the bond, were not liable for his fraudulent discharge thereof.

1ST DIVISION. ON 11th April 1911 Walter Bowie, farmer, Paisley, and others, the
Ld. Ormisdale. testamentary trustees of the late William Bowie, farmer, Paisley, brought an action against William Goudie, New Jersey, U.S.A., the seller of a certain heritable property, and Mrs Watson, Craignair, Bridge of Weir, the purchaser of it, and her husband, Thomas Watson, as her curator and administrator-in-law, for reduction of a discharge, bearing to be signed by the pursuers, of a bond and disposition in security in their favour granted by Goudie over the property; and secondly, for delivery to them of the bond then in the hands of Mrs Watson.

The following narrative of the circumstances is taken from the opinion of the Lord Ordinary:—"The pursuers of this action are testamentary trustees. In the course of administering their trust they lent at Whitsunday 1904 the sum of £500 to the defender William Goudie, receiving in security of their loan a bond and disposition in security over certain heritable property, consisting of a house at Bridge of Weir called 'Craignair.' William Bowie, a writer in Paisley, was agent for both parties in the transaction.

"The pursuers aver—and the argument proceeded on the footing—that William Bowie was the agent in the trust, and that the bond and disposition in security, with the other trust papers, were retained by him in that capacity. The interest on the loan was regularly accounted for by him to the pursuers down to Whitsunday 1910. Mr Bowie died in September 1910.

"At Whitsunday 1909 the defender William Goudie sold and disposed the property which formed the subject of the security to the defender Mrs Watson for £650, William Bowie acting as his agent in the matter. Mrs Watson employed another agent to represent her, and through him paid the £650 to William Bowie. Along with the disposition of the property Mrs Watson received, and now has in her possession, a discharge of the bond, bearing to be signed by the pur-

surers, and the bond itself. It is not now disputed that the signatures of the pursuers to the discharge are forged, and that the whole of the £500 was embezzled by William Bowie. Dec. 5, 1912.
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"The pursuers have raised the present action for reduction of the discharge, and for the delivery to them of the bond and disposition in security. Defences have been lodged by Mrs Watson and her husband, who state that they are willing to hand over the bond on receiving in exchange therefor £500. No defences were lodged for William Goudie."

With regard to the conclusions for delivery the pursuers pleaded, *inter alia*;—(3) The said pretended discharge being reduced, the defender Mrs Watson, as being in possession of the said bond and disposition in security, should be ordained to deliver same to the pursuers, as concluded for.

The defenders pleaded, *inter alia*;—(3) The defender Mrs Watson having paid the said sum of £650 conditionally upon receiving a valid disposition to Craignair, and in addition, the said bond and disposition in security and a discharge thereof, and having received said deeds in good faith, is entitled to retain the said bond and disposition in security and discharge until repaid the said sum of £500. (4) *Separatim*, the pursuers having entrusted the custody of said bond and disposition in security to the said William Bowie, are barred from obtaining redelivery thereof from these defenders, who received the same *bona fide* and for value, until they repay to the defenders the said sum of £500. (5) In any event, the pursuers having received payment of the said sum of £500 by their agent, the defenders Mr and Mrs Watson should be assoilzied.

On 13th June 1911, on the motion of the pursuers, the comparing defenders not opposing, decree was pronounced in terms of the reductive conclusions of the summons; and on 11th January 1912 the Lord Ordinary (Ormidale) pronounced this further interlocutor:—"Decerns and ordains the defender Mrs Elizabeth Ashworth Harrison or Watson to deliver up to the pursuers the bond and disposition in security described in the summons." *

* "OPINION.—[After the narrative quoted *supra*—I have now to decide by which of two perfectly innocent parties the loss brought about by the fraudulent conduct of William Bowie is to be borne.

"The law-agent of the pursuers, William Bowie, had no implied authority either to call up the bond or to accept repayment of the loan (*Peden v. Graham*, (1907) 15 S. L. T. 143), and it is not averred that they had given him any special authority to do either the one or the other—I am unable, therefore, to say that they were in any sense blameworthy or negligent in allowing William Bowie to retain possession of the bond.

"And on the other hand, I cannot see how the purchaser of the property could have carried through the sale in any other way than she did. It is not suggested that William Bowie was otherwise than a reputable agent at the time of the transaction. Mrs Watson paid a full price for the subjects, and was entitled to obtain a clear title. She took the usual steps for doing so, and she only paid the price on obtaining what purported to be a clear title.

"But the discharge which was handed to her, and which bears that the amount of the loan had been received from her by the creditors in the bond, has been reduced, the deed being admittedly a nullity. She has not, in fact, paid the creditors anything, and they have not, in fact, granted to her any discharge of the bond—(*Wallace's Trustees v. Port-Glasgow Har-*

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The compearing defenders reclaimed, and the case was heard before the First Division (consisting of the Lord President, Lord Mackenzie, and Lord Cullen) on 5th December 1912.

Argued for the reclaimers;—(1) The defender Mrs Watson was entitled to retain the bond as one of the writs included in the clause of assignation of writs in the disposition of the property. (2) Further, she was entitled to retain the bond, in respect that she had paid a full price for the property, and had received a discharge of the bond from the pursuers' agent who had implied authority to give it.¹ (3) In any event, the pursuers should suffer the loss resulting from their own agent's fraud, rather than the defender, who was not connected with it in any way.²

Counsel for the respondents were not called upon.

bour Trustees, (1880) 7 R. 645). What she did do was to pay to William Bowie, as agent for William Goudie, the seller of the property, £650, and William Bowie embezzled £500 of that sum, took the bond from the repositories of the pursuers in his office, and, along with what purported to be a discharge of the bond, but which was no discharge, handed it to the purchaser. He had no authority to deal with the bond in connection with the sale of the security subjects, and it seems to me that the legal position as in a question with the purchaser was just the same as if he had picked the bond from the pocket of the pursuers. He had no right or title to hand it to the purchaser, and in my judgment the purchaser has, now that the signatures to the discharge have been ascertained to be forged, no right or title to retain it. She received it in absolute good faith, having, as she honestly thought, paid full value for it to the creditors in it, but none the less was the delivery to her of the bond tainted with fraud, just as the discharge which was handed to her along with the bond was tainted with the vice of forgery. Without a discharge or other evidence of repayment to the creditors, the purchaser had no right to take the bond, and obviously she would have declined to accept the mere possession of the writ as, of itself, equivalent along with the disposition of the property to a clear title. It appears to me that the bond in this case is in the same position as the cow in the case of *Morrisson v. Robertson*, 1908 S. C. 332.

"The defender Mrs Watson maintained that the forgery of the discharge was something entirely independent of her contract with William Goudie for the purchase of the property, and that the security writ having been handed to her in implement of that transaction, which it is not proposed to set aside, and which was not in any way tainted with fraud, she is entitled to retain it. She is not, she says, concerned with the forged discharge, and is not seeking to take any advantage or benefit from it. She is simply claiming a right to retain possession, for what it is worth, of a writ which in due course came into her hands in fulfilment of the contract of sale and purchase. In my opinion, she is taking advantage from the forged document, for she received the bond simply and solely because the bond was falsely said to be discharged by the receipt of her money, not by William Goudie the seller, but by the pursuers.

"The position which was brought about by the fraud of William Bowie here seems to me to be entirely different from that disclosed in the case of *Brocklesby v. Temperance Building Society*, [1895] A. C. 173, on which the defender based her contention. That case was decided on the ground that

¹ *Robinson v. Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841; *Bourton v. Williams*, (1870) L. R., 5 Ch. 655; *Morrisson v. Robertson*, 1908 S. C. 332, Lord Kinnear, at p. 338.

² *Gordon v. James*, (1885) 30 Ch. D. 249; *Brocklesby v. Temperance Building Society*, [1895] A. C. 173.

LORD PRESIDENT.—The pursuers in this action are a set of trustees who Dec. 5, 1912. were in right of a bond and disposition in security which had been granted by a certain William Goudie over a villa in Bridge of Weir for £500. Their agent was a Mr William Bowie, and in accordance with what is almost universal custom that agent had possession of their security writ, namely, the bond and disposition in security. William Bowie was also agent for Goudie, the proprietor of the subjects over which the bond was granted. Goudie arranged through his agent a sale of the villa to the defender Mrs Watson. Mrs Watson wished that the property should be conveyed to her clear of encumbrances, and arranged with Bowie that that should be done. Accordingly, having paid a full price, she was handed a disposition of the property, and at the same time was handed the bond over the property, and also a discharge of the bond. After Bowie's death it was discovered that the discharge of the bond was a forgery, but that Bowie had lured the pursuers into security by going on paying the interest to them as if nothing had happened.

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The pursuers now bring this action, first of all, for reduction of the discharge as a forgery, and, secondly, for delivery of the *corpus* of the bond. Mrs Watson admits the forgery, and therefore has no defence, admittedly, to the reductive conclusions; but she seeks to retain the *corpus* of the bond until she is paid the sum of money which she parted with in respect of it.

The Lord Ordinary has decerned in terms of the conclusions of the summons, and I am of opinion that he is quite right. The forgery being admitted, the discharge goes for nothing, and *prima facie* therefore the bond belongs to the persons who are designated as creditors in the bond. Now, what right can Mrs Watson have to retain it? She must in some way connect herself with it by some form of title flowing from the pursuers. But that is just what she cannot do. It seems to me that to succeed she would have to establish this proposition, that the mere leaving of a bond and disposition in security with your agent is equivalent to a mandate to that agent to deal with it. That is a perfectly impossible proposition, and it is shown to be an impossible proposition by the fact that the agent could not deal with the bond without forging a new deed. So far as I can see, even in England, where one is allowed to pledge title-deeds, the mere deposition of a deed with one's agent does not give any mandate to raise money upon it. But in our law, where the pledging of titles is unavailing to create a security, it is an impossible proposition.

the pursuer, though himself innocent of fraud, had put it in the power of another to commit the fraud by clothing him with authority to intromit with certain deeds, with the result that these deeds came to be in the possession of the defenders on a perfectly good title, irrespective altogether of any forged documents. The forgery of further documents, executed in order to serve ulterior purposes of the fraudulent agent, was not in any way necessary to establish the defenders' right to hold the deeds. In *Brockleby's case* the forgery was not ancillary to the main transaction; in the present case it is.

"It is a very hard case for the defender Mrs Watson, but, in my opinion, the loss occasioned by the fraudulent conduct of William Bowie must be borne by her. I shall decern against her for the delivery of the bond and disposition in security to the pursuers."

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Accordingly—although I think it is a very hard case for this lady—it seems clear that the pursuers, who were in no way to blame, are entitled to possession of their bond.

LORD MACKENZIE.—I am of the same opinion. The only conclusion of the action with which we are now concerned is that in which the creditors in the bond ask that their bond be delivered to them. Now, the defender cannot produce any discharge, because, admittedly, the discharge was forged, and therefore is a nullity. The bond is now in the hands of the purchaser of the property over which it was granted, she having obtained it from Bowie, the seller's agent, who, as the agent of the creditors, had custody of the bond. That agent was the forger, and the question is—Which of two innocent parties is to suffer by his forgery?

The argument addressed to us rested on two grounds, the first of which was that the defender was entitled, in virtue of the assignation of writs in the disposition of the property, to retain this bond as one of the writs. I think the conclusive answer to that is that the bond is not one of the titles to the property. It is a burden upon the property. The purchaser was not entitled to receive it, and the seller had no right to grant any assignation which covered it. Mr Morison admitted that he could not succeed unless he was able to associate the bond with the contract of sale. But you cannot associate a bond with a contract of sale between the person who is the debtor in the bond and the buyer. The consent of the creditor was needed, and admittedly it never was got; and if it never was got, then Bowie had no more right to deal with the bond in this case than he had right to include, under the sale of Goudie's villa, land adjoining that villa which belonged to a third party, the titles to which happened to be in his custody for the time being.

The second ground upon which the case was argued was that in some way the creditors had armed Mr William Bowie, the fraudulent agent, with the means of committing this fraud. Now, I quite admit that if Bowie had in some way been clothed with authority to deal with the bond in the way of receiving payment and granting a discharge—if he had got that authority from the creditors, then, even if he had fraudulently discharged it, it might have been that the creditors who were his clients would have had to suffer, and not the innocent buyer who provided the money to enable the bond to be discharged. But there is nothing of that kind here; there is no suggestion that there was any authority, either written or verbal, given by the creditors to their agent Bowie to become a party in any way to the transaction that was carried out. I therefore think that the conclusion which the Lord Ordinary has reached is right.

LORD CULLEN.—I entirely concur.

THE COURT adhered.

MARTIN, MILLIGAN, & MACDONALD, W S.—WALT. M. MURRAY, S.S.C.—Agents.

MRS MARY KERR OR LENDRUM AND ANOTHER, Pursuers (Respondents). No. 46.

—*Moncrieff, K.C.—J. Macdonald.*

AYR STEAM SHIPPING COMPANY, LIMITED, Defenders (Appellants).— Dec. 5, 1912.

Horne, K.C.—Carmont.

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Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—
Accident arising out of and in the course of the employment—Unexplained
death—Seaman found drowned—Inference from proved facts.

In a claim for compensation by the dependants of a ship steward, who was last seen alive in his bunk, and was found drowned next day in the harbour near to the place where his ship had been lying, the arbitrator awarded compensation.

Circumstances in which the Court (diss. Lord Guthrie) recalled the award of the arbitrator, holding that there was no evidence to justify the inference that the accident which caused death arose out of the employment.

In an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Ayr, between Mrs Mary Kerr or Lendrum and Edward Lendrum, the widow and son respectively of the deceased Edward Lendrum, and the Ayr Steam Shipping Company, Limited, the Sheriff-substitute (Shairp) awarded compensation, and at the request of the defenders stated a case for appeal.

2D DIVISION.
Sheriff of
Ayrshire.

The case stated :—

"The following facts were admitted or proved, namely :—That the deceased Edward Lendrum was on 16th December 1911, and had been for some time previous to that date, employed by appellants as a cook and steward on their steamship 'Turnberry'; that, at intervals during a period of nine or ten years prior to his death, he had been in the appellants' employment as a steward on different steamships belonging to them;—[then followed findings as to the wages earned by the deceased, and as to the dependency of the pursuers on his earnings]—that on the morning of the said 16th day of December 1911 the 'Turnberry' was lying in the harbour of Larne; that the said now deceased Edward Lendrum served the crew of the ship with breakfast in the usual way; that the crew thereafter rested, having been working on the previous night; that the ship was to sail at 6 o'clock P.M. on said 16th December 1911; that the said deceased Edward Lendrum, after having served breakfast as aforesaid, had no meal to prepare or serve till shortly before the sailing of the ship; that it was customary for him to rest in the afternoons, especially on Saturday afternoons, as his work on Friday evenings was usually heavy and prevented him from obtaining sufficient sleep; that he slept in a bunk in a small, ill-ventilated room entering directly from the saloon of the ship; that the said room and saloon were both on deck, and that in going from his room, or from the saloon to the deck, the said Edward Lendrum would pass a lavatory, situated at the door leading from the saloon, which lavatory was the one used by Lendrum while aboard the said ship; that the captain of the ship, John McDonald, about 4 o'clock P.M. on said 16th December 1911, went to the saloon and told the said now deceased Edward Lendrum, whom he saw lying in his bunk, to prepare and serve tea for the crew before the ship sailed; that Lendrum just turned in his bunk and looked at the captain, but made no reply to him, and that the captain then returned to his own room; that the captain afterwards sent the

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chief officer of the ship, John M'Innes, to see if Lendrum was getting the crew's tea ready, and that M'Innes shortly afterwards reported to the captain that he could not find Lendrum in the ship; that the captain and chief officer then (about 5.30 P.M.) went and looked in Lendrum's bunk, and saw that he was not in it; that they found some of his clothes on a settee in the saloon, and his purse and watch lying by themselves in the saloon, but away from the clothes; that Lendrum's disappearance from the ship was at once reported to the police, and his dead body dressed in his day underclothes was next day found in the sea at a point between the place where the stern of the ship had been on 16th December 1911 when Lendrum disappeared and a slip situated a short distance from where the stern of the ship had been; that Lendrum was drowned, and his dead body bore no marks of violence to account for his death otherwise; that he was a good-tempered, sociable man, and pleasant to deal with, always able to do his work, and never seen by the captain of the ship to be the worse of intoxicating liquor, though he was not a teetotaler; that he was subject to attacks of nausea and sickness, and was seen on various previous occasions vomiting over the side of the ship; that his son, Edward Lendrum, who frequently sailed with his father in said ship, and to whom his father's tendency to sickness was well known, immediately on hearing of his father's death, expressed the opinion that he had fallen overboard while vomiting; that, in March 1911, a shortage of £3, 14s. 6d. was found in the liquor stock under the charge of the said deceased Edward Lendrum, but, by an arrangement with his employers, said sum was being gradually paid back by him, with the result that after his death it was found that on balancing accounts between the deceased and his employers there was a debit balance against him of only 11s. 1d.; that once, when the ship was lying in Ayr Harbour, he was seen hanging over her side by a rope, which was fastened to the ship's taffrail, and was round his waist; that he was holding on to the rope with both of his hands held above his head, and that he was not in the water; that he afterwards explained to his son Edward that he was trying to recover a towel which had fallen overboard; and, that he did not commit suicide.

"I accordingly, taking into consideration the whole facts admitted and proved, drew the inference in fact that, between 4.30 and 5.30 P.M. on 16th December 1911, the said now deceased Edward Lendrum left his bunk in the said steamship 'Turnberry,' went on her deck, and accidentally fell overboard, and was drowned, and I held that said accident arose out of and in the course of his employment as a cook and steward on board said ship.

"I therefore found the appellants liable to the said Mary Kerr or Lendrum in compensation under said Act to the extent of £300, and I also found the appellants liable to her in the expenses of process."

The question of law for the opinion of the Court was:—"Whether on the facts admitted and proved I was justified in holding that the deceased Edward Lendrum met his death as aforesaid by accident arising out of and in the course of his said employment?"

After a hearing, the Second Division, on 29th October 1912, pronounced this interlocutor:—"Having heard counsel on the note for the appellants, remit to the arbitrator to answer the following questions, viz., (1) The facts as to the clothes which the deceased was wearing when he was lying down in his bunk on the last occasion

when the captain saw him alive: (2) The facts as to the clothes which the captain found in the saloon after Lendrum was missed, and whether there were any of deceased's clothes in the saloon when the captain went to wake him: (3) Whether it was proved that six empty whisky bottles, of another kind than those supplied by the ship, were found under the deceased's mattress, and whether it was proved that the deceased's bunk had been overhauled eight days before his death, and that there were no whisky bottles there then: (4) Whether it was proved that there was a shortage of 18s. 3d. referable to the eight days during which the vessel had been running since her overhaul, this shortage being subsequent to that referred to in the case stated by the arbitrator, and discovered after the deceased's death: (5) What in fact was proved as to the height and construction of the bulwarks of the vessel, and the height of the deceased: (6) Was a plan produced and proved as part of the facts of the case? Note.—If No. 6 is answered in the affirmative, the Sheriff-clerk will transmit the plan for the use of the Court.”

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The arbitrator reported as follows:—“In terms of the foregoing remit, I have respectfully to report to your Lordships (1) that on the last occasion when Captain M'Donald saw the deceased Edward Lendrum alive, and lying in his bunk, he (Lendrum) had his waistcoat on, but the captain could not say whether Lendrum had on his trousers or not, as the lower part of his body was covered with the bedclothes, nor was the captain able to say whether or not Lendrum had his coat on; (2) that after Lendrum was missed, there were found in the dining-saloon of the 'Turnberry,' on a settee, Lendrum's jacket, waistcoat, trousers, cap, necktie, collar, boots, purse (containing a few coppers), and watch, the purse and watch not being in the pockets of the clothing, but that there was no underclothing, and that none of the above-enumerated articles of clothing were observed in the dining-saloon by Captain M'Donald when he went previously to wake Lendrum; the clothes, when found, were not folded up, just thrown off; (3) that it was not proved that six empty whisky bottles, of another kind than those supplied by the ship, were found under the deceased's mattress, nor was it proved that the deceased's bunk had been overhauled eight days before his death, and that there were no whisky bottles there then; (4) that it was not proved that there was a shortage of 18s. 3d. in the stock of liquor controlled by Lendrum referable to the eight days, 8th to 16th December, during which the 'Turnberry' had been running after her overhaul, but that it was proved by the admission of the defenders' cashier that, on an accounting, only the sum of 11s. 1d. was due to the Company by Lendrum at the date of his death; (5 and 6) that the height and construction of the bulwarks of the 'Turnberry' are shown on a plan produced by the pursuers at the proof on 15th May 1912, the accuracy of which plan was admitted by the agents of the parties, and that it was proved that Lendrum was 5 feet 6 inches in height. The said plan accompanies this report, and shows the half rounds where Lendrum was seen vomiting on two occasions previous to his death.”

Thereafter the case was again heard before the Second Division on 28th November 1912.

Argued for the appellants;—In order to succeed, the pursuers required to prove death by an accident arising out of and in the course of the employment. It might be that they had fairly established death by an accident arising in the course of the employment,

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but there was absolutely no evidence to show whether the accident did or did not arise out of the employment, and no facts proved from which any inference could be drawn. The evidence was inconclusive, and the facts consistent with either hypothesis. In such a case the pursuer was not entitled to an award.¹ The case belonged to the class typified by *Bender v. "Zent,"*² *Marshall v. "Wild Rose,"*³ and *Burwash v. Leyland & Company,*⁴ rather than the class of which *Mackinnon v. Miller,*⁵ "*Swansea Vale*" v. *Rice,*⁶ and *Lee v. Stag Line Company*⁷ were examples.

Argued for the respondents;—The point for decision was not whether on the facts proved the Court would have come to a different conclusion from the arbitrator, but whether there was any evidence to support the arbitrator's judgment.⁸ It was impossible to say that there was no evidence in this case upon which it could competently be found that death resulted from an accident arising out of and in the course of the employment. The facts were very similar to those in *Mackinnon v. Miller,*⁹ where the Court had refused to interfere with the arbitrator's decision. Further, it was to be noted that the deceased here had work to perform at the time, and was not off duty as in some of the contrary decisions.

At advising on 5th December 1912,—

LORD DUNDAS.—This case, which relates to the unexplained drowning of a seaman, is, I think, both an important and a difficult one. The facts, as found by the learned arbitrator, are not in all respects as complete and specific as one would desire, even after a remit to and report by him upon certain points. The material facts may be summarised as follows. On the crucial date, 16th December 1911, the now deceased Edward Lendrum was, and had been for some time, employed as cook and steward on the appellants' steamship "Turnberry," which on that day was lying in the harbour of Larne. She was to sail at 6 P.M. The deceased was, as customary, resting in his bunk in the afternoon; it was a small ill-ventilated room on the deck level, adjoining the saloon; the men's lavatory was on the same level and close by, as shown on the admitted sketch plan. About 4 P.M. the captain told Lendrum, whom he saw lying in his bunk, to prepare and serve tea for the crew before the ship sailed. Lendrum turned and looked at the captain, but made no reply; he had his waistcoat on, but the captain cannot say whether his coat and trousers were on or not. About 5.30 the chief officer was sent to see if Lendrum was preparing the tea, and reported that he could not find him on the ship. The man was never afterwards seen alive; his coat, waistcoat, trousers, cap, tie, collar, and boots, and his purse (containing a few coppers) and watch were found by the captain and chief officer on a settee in the saloon; the clothes were not folded, just

¹ *Barnabas v. Bersham Colliery Co.*, (1910) 102 L. T. 621.

² [1909] 2 K. B. 41.

³ [1909] 2 K. B. 46, *aff.* [1910] A. C. 486.

⁴ (1912) 1 Gordon W. C. R. 400.

⁵ 1909 S. C. 373.

⁶ [1912] A. C. 238.

⁷ (1912) 1 Gordon W. C. R. 398.

⁸ *Euman v. Dalziel & Co.*, 1912 S. C. 966.

⁹ 1909 S. C. 373, approved in "*Swansea Vale*" v. *Rice*, [1912] A. C. 238.

thrown off; none of the articles named were observed in the saloon by the Dec. 5, 1912. captain when he went to Lendrum about four o'clock. The body, clad in underclothes, was found next day in the sea near where the "Turnberry" had been lying; the man was drowned, and there were no marks of violence on the body. He was a good-tempered, sociable, pleasant man, and sober, though not teetotal. He was subject to attacks of nausea and sickness, and was seen on various previous occasions vomiting over the side of the ship; but the case does not state whether these attacks of sickness occurred at sea only, or also when the ship was in harbour, nor are any dates given, even approximately, of any of the attacks. There had been, in March 1911, a shortage in the liquor stock under Lendrum's control; but the sum (£3, 14s. 6d.) was, by arrangement, being gradually paid back by him, and the debit balance had been reduced to 11s. 1d. A strange episode is stated, for which no date is given, when Lendrum was seen hanging over the ship's side, suspended by a rope round his waist, and explained that he was trying to recover a towel. The arbitrator finds that he did not commit suicide. The ship's rail was 3 feet 5 inches above the deck; Lendrum's height was 5 feet 6 inches.

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The learned arbitrator has awarded compensation to the dependants. I have come to the conclusion, for reasons to be stated, that his award cannot stand; but before dealing with these reasons, I shall make some observations upon the law and authorities bearing on the case. During the discussion counsel for the parties judiciously limited their citation of reported cases to six, which they seemed to be agreed, and so far as I see they were right, are the most nearly in point to the present case. These were *Mackinnon v. Miller*¹; "*Swansea Vale*" v. *Rice*²; *Lee v. Stag Line Company*³; *Bender v. "Zent"*⁴; *Marshall v. "Wild Rose"*⁵; and *Burwash v. Leyland & Company*.⁶ In the first three of the cases the decision was in favour of the applicants; in the remaining three, in each of which the Court differed from the arbitrator, the decision was in favour of the employers.

*Mackinnon v. Miller*¹ is, I think, much the strongest case in favour of the applicant. Miller, an engineer on board a steam tug which lay moored to the jetty at Kinlochleven, was last seen alive about 5 A.M. on 15th February 1908, asleep in his bunk; an hour later he was missed; his working clothes were lying beside the bunk; his body, clad in nightdress, was recovered two days later in the sea, close by where the tug had been lying; suicide was negatived. The Sheriff-substitute awarded compensation, and the Court declined to interfere with his conclusion. The Lord President pointed out that though there was no direct testimony, there was nothing antecedently wrong in saying one might come to a certain inference although that inference was only based on circumstantial evidence. "The deck was a place where Miller had every right to be; the deck was a place where even at that hour of the morning he might fairly be, not perhaps in the direct carrying out of his duties, but for indirect purposes with which

¹ 1909 S. C. 373.

² (1912) 1 Gordon W. C. R. 398.

³ [1909] 2 K. B. 46, *aff.* [1910] A. C. 486.

⁴ (1912) 28 T. L. R. 546, 1 Gordon W. C. R. 400.

⁵ [1912] A. C. 238.

⁶ [1909] 2 K. B. 41.

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these duties were not unconnected." The Sheriff-substitute had drawn an inference in which the Court thought there was nothing violent, and they would not disturb his conclusion. It is fair to observe that *Miller's* case¹ was prior in date to the decision by the House of Lords in *Marshall v. "Wild Rose,"*² which I think stands as the leading authority on this matter. Upon the other hand, in the later case of "*Swansea Vale*,"³ Lord Shaw said: "I see no occasion to differ from, but much to incline me to agree with, the judgment in the case of *Mackinnon v. Miller*,¹ and in particular with the judgment of Lord Dunedin." I do not at all suggest that *Mackinnon v. Miller*¹ was wrongly decided. But after all, the decision in each of these cases must depend upon its own facts; and there were facts in that case—e.g., that the height of the ship's rail was only 20 inches, and the existence, as the report discloses, of various obstacles or stumbling-blocks upon the deck, which differentiate it from the present case. "*Swansea Vale*" v. *Rice*³ was, I think, a comparatively simple and plain-sailing case upon its facts. Rice was first mate upon a voyage from Greenock to Algiers. At 4 A.M. he complained to the captain of being sick and giddy, took a dose of castor oil, and went on deck to keep his watch (4 to 8 o'clock); he was not seen after 7 A.M. The County Court Judge awarded compensation, and the Court of Appeal and House of Lords upheld his decision. There was more than mere conjecture to proceed upon; this sick officer, when last seen, was on active duty, discharging a responsible office. As Lord Shaw put it: "A man engaged in a variety of duties is sent in a sick and giddy condition to perform those duties and into a position of danger." The third case is *Lee v. Stag Line Company*.⁴ Lee was engaged as ship fireman on a voyage in the tropics; he was new at the work; he was put on duty one night from midnight to 6 A.M., which was longer than his usual watch (12 to 4), owing to the illness of another fireman; about 4.45 A.M. he was missed, and he was never seen again. Shortly before he had been seen on deck getting a drink. It was proved that the firemen while on duty were in use to go on deck for fresh air. The ship's rail was three feet high; the deceased was six feet in height; the ship was given to rolling, and was rolling slightly that morning. The County Court Judge drew the inference that Lee died as the result of an accident arising out of and in the course of his employment, and the Court of Appeal held that there was evidence to justify this inference. Cozens-Hardy, M.R., observed: "It was usual—I think I may say necessary—in the tropics to come on deck for fresh air. That makes all the difference. Although the man's regular duty was in the stokehole, he was really acting equally in the discharge of his duty in coming on deck." I come now to the cases in which the applicants were unsuccessful. The first in date is *Bender v. "Zent,"*⁵ which, on its facts, affords a sharp contrast with the case of *Lee*.⁴ While a steamship was on the high seas, the chief cook and baker (Bender) was lost overboard; the weather was fine, the ship steady, and there was

¹ 1909 S. C. 373.² [1909] 2 K. B. 46, *aff.* [1910] A. C. 486.³ [1912] A. C. 238.⁴ [1912] 1 Gordon W. C. R. 398.⁵ [1909] 2 K. B. 41.

a 4-foot rail and bulwark all round. The man was last seen about 5.35 A.M. Dec. 5, 1912. The County Court Judge awarded compensation, but the Court of Appeal took the opposite view. The Court fully recognised, as did Lord Dundas in *Mackinnon v. Miller*,¹ the competency of drawing an inference from facts that an accident arose out of as well as in the course of an employment, and though no direct testimony is available. But the onus is always upon the applicant, and none the less so although, by the workman's death, a greater burden is thrown on his dependants. The facts afforded ground for conjecture, but did not warrant the inference which the County Court Judge drew from them. Only three days after the judgment in *Bender v. "Zent"*² the same Court decided the important case of *Marshall v. "Wild Rose"*.³ The rubric, which seems to be fully borne out by the opinions, bears broadly that "the unexplained drowning of a seaman engaged on board ship does not of itself raise any presumption that his death was the result of an accident arising out of as well as in the course of his employment so as to entitle his dependants to compensation under the Workmen's Compensation Act, 1906." Lord Moulton (then L.J.) said: "The point is a very important one, and I hope it will go to the highest tribunal, so that we may have directions upon it. It may be expressed in a very few words: Is the unexplained drowning of a sailor by falling from his ship when at sea a sufficient *prima facie* case for compensation?" The facts of *Marshall's* case⁴ were brief and scanty. He was second engineer on a steam trawler lying in Aberdeen harbour; he came on board one evening at ten o'clock; steam was to be got up by midnight; he went below, and undressed himself, excepting shirt, trousers, and socks; he came up on deck later, saying to the chief engineer that he was going for a breath of fresh air; it was a very hot night. He was missed at midnight; and his body was found next day in the sea just under the rail on the starboard quarter, where the men were in the habit of sitting in hot weather. The County Court Judge awarded compensation; but the Court of Appeal, and a majority of the noble and learned Lords, took the opposite view. Lord Shaw, one of the majority, pointed out that "the name of inference may be apt to be given to what is pure conjecture"; that there was no room for anything but conjecture as to what Marshall did, or what befell him, after he came up on deck that night, and that, assuming his death to have been due to an accident arising in the course of his employment, there was no ground for any inference that it arose out of the employment. The latest of the six cases to which we were specially referred is that of *Burwash*,⁴ which was decided by the Court of Appeal contemporaneously with *Lee v. Stag Line Company*.⁵ The facts in *Burwash's* case⁴ were remarkably like those now under consideration, but were in several respects more favourable for the applicants; yet the decision was against them. A ship's cook disappeared while the vessel was at sea. When last seen he was at his work in the galley, where there was no possibility of his falling overboard.

¹ 1909 S. C. 373.² [1909] 2 K. B. 41.³ [1909] 2 K. B. 46, *aff.* [1910] A. C. 486.⁴ (1912) 1 Gordon W. C. R. 400.⁵ (1912) 1 Gordon W. C. R. 398.

Dec. 5, 1912. He was suffering from a disease which caused him to go frequently to the lavatory, and to reach it he had to go on to the open deck at a point 8 feet from the ship's rail, which was 3 feet 7 inches high; it was dark at the time, and the ship was rolling. The County Court Judge awarded compensation, but the Court of Appeal allowed the appeal. Cozens-Hardy, M.R., observed that "there is no evidence to show how the cook got out of his galley in the course of his duty, and no evidence from which it can be inferred how the man went into the sea," and added that "the case is not beyond the region of surmise." Farwell, L.J., treated the matter as "really a pure case of guesswork." Kennedy, L.J., said: "It is a mere matter of conjecture. The man was lost in the sea by drowning, and we know nothing more than that." After alluding to *Bender v. "Zent,"*¹ his Lordship went on to say: "The proof certainly lies upon the dependants, but here there is nothing to show how the man came to leave the galley. If he did leave the galley justifiably he was never seen. With reluctance I feel myself obliged to say that the inference we are asked to draw here goes beyond anything justified by the circumstances which existed at the time." The case of *Burwash*,² if rightly decided, as I think it was, affords a direct and strong authority adverse to the present applicants.

The weight of the authorities now reviewed seems to be in favour of the employers in the case before us. I think one may deduce from the decisions (1) that the burden is always upon the applicant to prove that death resulted from an accident arising out of as well as in the course of the employment; (2) that such proof need not be by direct, but may be by circumstantial evidence; but there must be facts from which an inference can be drawn, as distinguished from mere conjecture, surmise, or probability; and (3) that an award by an arbitrator cannot stand unless the facts found are such as to entitle him reasonably to infer his conclusion from them. Now, when one turns to the facts of this case, the precise cause of Lendrum's death is left in mystery and darkness. I think there are legitimate grounds for at least a suspicion of suicide. The man leaves his bunk, and is found drowned; he has divested himself of his upper clothing, part of which he certainly had on when last seen, and leaves it, and his purse and watch, in the saloon; and if he had occasion to be sick, the lavatory was nearer to his bunk than the ship's side. But the Sheriff-substitute negatives suicide, though it does not appear how he reached that inference from the facts as disclosed. Leaving suicide out of account, I do not say that the arbitrator might not reasonably infer that death was due to an accident arising in the course of the employment. But the question is whether he could so infer accident arising out of the employment. I am unable to hold that he could. The onus is on the applicant in that matter; and I can see nothing in the facts which could warrant the inference. The facts here are no stronger, to my thinking, than those in *Marshall*³ and in *Bender*,¹ and less strong than those in *Burwash*.² Mr Moncrieff urged that the last known fact before Lendrum's disappearance was the captain's

¹ [1909] 2 K. B. 41.

² 28 T. L. R. 546, 1 Gordon W. C. R. 400.

³ [1909] 2 K. B. 46, *aff.* [1910] A. C. 486.

order to him to prepare tea ; that he was thereafter a man on active duty ; Dec. 5, 1912. that in all probability he was, while engaged in that duty, taken sick, and while vomiting, fell over the side and was drowned. But the sickness is absolutely conjectural. I am not clear that in any case one could hold that being sick over the side was an act springing from or caused by his employment, so that a fall overboard while vomiting could be said to be an accident arising out of the employment. A case might occur where a cook, engaged in his duty, was forced by the motion of the vessel to leave his work and vomit over the side ; and I could understand in such a case an inference that his consequent fall overboard was an accident arising out of his employment ; but there is no case of that sort here. It is enough, however, as I think, that the suggestion of sickness and its hypothetical consequences is here entirely in the region of guess and surmise and conjecture. In my judgment, therefore, the Sheriff-substitute could not competently draw an inference from the facts found that the accident (assuming there was an accident) arose out of the employment of the deceased. That view, if correct, would sufficiently dispose of the case. But I may add that, looking to the peculiar way in which the Sheriff-substitute's conclusion is expressed, I am not satisfied that he intended to draw the inference which the applicants suppose him to have drawn. The inference in fact which the arbitrator says he drew is merely that Lendrum left his bunk, went on deck, accidentally fell overboard, and was drowned. He then goes on to say : "And I held that said accident arose out of and in the course of his employment." It looks to me as if the Sheriff-substitute had overlooked the distinction between "out of" and "in the course of," and the necessity for establishing both points in order to entitle an applicant to compensation. What the arbitrator says he infers in fact might warrant him in holding that there was an accident in the course of the employment ; but it would not, I think, justify the further conclusion that it arose out of the employment. It appears to me that, having drawn his inference in fact, he proceeded to deduce a conclusion in law which the inference in fact was not sufficient to support. But whether or not this interpretation of the Sheriff-substitute's conclusion is the correct one, it seems to me that his award cannot be sustained ; and that the question put to us must be answered in the negative.

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LORD SALVESEN.—[After stating the facts found proved with regard to Lendrum's death]—There are only three possible ways by which to account for his death—foul play, suicide, or accident. Foul play is out of the question, and as to suicide the facts proved do not seem to me to justify an inference that he took his own life. It is expressly found that he was a good-tempered, social man, pleasant to deal with, and was never seen by the captain to be the worse of intoxicating liquor, although he was not a teetotaler. On the other hand it is proved that there had been a shortage in the liquor stock under his charge of £3, 14s. 6d. in March 1911 ; but by an arrangement with his employers this sum was being gradually paid back, with the result that at the time of his death he was only due them 11s. 1d. There was therefore nothing in his relations with his employers which would lead him to take his own life. On the other hand, it remains

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a mystery why he should have removed such parts of his clothing as he had on when in his bunk and taken his clothes to the saloon. It was suggested that as his own bunk was small and ill ventilated he had taken his clothes there to dress in greater comfort. This, of course, is possible, but does not explain why he should have removed the waistcoat which he had on while in his bunk. If he was intending to drown himself he might perhaps, before going on deck, divest himself of his clothes and leave such valuables as he had behind, or if he had become suddenly deranged his actings might be accounted for. In the course of performing his duties in preparing tea for the crew he would naturally first dress himself, and there would seem to be no reason why he should divest himself of such of his day clothing as he already had on. Counsel for the respondent suggested that he had taken off his trousers before lying down, and might require to remove his vest in order to put on his braces. This seems on the face of it extremely improbable, more especially as braces did not form part of the clothing which he left behind. His conduct in removing his clothes is certainly mysterious; but, having in view all the circumstances, I do not think any inference can be drawn that he met his death by his own wilful act. The Sheriff-substitute has found in fact that he did not commit suicide, by which I suppose he means that there was no evidence from which he could reasonably draw the inference that he had done so. If that is the meaning of the finding I am prepared to assent to it, because, although the possibility of suicide has certainly not been excluded, the presumption is the other way.

The last alternative is that he met his death by accident; and, difficult as it is to figure what kind of accident could have happened to him under the circumstances, I hold that the probabilities point in that direction. The theory presented by the respondent was that he had suddenly felt an attack of sickness coming on, that he had rushed on deck to vomit over the side of the ship, and that in so doing he had overbalanced and fallen. It is possible that this happened, although I cannot say there are any facts found which make it probable. It is true that on several previous occasions he had been seen vomiting over the side of the ship, but it is not said how long before his death he was last so seen, nor whether such vomiting took place while he was at sea. There is no finding that during the day of the accident, or even during the last voyage of the "Turnberry," he had complained of sickness or shown any symptoms of indisposition. He had gone about his duties in the morning apparently in the ordinary way, and had been idling or resting the rest of the day. He must have understood the captain's message or he would not have got up; and, as there was a lavatory close to the saloon in which he could conveniently have been sick, it is difficult to understand why he should have passed the door of this lavatory and gone out in his stocking soles on to the deck of the vessel on a December afternoon when it must have been perfectly dark. Further, as the rail of the vessel over which he is supposed to have leaned was 3 feet 5 inches above the deck, and Lendrum was a small man—5 feet 6 inches in height—it is not easy to understand how he could have overbalanced, even if he had had a paroxysm of sickness. A slip on the deck or a stumble would not account for his falling overboard, although he might well have stumbled in the

dark. The circumstances of his disappearance appear to me to be wholly wrapped in mystery. Dec. 5, 1912.

Assuming, however, that Lendrum accidentally fell overboard, has the respondent proved that this accident arose out of his employment? As cook and steward he had no occasion to go near the sides of the vessel. At the time in question his duties would require him to be in the saloon and in the galley or between the two, but he could scarcely have been in the performance of his duty in the attire in which his body was found. If it had been affirmatively proved or could be reasonably inferred that he did rush to the side of the ship in order to vomit, and had thus fallen overboard, I should have been prepared to hold that the accident had arisen out of his employment; but when one comes to theorise on the manner in which he met his death, one is in the region of pure conjecture. All that can be affirmed is that his falling overboard is entirely unexplained, and the theory of the respondent seems to be just as improbable as any other theory which might be suggested on the other side. That the man sometimes did eccentric things is proved by the fact that on one occasion he was observed hanging over the side by a rope fastened to the ship's taffrail and round his own waist, and that on that occasion he was holding on to the rope with both hands held above his head. The explanation that he afterwards gave to his son, that he was in this way trying to recover a towel which had fallen overboard, does not make his conduct much more rational. The case therefore seems to me to fall within the category of which *Bender*¹ and *Marshall*² are excellent illustrations. In the latter case Lord Shaw of Dunfermline said: "What did the sailor Marshall do when he left his berth and went on deck? Nobody knows. All is conjecture. Did he jump overboard, walk overboard, or fall overboard? One can infer nothing, all is conjecture. Was there an accident at all, or how and why did the deceased unhappily meet his fate? No doubt the occurrence took place during the period of his engagement, but did it take place in the course of his employment, or . . . in the course of some occupation grafted on to his employment but in no way part of it, necessary to it, or usual in it?" Each of these pertinent questions can be put with equal force here. Indeed, in *Marshall's* case,² there was a greater probability that the man had fallen overboard while sitting on the top of the bulwarks than that he met his death in any other way. I adopt the answer of the learned and noble Lord in that case as applicable to the present, when he says: "There can be in my view nothing dignified with the name of an inference on this subject, but again only conjecture."

We were referred to the decision of the First Division in the case of *Mackinnon*,³ and counsel for the respondent argued that the facts there were no more convincing than in the present, and yet the Court had refused to disturb the finding of the arbitrator in favour of the workman's dependants. There was, however, one important fact in that case which made the likelihood of an accidental falling overboard much greater than in the present, namely, that the bulwark was only 20 inches in height, whereas the rails of the "Turnberry" were 3 feet 5 inches, or more than twice the height. In

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¹ [1909] 2 K. B. 41.

² [1910] A. C. 486.

³ 1909 S. C. 373.

Dec. 5, 1912. its facts the present case much more closely resembles those which were held by the Court of Appeal not to entitle them to draw the inference that the cook of the "Zent" had met with an accident arising out of his employment. The Sheriff-substitute has made no finding that the accident which he infers Lendrum met with arose out of his employment. Indeed, as I read his statement, he seems to have assumed that it was enough to reach that conclusion because Lendrum fell overboard while in the course of his employment. In short, he has not adverted to the distinction that was so clearly pointed out by the Judges who decided the cases of *Bender*¹ and *Marshall*.² In my opinion there are no facts from which an inference can reasonably be drawn that the accident—assuming it to be proved—arose out of Lendrum's employment. I am therefore for answering the questions of law put to us by the arbitrator in the negative.

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LOED GUTHRIE.—It is admitted that the deceased Edward Lendrum was drowned while in the course of his employment by the appellants. On the question of whether the occurrence arose out of the employment, had I been in the arbitrator's position, I think that, on the facts held proved by him, I should have drawn a different inference from that at which he has arrived. But the only question for us being whether he could reasonably hold, as he has done, that the respondents had proved that the death of the deceased Edward Lendrum was due to an accident arising out of his employment by the appellants, I am not prepared to say that such a conclusion, taking into consideration, as the arbitrator says he does in the second last paragraph of the case, "the whole facts admitted and proved," could not be reasonably drawn. I emphasise this distinction, because it seems to me that it has not always been maintained in the cases which have been cited to us, and which your Lordships have fully discussed. Thus, Lord Justice Kennedy in the case of *Burwash v. Leyland & Company*,³ said in the passage quoted by Lord Dundas,—"I feel myself obliged to say that the inference we are asked to draw here goes beyond anything justified by the circumstances which existed at the time." With great deference it appears to me that we are not asked to draw any inference. What we are asked to do is to consider whether a certain inference could be reasonably drawn—not whether we ourselves could or could not draw it. In this case I could not draw the arbitrator's inference, but I think all the same it could be reasonably drawn. I do not decide that there was sufficient legal evidence to warrant the arbitrator's decision, but only that there was such legal evidence as might reasonably warrant the inference.

Not only do the circumstances not suggest, they seem to me to negative, the idea either of violence or of suicide. The arbitrator has found as a fact that the deceased did not commit suicide, and the averments of the appellants bearing on suicide have either been displaced altogether by the arbitrator's report or so minimised as to lose all significance. An intention to enter the water for any ordinary legitimate purpose being equally out of the question, the respondents say that, by a process of exclusion, they have

¹ [1909] 2 K. B. 41.

² [1910] A. C. 486.

³ 28 L. T. R. 546, 1 Gordon W. C. R. 400.

reduced the possible explanations of the deceased's death to accident. I Dec. 5, 1912. think they are so far right. The difficulty remains that they must prove to the satisfaction of the arbitrator that the accident arose out of the deceased's employment, and, if the arbitrator is in their favour, they must prove to our satisfaction that the facts proved by them made it reasonable for the arbitrator to decide for them.

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If, as the arbitrator thinks, it is sufficiently proved that the deceased met his death by overbalancing himself while vomiting over the ship's side, fell into the water and was drowned, I have no doubt that this occurrence would be an accident arising not only in the course of but out of the employment. The death did not result from the sickness, but from the sickness occurring at a time when the circumstances connected with the employment introduced a special risk. The difficult question is whether there were grounds for the arbitrator coming reasonably to the view he did.

It is admitted that, whatever view be taken, there are circumstances in the case which are difficult to explain. If the result were that there was no more reason to infer accident arising out of the employment than accident arising outwith the employment—if there were no circumstances to suggest that the deceased was in the discharge of his duties when he fell overboard—then, as all the cases show, the respondents must fail, because the arbitrator could not reasonably come to the conclusion at which he has arrived. In that case he would not be drawing a reasonable inference from facts, there being in the case I am assuming no facts from which an inference in the respondents' favour could be reasonably drawn. He would be proceeding merely on conjecture and surmise as to what was conceivable.

The arbitrator, as I read the evidence, had it sufficiently proved that immediately before the accident the deceased received an order to prepare and serve a meal for the crew, that he understood the order and got up out of the bunk where he had been sleeping with the view of fulfilling the order, that when the accident must have happened he would naturally have been in the course of actively executing that order, and that the captain understood he was at the time of the accident so employed, and that the deck from which he must have gone overboard was a place where he might have occasion to be in the discharge of his duties. This being proved, it seems to me that very little more was required to lead reasonably to the inference at which the arbitrator has arrived. The additional circumstances were found by the arbitrator in the facts thus stated by him:—"He was subject to attacks of nausea and sickness, and was seen on various previous occasions vomiting over the side of the ship," and he adds,—"His son Edward Lendrum, who frequently sailed with his father in said ship, and to whom his father's tendency to sickness was well known, immediately on hearing of his father's death expressed the opinion that he had fallen overboard while vomiting." Now if this statement by the arbitrator only means that the deceased was unusually liable to sea-sickness, and does not imply a general proneness to nausea on land as well as at sea, and if the statement is consistent with the deceased's attacks having been long previous to the drowning, then I would agree with your Lordships that the facts thus held proved could not reasonably be held as sufficient, along with the circumstances above detailed, to warrant the inference which he has drawn. But I do

Dec. 5, 1912. not so read the arbitrator's findings. Although they are lacking in important details, which I think they might have contained, I read them as sufficient to lead to the reasonable inference that the deceased had gone from his cabin into the saloon to dress, that while dressing he was seized with an attack of nausea, and that, leaning too far over the bulwark while in the act of violent retching, he overbalanced himself and fell overboard. I do not say I should have thought these facts sufficient in view of no complaint of sickness having been made by the deceased or appearance of illness observed, and in view of the height of the bulwark as compared with the deceased's height. But my difficulty arises, as I think, on a balancing of evidence. I am not prepared to hold that this is a case in which, as the Lord President put it in *Mackinnon's case*,¹ the arbitrator has "proceeded entirely contrary to evidence or upon no evidence at all." The facts in *Mackinnon's case*¹ seem to me in essential features to have been very like those in the present case. No doubt the bulwark was only 20 inches, while in this case it was 41 inches; but I do not find any point made of the height of the bulwark in any of the learned Judges' opinions. Had the Court had occasion to review the arbitrator's award instead of merely determining whether it involved a conclusion which could reasonably be arrived at, such an element would no doubt have been dealt with. In view of the functions which we are discharging, I do not think this difference between the two cases, the only one I can discover, is relevant.

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I therefore think that on the facts admitted and proved, the arbitrator was justified in holding that the deceased Edward Lendrum met his death by accident arising out of and in the course of his employment by the appellants.

LORD JUSTICE-CLERK.—Your Lordships have so fully dealt with the facts of this case and with various cases which were quoted in the debate, that I feel it would be mere repetition if I were to attempt to go over the same ground again, agreeing as I do with the opinions of Lord Dundas and Lord Salvesen in every particular. In the cases in which a person in employment is found dead, there being no one present who can give any evidence as to how the death came about, difficult questions may arise as to whether the surrounding circumstances which are proved amount to evidence establishing that the death arose out of the employment, assuming that the primary condition is established that it occurred in the course of the employment. I say "proved," for without proof there can be no case on assumption. The numerous cases which were referred to give illustrations both of proof sufficient and proof that falls short of sufficiency. The applicant for an award under the Workmen's Compensation Act is in no different position from any other litigant who pursues an action. He must prove his case. He is not entitled to succeed on likelihoods or deductions made from data insufficient to bring conviction to the mind. If the situation is obscure, then he cannot succeed. It has to be remembered that the employer who is sued under the Act is not in the position of an insurer. He has no bargain with his employee as an insurance company

¹ 1909 S. C. 373.

has with one insured. A person insuring his life stipulates that, on his death, he shall pay a premium out of his own funds, the insurance company on his decease shall pay a certain sum to his executors. When the death occurs the right to the agreed-on sum emerges, and the burden of proof of exemption from liability rests on the insurers. If they set forth any defence, such as suicide, the burden of proof is on them. But in the case of an employer under the Act, he has received nothing from the person who is killed. He has undertaken no obligation. Any claim against him is a claim under the statute, by which he is ordained to pay compensation. He is in the position of being compelled by law to compensate his employee if these conditions are fulfilled—(1) that the workman has been injured or killed; (2) that the injury was caused by an accident; (3) that it occurred in the course of the employment; and (4) that it arose out of the employment. In this case it is the last question that is the important one—Did the deceased die from an accident arising out of his employment? I concur with your Lordships in thinking that this has not been proved so that the question can be answered in the affirmative. Lord Guthrie holds the arbitrator could hold it proved (1) that the deceased was sick; (2) that he went and leaned over the rail; (3) that he overbalanced himself and fell into the water. I am unable to see how any one of these three things can be held to have been proved by any circumstantial evidence expressed in the finding of the arbitrator; and unless they were all proved there could be no justification for deciding as the arbitrator has done. It appears to me that, as was expressed by Lord Justice Fletcher Moulton (now Lord Moulton) in the case of *Marshall*,¹ “the facts here amount to nothing more than the unexplained drowning of the seaman.”

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Lord Justice Farwell in the same case seems to me to put the matter most tersely and clearly, and I adopt his words when he says: “It is perfectly plain from the decisions of the House of Lords as well as of this Court that the onus is on the claimant to make out his case. He has to prove affirmatively that he brings himself within the Act. The Act of Parliament has thought fit to add to ‘in the course of his employment’ the words ‘arising out of the employment,’ showing that both these two things are necessary. I cannot see myself how it is possible to infer from the mere fact that a man disappears in the course of his employment—that is, in the course of the voyage on his ship if he is employed as a sailor,” or as here when the ship was in harbour—“without more, that he disappeared in consequence of an accident arising out of his employment.”

THE COURT pronounced this interlocutor:—“Sustain the appeal: Answer the question of law therein stated in the negative: Therefore recall the award of the arbitrator, remit to him to dismiss the claim, and decern; find the appellants entitled to their expenses of the stated case, and remit,” &c.

LINDSAY COOK & DICKSON, S.S.C.—J. & J. ROSS, W.S.—AGENTS.

¹ [1909] 2 K. B. 46, *aff.* [1910] A. C. 486.

No. 47.

WILLIAM M'MILLAN, Pursuer (Appellant).—*Crabb Watt, K.C.*—*A. M. Mackay.*

Dec. 7, 1912.

THE SINGER SEWING MACHINE COMPANY, LIMITED, Defendants
(Respondents).—*Wilson, K.C.*—*W. Mitchell.*M'Millan v.
Singer
Sewing
Machine Co.,
Limited.*Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)*—"Accident"—*Pleurisy following upon chill.*

A collector and canvasser, who had contracted pleurisy, claimed compensation from his employers, averring that in order to finish his work timeously one day he had to over-exert himself in climbing the stairs of a tenement; that he became "sweated" and contracted a chill which developed into pleurisy; and that he thus sustained an accident in the course of his employment. The arbitrator, without allowing a proof, dismissed the application as irrelevant, holding that the workman had failed to aver an "accident" within the meaning of the Act.

In an appeal, *held* that the arbitrator was right.

1st DIVISION. In an arbitration under the Workmen's Compensation Act, 1906, between William M'Millan, canvasser, Glasgow, and the Singer Sewing Machine Company, Limited, Glasgow, the Sheriff-substitute of Lanarkshire (Glegg) dismissed the application as irrelevant, and at the request of the applicant stated a case for appeal.

The case set forth that the applicant had made, *inter alia*, the following averments:—"1. The pursuer is a collector and canvasser, and resides at 44 Phoenix Park Terrace, off Garscube Road, Glasgow. The defenders are a limited liability company, and carry on business at 58 Bothwell Street, Glasgow. 2. The pursuer entered the defenders' employment as a collector and canvasser on or about the 15th day of February 1912, at a salary of 10s. per week and commission, made up of (1) 5 per cent on sums collected, and (2) 10 per cent on goods sold. The said salary of 10s. per week was increased to £1 per week in or about the middle of March 1912. 3. On or about Monday, the 6th day of May 1912, the pursuer was engaged in the ordinary course of his employment as canvasser and collector with defenders in canvassing and collecting accounts from defenders' customers in the Maryhill and Lambhill districts of Glasgow and neighbourhood thereof. The weather was quite dry all day. Pursuer was engaged up till about eight o'clock on the evening in question, when he found that it would be necessary for him to tax his energies to the utmost in order to enable him timeously to overcome the work before him, and the pursuer had to complete said work in the evening of said Monday, 6th May, as it was his duty and instruction to do so. 4. The last calls of the pursuer consisted of calls on a number of customers of defenders for the collection of accounts in three different tenements in Maryhill, viz.:—(1) Mrs Thomson, 173 Cumlodden Drive; (2) Mrs Gibbin, 7 Morrison Street; and (3) Mrs Crossan, 9 Morrison Street. The pursuer had called at said tenements earlier in the day, but none of said customers were at home, and accordingly, on the evening of said 6th May 1912, and about eight o'clock, the pursuer proceeded to call at the house of the said Mrs Thomson. The said Mrs Thomson resided in a flat in said tenement, three stairs up. While walking up said stairs the pursuer over-exerted himself and became sweated, with the result that he contracted a chill. He completed his other two calls on Mrs Gibbin and Mrs Crossan, but on arriving home he had to go immediately to

bed. 5. As a result of having contracted said chill he was confined Dec. 7, 1912. to bed from 6th to 14th May 1912, on which latter date he was taken M'Millan v. Singer; suffering from pleurisy as a consequence of said chill, and he has since said 6th May been incapacitated from resuming his occupation. Sewing Machine Co., Limited.

6. Said chill contracted by the pursuer was an accident within the meaning of the Workmen's Compensation Act, 1906, and arose out of and in the course of pursuer's employment as a collector and canvasser foreshaid with defenders."

The case further set forth:—"I heard parties' procurators on the relevancy of the appellant's averments, when I found that the appellant had failed to make a relevant statement that (1) there was an accident within the meaning of the Workmen's Compensation Act, and (2) assuming there was an accident, said accident arose out of the appellant's employment. I therefore dismissed the application, and found the respondents entitled to expenses."

The question of law for the opinion of the Court was:—"Whether on the facts contended on the arbitrator was right in dismissing the application as irrelevant?"

The case was heard before the First Division (without Lord Johnston) on 7th December 1912.

Argued for the appellant;—The injury, viz., the chill and subsequent pleurisy, undoubtedly arose "out of" the applicant's employment. Further, it was an "accident," for the passage of a disease germ into the body could be an "accident"; it was "a physiological injury,"² and was strictly parallel to the "anthrax" and other cases.³ Provided the time, place, and circumstances in which the germ entered the body were sufficiently averred, such an injury was an "accident,"⁴ and the time, place, and circumstances were here specifically averred. [The LORD PRESIDENT referred to *Blakey v. Robson, Eekford, & Company, Limited*.⁵]

Counsel for the respondents were not called upon.

LORD PRESIDENT.—I had occasion some time ago to complain—as I might almost say—of the way in which, by the use of decided cases, we are, so to speak, driven from point to point and made to arrive at a result very far distant from the point at which we started; and I confess that I think in this case we have a very flagrant example of that process. It is really almost painful to see to what a pitch of extravagance we are asked to go as the result of what—I must admit—seems to be quite reasonable argument upon the authorities.

Looking at this as a plain man, I think that nothing could be further

¹ *Millar v. Refuge Assurance Co., Limited*, 1912 S. C. 37; *Kitchenham v. Owners of s.s. "Johannesburg"*, [1911] 1 K. B. 523.

² *Stewart v. Wilsons and Clyde Coal Co., Limited*, (1902) 5 F. 120, *per* Lord McLaren, at p. 122.

³ *Brintons, Limited, v. Turvey*, [1905] A. C. 230; *Fenton v. J. Thorley & Co., Limited*, [1903] A. C. 443, *per* Lord Macnaghten, at p. 448; *Warner v. Couchman*, [1911] 1 K. B. 351, *per* Fletcher Moulton, L.J., at p. 354.

⁴ *Broderick v. London County Council*, [1908] 2 K. B. 807; *Steel v. Cammell, Laird, & Co., Limited*, [1905] 2 K. B. 232; *Eke v. Hart-Dyke*, [1910] 2 K. B. 677; *Kelly v. Auchenlea Coal Co., Limited*, 1911 S. C. 864.

⁵ 1912 S. C. 334.

Dec. 7, 1912. removed from an accident than what happened in this case. All that the claimant can say is that in the course of his ordinary work he got overheated—he got, as he puts it, sweated—and that, when he got home, he felt he had contracted a chill and afterwards found he was suffering from pleurisy.

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I must say that, until I am compelled to say so by a higher tribunal, I shall never admit that such a thing as this is an accident. We were very strongly urged by the learned counsel who pleaded the case to allow a proof. I do not think we should do so, because a proof would come to nothing. He cannot ask that he should be better treated than by supposing he has proved every word which he has set forth; and if he had, it would amount to no more than what I have said. But in case the matter should go further, I think it necessary to say that I think an arbitrator in Scotland is entitled, in the conduct of the arbitration, to take the procedure to which we are accustomed in Scotland—I mean the procedure which requires consideration of the question of relevancy before proof is allowed. I think it necessary to say so, because that is not the procedure in England. As we all know, the practical use of demurrer has long ago ceased. Everything goes to what is called trial, and relevancy is taken up along with the inquiry into the facts. This is not our practice, and there is no reason why we should alter our practice.

Accordingly, I think that this arbitrator, if he was clearly of opinion that the case as stated was irrelevant, was not bound to order a proof, and that we should not order him now to allow it. Assuming that the appellant, as I have just said, had proved everything which is stated in the case, it seems to me that there would be no proof of accident.

It would be quite useless to go through the various cases. I would only say, with great respect, that I, for my part, entirely agree with the general review of the cases that was given by the Court of Appeal in England in the case of *Eke v. Hart-Dyke*.¹ And I notice that, in that case, Lord Justice Kennedy particularly scouts the idea of the case of a man catching cold being said to be an accident. Well, I cannot see the distinction between catching a cold which passes off and catching a cold which eventually develops into pleurisy. Upon the whole matter I am of opinion that we should answer the question in the affirmative.

LORD KINNEAR.—I agree.

LORD MACKENZIE.—I am of the same opinion. I think this is a very plain case. I would only add to what your Lordship has said on the question of relevancy that there was no suggestion in the argument that the learned arbitrator had omitted to state any fact in the case which would assist the appellant in his claim.

THE COURT answered the question of law in the affirmative.

E. ROLLAND M'NAB, S.S.C.—ADAMSON, GULLAND, & STUART, S.S.C.—Agents.

¹ [1910] 2 K. B. 677.

WILLIAM DOUGALL, Pursuer (Appellant).—*D. Anderson.*
 CALEDONIAN RAILWAY COMPANY, Defenders (Respondents).—*Wark.*

No. 48.

Dec. 7, 1912.

Process—Record—Amendment—Failure to pay opponent's expenses—Absolutor or dismissal.

Dougall v.
 Caledonian
 Railway Co.

IN an action of damages for personal injury brought in the Sheriff Court at Perth and remitted to the Court of Session for jury trial under section 30 of the Sheriff Courts (Scotland) Act, 1907,¹ the Second Division, on 15th November 1912, allowed the pursuer to amend his record, found the defenders entitled to the expenses connected with the amendment, and allowed the pursuer "to proceed in the cause only on payment" of the expenses found due. The pursuer having subsequently intimated that he did not intend to pay the expenses and proceed in the cause, the defenders moved for absolutor. The pursuer maintained that the appropriate decree was one of dismissal.

2D DIVISION.
 Sheriff of
 Perthshire.

ON 7th December 1912 the Court, without delivering opinions, pronounced this interlocutor:—"In respect that the order as to expenses contained in the interlocutor of 15th November last has not been obtempered, assolvie the defenders from the conclusions of the summons, and decern."

J. MILLER THOMSON & Co., W.S.—HOPE, TODD, & KIRK, W.S.—Agents.

THOMAS COUBROUGH AND ANOTHER (Miss Elizabeth Muir's Executors),
 Pursuers (Respondents).—*Horne, K.C.—Paton.*

No. 49.

ALEXANDER CRAIG AND ANOTHER (William Craig's Trustees),
 Defenders (Reclaimers).—*Morison, K.C.—MacRobert.*

Dec. 10, 1912.

Agent and Principal—Liability to third parties—Knowledge of agent imputed to principal.

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Fraud—Forgery—Adoption—Agent and Client—Fraud of agent—Adoption by client—Personal bar.

The proprietrix of certain subjects handed the title-deeds thereof to her law-agent, a nephew, at whose death it was discovered that he had utilised the title-deeds to obtain money for himself by means of a forged bond over the property. Previously the proprietrix had received a demand for payment of income-tax on "interest" and, not knowing to what such a demand could refer, she asked another nephew, a brother of the law-agent, to make inquiries, in the course of which he learnt that his brother had obtained money for himself on the security of his aunt's title-deeds. He refrained from communicating this to his aunt till after his brother's death, when she heard of the bond for the first time and at once repudiated her signature. In an action by her against the bondholders for reduction of the bond as a forgery and for delivery of the title-deeds, the defenders maintained that she had adopted the forged deed as her own, or at least was barred by her actings from pleading that she had not adopted it.

Held that the knowledge of the nephew employed to make inquiries, which he had refrained from communicating, could not be imputed to

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the pursuer so as to bar her from subsequently repudiating the forgery ; and decree *granted* as concluded for.

Dictum of Lord Halsbury in *Blackburn, Low, & Co. v. Vigors*, (1887) 12 App. Cas. 531, at p. 537, *commented on* and *explained*.

Question, per the Lord President, whether the doctrine of adoption by "bar" can ever be applied where the knowledge of the person alleged to be barred is merely constructive knowledge.

1ST DIVISION.
Lord Dewar.

ON 24th July 1911 Miss Elizabeth Muir, Greenlaw Avenue, Paisley, brought an action against the testamentary trustees of the late William Craig, joiner, Paisley, for reduction of a bond and disposition in security, bearing to be granted by her, and for delivery of the title-deeds of the security subjects, on the ground that the signatures to the bond had been forged by her law-agent.

A proof was allowed and led. The facts established at the proof, which bore out the averments of the pursuer, were thus narrated by the Lord Ordinary in his opinion :—

"This action was raised on 24th July 1911 at the instance of the late Miss Muir, 11 Greenlaw Avenue, Paisley, who died on 30th September 1911, and the trustees accepting and acting under her will have sisted themselves as pursuers in the action. The question for decision is whether a bond and disposition in security—the signature to which is alleged to have been forged—now falls to be reduced, and the title-deeds delivered to the pursuers.

"Miss Muir was an old lady who owned some house property in Campbell Street, Paisley, valued at £750, and this was practically all her capital. In or about the year 1902 she transferred the title-deeds of this property to her nephew, the late William Bowie, who at that time was a solicitor of good repute in Paisley; but when he died on 2nd September 1910 his affairs were found to be hopelessly involved, and it was discovered that for a number of years prior to his death he had persistently misappropriated large sums of money belonging to his clients. Among other defalcations the pursuers allege that he forged Miss Muir's signature to the bond and disposition in security now under reduction. It is dated 11th and recorded 12th August 1904, and bears to have been granted by Miss Muir in favour of William Craig in consideration of the sum of £500 alleged to have been paid to her by William Craig's curator bonis. It is averred on record that Miss Muir did not sign this deed, or authorise or employ William Bowie to grant it; that she did not receive the £500 or any part thereof; that her signature and the signature of the instrumentary witness, James Charters, were forged; and that on learning of the existence of the bond Miss Muir at once repudiated it. The defenders deny that Miss Muir's signature was forged, and alternatively they plead that even assuming it was, Miss Muir and her representatives are barred by her actions from challenging it; and that in any event as the defenders obtained the title-deeds from the late William Bowie—while acting within the scope of his employment—as additional security, they are not bound to return them until the money advanced has been paid. I am of opinion that this defence has failed in all its branches.

"I have no doubt that Miss Muir's signature was forged. Miss Muir took much interest in her affairs, and largely managed them herself. She often referred to the fact—and was very proud of it—that there was no burden on *her* property; and she was naturally

much surprised when she came to know that a bond and disposition in security had been granted over it. She stated that she had given no authority, and when she saw the deed she immediately repudiated the signature both verbally and in writing, and gave her solicitor instructions to raise this action; and the expert evidence is to the effect that the signature is a forgery. Moreover, Mr James Charters—the instrumentary witness—who had been a clerk in Mr Bowie's office, states in his evidence (which was taken on commission) that his signature is forged also. And it is significant that Mr Charters was the instrumentary witness to Miss Muir's will which Bowie prepared and which was in his possession at the time he executed the bond and disposition in security. It is obvious on the face of the documents that both signatures to the bond have been copied from the will. Then it is proved, if further proof were necessary, that Miss Muir was not in Paisley on the date when she is alleged to have signed the bond there; and although her bank-book and accounts were carefully kept, there is no evidence that the £500, or any part of it, ever reached her, and she certainly paid no interest on the bond. Then Bowie was involved in building speculations and was hard pressed for money. It is proved that he misappropriated—by forgery and otherwise—large sums from other clients, and he confessed to his brother Thomas that he had borrowed this £500 on the security of Miss Muir's property without her knowledge and consent. He did not say that he had granted a bond and disposition in security, and forged the signature; but it is quite clear on the evidence that this is what he actually did, because he paid the interest, and the tax on the interest and the premium on the additional policy of insurance he took out over the subjects, out of his own pocket, while he regularly rendered accounts to Miss Muir for all the other disbursements he made on her behalf. All this, and much more, the pursuers proved, and the defenders offered no rebutting evidence at all. It is really too clear for argument that the signature is a forgery, and that William Bowie was the forger.

"But it is said that Miss Muir by her actings adopted the deed and that the pursuers are barred by her negligence from now challenging it. The alleged negligence is as follows:—In June 1910 Miss Muir received an official notice from the Inland Revenue claiming £1, 1s. 10d. of tax in respect of 'interest.' No mention was made of any bond, and Miss Muir did not know what the notice referred to, but thought probably it was some of 'Mr Lloyd George's new taxes.' She consulted her nephew Thomas Bowie, and as he did not know what it meant, she asked him to call at the Inland Revenue Office. He did so, and discovered that there was a bond over the property. As he had often heard his aunt say that there was no burden on her property, he had an interview with his brother William and asked him to explain. William confessed that he had obtained the money from the defenders on the security of Miss Muir's property without her knowledge or consent. He did not say that he had forged her signature, and Thomas states that he thought that the money had been obtained without any bond and on the security of the titles alone. I have some difficulty in understanding how he could think so when he admits that he had been satisfied at the Inland Revenue Office that there actually was a bond. But whether he knew the whole truth or not, he agreed, at William's earnest request, not to disclose the facts to Miss Muir, and accordingly when, a few days

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Dec. 10, 1912. later, she asked him what the assessor had said, he replied that he had not seen him. This was in June, and nothing further was said or done until after William's death, which occurred on 2nd September, when, as I have said, his affairs were found to be much involved and his estate bankrupt. On the 19th September Thomas Bowie told his sister, Miss M. Bowie, of William's confession, and asked her to inform Miss Muir, and she did so, and Miss Muir then learned for the first time what the Inland Revenue really meant. In these circumstances the defenders argued that although the notice did not make any reference to a bond on Miss Muir's property, yet it was sufficient, if she had been reasonably diligent, to enable her to discover that the bond in point of fact existed, and that her signature had been forged; and they maintained that the knowledge which she might by the exercise of reasonable diligence have acquired, must be imputed to her; and that, having allowed the matter to lie over until after William's death, when the circumstances were altered for the worse, she must be held to have adopted the deed, and that her representatives were accordingly barred from pleading forgery."

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The defenders pleaded, *inter alia*;—3. In any event, the defenders should be assoilzied in respect (1) that the deceased Elizabeth Muir and her representatives are barred by her actings from challenging the bond in question; (2) that the said deceased acquiesced in and homologated said bond; and (3) of *mora* and *taciturnity*.

On 1st August 1912 the Lord Ordinary (Dewar) pronounced the following interlocutor:—"Decerns in terms of the reductive conclusion of the summons, and decerns against the defenders in terms of the conclusion for delivery: Finds the pursuers entitled to expenses: Allow, &c.*"

* "OPINION.—[After the narrative quoted *supra*—In support of this argument [viz., that the pursuer had adopted the bond] I was referred to a number of English cases; but, so far as I can see, they have no application to the facts of this case. I quite understand that if a man knows that another is relying upon his forged signature, he may incur liability unless he divulges the fact before the position alters for the worse, and wilful ignorance may amount to actual knowledge; thus, for example, a person must not deliberately abstain from inquiry where inquiry ought to be made. And if the defenders had proved that Miss Muir knew, or even in the absence of actual knowledge, that she had good reason to believe, that William Bowie had forged her signature, and that she had deliberately refrained from making inquiry in order to screen him, the case would have been different. But they have not proved anything of that kind, and, as I understand their argument, that is not the case they present. Their case is that the Inland Revenue notice was sufficient to put her on her inquiry; that she ought to have inquired; and if she had, the forgery would have been disclosed. Briefly put, the argument I think comes to this, the notice ought to have awakened Miss Muir's suspicion, and she must be held liable because it did not. But there is no legal obligation on a person to be suspicious, and even if there were, I see nothing in the notice to excite suspicion of forgery. I think it was much more natural for an old lady to suspect that it conveyed an intimation of a new tax, and I do not think that she displayed any negligence in taking that view. I have no doubt that a great many people pay their taxes without any inquiry at all, and I do not think that it would be reasonable to hold that in doing so they are guilty of such negligence in the management of their own affairs as may render them liable to their neighbours. And further, Miss Muir stood in no special relation to the defenders, and I am quite unable to see on what

The defenders reclaimed, and the case was heard before the First Dec. 10, 1912. Division (consisting of the Lord President, Lord Mackenzie, and Lord Cullen) on 5th December 1912.

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Argued for the reclaimers;—(1) It was not proved that in point of fact the signatures in the bond had been forged. (2) *Esto* that they were forged, Miss Muir was put upon her guard by the receipt of the Inland Revenue schedule. Thereafter she employed an agent to make inquiries, and although he concealed from her the result of his inquiries he was an "agent to know," and his knowledge must be attributed to her.¹ Accordingly, she must be held to have adopted the forgery, and was barred from challenging it. In any event, the defenders had suffered prejudice through Miss Muir's neglect and through the fault of her agent, and therefore she should bear the loss rather than the entirely innocent parties.² Counsel stated that, in view of the decision in *Bowie's Trustees v. Watson*,³ the reclaimers could not resist delivery of the title-deeds.

Counsel for the respondents were not called on.

At advising on 10th December 1912,—

LORD PRESIDENT.—This is an action which was raised by the deceased Miss Elizabeth Muir, and is now insisted in by her executors, to reduce a

legal principle it can be maintained that she was bound to make special inquiry into her affairs in their interests. It is not said that the forgery was caused by her negligence, but only that she negligently failed to discover it. She did nothing to deceive or mislead the defenders, or to prevent them discovering it for themselves. She did not know of the existence of the bond until after William Bowie's death, and all she then knew was that her signature was forged. In these circumstances I do not think that it can, in any reasonable sense, be said that she adopted the deed; her knowledge is the only possible basis for adoption, and it is proved that she had no knowledge at all.

"Finally, the defenders argued that they were not in any event bound to deliver the title-deeds, because they had stipulated that the titles should be handed over to them as additional security, and in handing them over, William Bowie was acting within the scope of his authority. But I do not think he was. He had no more authority to pledge the titles than he had to forge Miss Muir's signature, and the title-deeds without the bond afforded no security at all. I think the forgery and the handing over of the titles was one dishonest transaction, to which Miss Muir was in no way a party, and which she was powerless to prevent. The source of all the trouble was, I think, simply this,—the defenders permitted themselves to be duped by William Bowie. They trusted him, and handed over their money to him, and discovered when too late that they had made a mistake. Instead of seeing Miss Muir sign the deed, or asking her to acknowledge the signature, they accepted Bowie's assurance that it was hers. This, as events have proved, was a fatal error; but it was an error which they themselves made, and they cannot, in my opinion, hold Miss Muir's estate liable for it.

"I am accordingly of opinion on the whole matter that the pursuers are entitled to decree in terms of the conclusions of the summons, with expenses."

¹ *Blackburn, Low, & Co. v. Vigors*, (1887) 12 App. Cas. 531, *per* Lord Halsbury, L.C., at p. 537.

² *Mackenzie v. British Linen Company*, (1881) 8 R. (H. L.) 8; *Ogilvie v. West Australian Mortgage and Agency Corporation, Limited*, [1896] A. C. 257, *per* Lord Watson, at p. 270.

³ *Supra*, p. 326.

Dec. 10, 1912. bond for £500 over her property in Campbell Street, Paisley. The ground of reduction is the very simple one that no such bond in truth exists, the signatures to the so-called bond which has been registered being forgeries. The action is resisted by the bondholder.

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The facts out of which the matter arose stand thus: Miss Muir had a nephew called William Bowie, who was a law-agent. He has since died, and after his death it was found out that he had embezzled a great deal of clients' money, and in more ways than one brought himself within the reach of the criminal law, and it is said that he was the forger. It is quite certain that the £500 which was paid to Bowie never reached Miss Muir, and consequently, Bowie must have made away with it.

Now, the first ground of defence was a denial that the writing was forged. Miss Muir, owing to her death, was not examined; the action had not gone far enough before her death to allow of her examination. She had, as a matter of fact, repudiated her signature—we have secondary evidence of that. But upon the whole matter, having read the evidence in the case, I have not a shade of doubt that the Lord Ordinary, who is also perfectly confident in his opinion, has arrived at the right result, and that there is no doubt whatsoever that the signatures here are forgeries.

That being so, the next defence is that Miss Muir, by her actings, adopted the forgery, or at least is barred from saying that she did not adopt it. The facts upon which that plea is based are these: Miss Muir had another nephew, a brother of William Bowie, and Miss Muir received from the Inland Revenue a demand for payment of £1, 1s. 10d. for income-tax. She never had such a demand before, and she did not understand it, and as this nephew happened to be calling, she asked him to go and make inquiries as to why she was due this £1, 1s. 10d. The nephew went to the Inland Revenue, and was told by them that it was in respect of a bond over her property, whereupon the nephew said to the representative of the Inland Revenue that he did not think it could be that, because he knew that his aunt had no bond over the property, because she had said so. The representative of the Inland Revenue then communicated with Edinburgh, and produced to this nephew evidence which made him come to the conclusion that after all there must be a bond over the property. Then, understanding no more, he sent for his brother, William Bowie, who, upon being asked the question, at once broke down and confessed that he had used his aunt's title-deeds in order to raise money. William begged his brother not to say anything about it at present, as he would be able to replace the money, to which request the brother acceded, and consequently never communicated the result of his investigations to Miss Muir at all, but simply put her off with some excuse that he had not yet found out. Then William Bowie died. These are the circumstances which, it is said, constitute the adoption of the forgery by Miss Muir.

The law of adoption of forgery was long ago authoritatively stated in the case of *Mackenzie v. British Linen Company*,¹ in the House of Lords, and there is nothing more to be said about it. I need scarcely remind your Lordships that adoption is the basis of the doctrine, and that adoption

¹ 8 R. (H. L.) 8.

prima facie means something positive. But it was recognised in *Mackenzie* Dec. 10, 1912. *v. British Linen Company*¹ that you might be in a position to be what is called "estopped" in England or "barred" in Scotland—you might be in such a position that you would not be heard to say that the signature was not yours. In particular the dictum of Baron Parke in the well-known case of *Freeman v. Cook*,² was adopted in the *British Linen Company* case,¹ and therefore I may take it that it is good Scots law as well as good English law. The point of the doctrine is that, when you know there is a forgery and when you know that the person relying upon that forgery is putting himself in a worse position or losing some remedy which he would otherwise have, you are not entitled to keep silence and then to tell him at the end of the day, after his position has been made worse by the delay, that the signature is forged. But while that is perfectly true where there is knowledge of the forgery, it seems to me that, in order to reach the result here the defenders have got to make some very extraordinary leaps from one position to another.

In the first place I very much doubt whether this doctrine of adoption by "bar" or "estoppel" could ever be applied, not to real knowledge, but to constructive knowledge, which is all, of course, that Miss Muir ever had here. Nobody says that she ever had any real knowledge; she could only have constructive knowledge through her nephew. That is the first chasm that the defenders here have to bridge, but it is not the last. The next one is even more formidable. It is, Did she have any constructive knowledge? Now, the whole argument there, as stated by Mr MacRobert, was based on a dictum of Lord Halsbury in the case of *Blackburn, Low, & Company v. Vigora*.³ I had, while I was at the bar, an opportunity of learning many a lesson in law from Lord Halsbury in the House of Lords, and if I remember once I remember twenty times that noble and learned Lord protesting with all the vigour of which he is a perfect master against his dicta being taken away from the *subjecta materies* and used as a definition, and I think Lord Halsbury would be the very last person to use the dictum which I am just going to read in a general sense. The particular dictum was this (p. 537): "When a person is the agent to know, his knowledge does bind the principal." Now that was a perfectly good proposition, and only just a little abbreviated in expression. The circumstances in *Blackburn*³ were thus set forth in the rubric: "The plaintiffs instructed a broker to re-insure an overdue ship. Whilst acting for the plaintiffs the broker received information material to the risk, but did not communicate it to them, and the plaintiffs effected a re-insurance for £800 through the broker's London agents. Afterwards the plaintiffs effected a re-insurance for £700, lost or not lost, through another broker. The ship had in fact been lost some days before the plaintiffs tried to re-insure, but neither the plaintiffs nor the last-named broker knew it, and both he and the plaintiffs acted throughout in good faith." The first re-insurance was bad for a non-disclosure. It was argued that the second was bad also. It was held that the knowledge of the first broker was not the knowledge of the plaintiffs, and that the plaintiffs were entitled to recover upon the policy for £700. Now, his Lordship deals

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¹ 8 R. (H. L.) 8.² (1848) 2 Ex. 654.³ 12 App. Cas. 531.

Dec. 10, 1912. with the situation thus: "A broker is employed to effect a particular insurance. While so employed he receives material information, he does not effect the insurance and he does not communicate the information. How is it possible to suggest that the assured could rely upon the communication to the principal of every piece of information acquired by any agent through whom the assured has unsuccessfully endeavoured to procure an insurance? -I am unable to accept the criticism by the Master of the Rolls upon the proposition that the knowledge of the agent is the knowledge of the principal. When a person is the agent to know, his knowledge does bind the principal." What does that mean when expanded? It means this—when your agent is the person whom you have commissioned to effect a contract, to wit, in this case, a contract of insurance, then for every purpose, as in a question with the underwriter, you put the agent in the same position as yourself, and if he, for the purpose of that insurance, gets knowledge which is material to the risk, he is bound to communicate it to the underwriter, just as you would be bound to communicate it to the underwriter; and you cannot, if the underwriter is put upon a risk unjustly by that not having been done, take to yourself the benefit of a contract which in point of fact has been vitiated by a non-disclosure on the part of your agent. All that is perfectly simple, but to build upon that foundation the idea that Lord Halsbury has discovered a sort of legal unicorn called the "agent to know" seems to me perfectly preposterous. I do not know what the "agent to know" is. It would come to this, that the most complete agent to know would be just the person whom you had sent to ask a question, as, for example, any servant whom you had sent to speak for you at the telephone. Any such messenger necessarily makes you constructively aware of all that he has learned, and does not tell. That is the proposition. I think that proposition is absurd. There is no such thing as an "agent to know." The relation of principal and agent generally involves a contract between them. At anyrate, the relation is generally based, to use Scots terms, upon a mandate; but a general position of an "agent to know" is unknown, I think, to the law.

The difficulty does not end there, because, after all, what Bowie, the brother, was sent to ask was not whether there was a bond upon the property; he was to ask, "What is the meaning of the Inland Revenue asking me for £1, 1s. 10d.?" Therefore the argument for the defenders really comes to this: An old lady sends her nephew to ask the Inland Revenue what they meant by asking her for £1, 1s. 10d.; that nephew, if he had properly made his investigations, would have found out that this was a demand in respect that there was a bond. Under Schedule A, she was entitled to an exemption, since her total income was under the exempted figure; nevertheless, she had to pay income-tax in respect of the interest which she deducted from the creditor in the bond. All these are things about which, I may say, most old ladies would not understand anything. Then, if he had pursued his investigations, he would have found out that there was a bond; if he had gone further, he must have come to the conclusion that that bond was a forgery. Then, although the nephew had not told the old lady anything about these things, she becomes the adopter of the forgery. I cannot help calling such an argument an absurdity. I do

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not think it necessary to say any more, and I think upon the whole matter Dec. 10, 1912. that the interlocutor of the Lord Ordinary should be adhered to.

There was one other ground of defence, but that was held to be ruled by ^{Muir's} Executors v. ^{Craig's} Trustees. a case¹ which was decided by us on the day when the argument in this case was heard.

LORD MACKENZIE.—I concur with your Lordship. It was argued to us that it had not been proved that this old lady's signature on the bond in question had been forged, but I think the onus is completely discharged, and I entirely concur in what the Lord Ordinary says. With regard to her not being examined, it appears that a commission was taken to examine her, and that it was only because the parties whose duty it would have been to execute the commission had every reason to think and hope that she would be well enough to be examined at the proof that the commission was not executed, and, therefore, there is no blame upon them for not having obtained her evidence and laid it before the Court.

It is quite evident that she had been in use to say that there was no bond upon her property, and that she was somewhat proud of the fact. When she learned that this bond had been discovered, she immediately repudiated her signature, and she instructed the action to be raised. Then the evidence of the instrumentary witness, Charters, obtained on commission, is to the effect that his signature was forged. And it is further proved satisfactorily that Miss Muir was not in Paisley on the date on which, on the face of the bond, she appears to have signed it there. Then, there is no doubt that the deceased William Bowie had been hard pressed for money, and that he made a confession to his brother Thomas which, although not in terms acknowledging that he had forged the bond, made it perfectly apparent that he had made use of his aunt's property for the purpose of raising money. It is equally clear that Miss Muir herself did not pay any interest on the bond, and that William Bowie did, and accordingly, as the Lord Ordinary says, it is too clear for argument that Miss Muir's name had been forged upon this bond by William Bowie.

But then it is said that if she did not adopt the forgery, at anyrate there are circumstances which show that she must be barred from saying that she did not adopt it. That she adopted it in the way of doing anything positive is certainly not the case. The case of *Blackburn*² was pressed upon our attention as sufficient to show that there is good ground for the plea of bar, because the knowledge of the nephew Thomas Bowie is to be deemed for the purposes of this case to be her knowledge. In one of the cases, I think *Blackburn*,² it was pointed out that the wrong use of the word "agent" had caused a good deal of confusion in these cases. I think that when the facts in regard to the so-called agency here are examined they amount to no more than your Lordship has already described, that Thomas Bowie was used for the purpose of taking a message to the Inland Revenue to ask why they were making the charge of £1, 1s. 10d. The subsequent structure is built up on that one fact. Now, when one compares that with the state of facts in *Blackburn*,² they are utterly different. *Blackburn's* case² had

¹ Bowie's Trustees v. Watson, *supra*, p. 326.

² 12 App. Cas. 531.

Dec. 10, 1912. relation to a contract of marine insurance, and, of course, in all such contracts of insurance it is a condition precedent that the insured shall make a full disclosure of all facts which materially affect the risk which are within his knowledge when the contract is made. In the particular case the agent, whose knowledge was sought to be fixed upon the principal, had dropped out of the case; but it is quite clearly pointed out that the reason why, if that broker had effected the insurance, his knowledge, unless he communicated it, would have been fatal to the policy, was because his agency was to effect an insurance. That is quite clearly pointed out in the judgment of Lord Halsbury, and therefore it seems to me necessary to read the expression "agent to know" along with the passage in which it is apparent that Lord Halsbury was referring to a person who was acting as agent in effecting an insurance. That is quite different, and has no application to the facts in this present case. Accordingly, I am of opinion that the arguments of the defenders cannot prevail, and that we should adhere to the interlocutor of the Lord Ordinary.

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Lord Mac-
kenzie.

The Lord President intimated that LORD CULLEN, who was absent at advising, concurred.

LORD KINNEAR was present when the case was advised.

THE COURT adhered.

J. W. & J. MACKENZIE, W.S.—LISTER SHAND & LINDSAY, S.S.C.—Agents.

No. 50.

Dec. 10, 1912.

Burns v.
William
Baird & Co.,
Limited.

JAMES BURNS, Appellant.—*Maconochie*.
WILLIAM BAIRD & COMPANY, LIMITED, Respondents.—
Horne, K.C.—Hon. W. Watson.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Schedule, 9 (d)—Act of Sederunt, 26th June 1907, sec. 12—Application to record memorandum—Agreement for redemption of weekly payment—Minute by workman objecting to adequacy of sum agreed on and to means by which agreement obtained—Reference by Sheriff-clerk to Sheriff—Competency of procedure

The Workmen's Compensation Act, 1906, Second Schedule, 9 (d) enacts that where it appears to the Sheriff-clerk that an agreement as to the redemption of a weekly payment of compensation ought not to be registered by reason of the inadequacy of the redemption money or because the agreement has been improperly obtained, he may refuse to record the memorandum and refer the matter to the Sheriff.

By Act of Sederunt, 26th June 1907, it is provided that when the genuineness of a memorandum is disputed, or when the employer objects to the recording of it, or when the Sheriff-clerk refuses to record it under paragraph 9 (d) of the Second Schedule, "the person disputing the genuineness, or the employer, or the Sheriff-clerk, as the case may be, shall lodge a minute stating clearly all the grounds for his action."

Held that where, upon a minute lodged by a workman objecting to the recording of a memorandum on the grounds mentioned in paragraph 9 (d) of the Second Schedule, the matter was referred by the Sheriff-clerk to the Sheriff, it was the duty of the latter to determine the questions thus raised, notwithstanding that the minute was lodged by the workman and not by the Sheriff-clerk.

IN an application in the Sheriff Court at Stirling at the instance of Dec. 10, 1912.
 William Baird & Company, Limited, Glasgow, for warrant to record
 a memorandum of agreement between them and James Burns, brusher, Burns v.
 Kilsyth, the Sheriff-substitute (Mitchell) granted warrant, and at the William
 request of the workman stated a case for appeal. Baird & Co.,
 Limited.

The following narrative of the facts is taken from the opinion of 2D DIVISION.
 Lord Salvesen:— Sheriff of Stir-
 ling, Dum-
 barton, and
 Clackmannan.

"The material facts as found by the Sheriff-substitute and appearing from the correspondence annexed to the case are as follows:— On 11th December 1911 the appellant, while in the employment of the respondents, sustained personal injury consisting of a compound fracture of his right hand caused by accident while working in their No. 1 pit. On 26th March 1912 a solicitor on behalf of the appellant signed a document which, after referring to the accident, proceeded as follows:—'An agreement was made on 26th March 1912, and was as follows:—That a lump sum payment amounting to forty pounds—shillings and—pence sterling, in addition to the weekly compensation already paid, was accepted by the claimant in full satisfaction and discharge of all claims past and future in respect of said accident. It is requested that this memorandum be recorded in the Special Register of the Sheriff Court of Stirling, Dumbarton, and Clackmannan at Stirling.' It bore to be addressed 'To the Sheriff-clerk, Court House, Stirling.' On the same day an application to record this memorandum was made by a law-agent of the company with which the respondents were insured, and on 27th March the Sheriff-clerk served a copy of the memorandum on the appellant, with an intimation that it would be recorded unless the genuineness was disputed or recording was objected to before 4th April.

"On 3rd April an agent on behalf of the appellant—Mr M'Dougall—wrote to the Sheriff-clerk stating that his client disputed the genuineness of the memorandum and objected to its being recorded, and this was duly intimated to the respondents. On 12th April Mr M'Dougall explained in a further letter to the Sheriff-clerk the grounds of his client's objections. These were, briefly, that £40 was inadequate as compensation for his injuries; that the appellant had no independent legal or medical advice; that he was informed that £40 was all that he could get; and that he was illiterate. He also enclosed a report from a medical man in support of his statement as to inadequacy, and asked that the matter should be referred to the Sheriff. The Sheriff-clerk wrote in reply that he would submit the whole documents to the Sheriff. On 16th April the Sheriff-clerk wrote to Mr M'Dougall advising him to lodge a minute as provided for in section 12 of the Act of Sederunt of 26th June 1907, and at the same time an initial writ claiming that the amount of compensation should be determined by arbitration. Two further letters passed between the parties, one in which the claimant's agent suggested that the Sheriff-clerk should lodge a minute stating the grounds on which he referred the matter to the Sheriff, and the other in which the Sheriff-clerk took up the position that the intention of the Act of Sederunt seemed to be that the Sheriff-clerk should only act when no objection had been lodged to the recording of the memorandum, and indicating his view that it fell to the appellant to lodge a minute. A minute (No. 1 of process) was accordingly lodged by the appellant. It was in these terms:—

"The said James Burns objects to the recording of the memo-

Dec. 10, 1912.

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random of agreement on the ground that it is not genuine in respect that said payment of forty pounds sterling was not accepted by the claimant in full satisfaction and discharge of all claims past and future in respect of the accident described in said memorandum. It is explained and averred that the claimant is illiterate, and cannot even write his own name. On or about 26th March 1912 the respondents, through their agents, requested the claimant to come to Glasgow, and at the interview which took place on the date mentioned respondents offered the claimant forty pounds, stating that that sum was the most he could get under any circumstances, and that his hand would soon be better. In that belief the claimant reluctantly accepted the sum offered. As the claimant was unable to write, one of the respondents' representatives intimated to the claimant that he would send out for a "Sheriff," who would sign for him. The claimant gave the party who was brought in authority to sign for him, but expressed at the time his dissatisfaction with the sum he was being paid by the respondents. The said party, however, offered him no advice. The respondents did not suggest to the claimant, although they knew of his being illiterate, that he should obtain independent medical or legal advice. In accepting said sum of forty pounds the claimant relied on the respondents treating him fairly from their knowledge of his injuries, which were examined on several occasions by the respondents' medical officers. It is explained and averred that the said sum of forty pounds paid to the claimant is grossly inadequate. The claimant has, since receiving said payment, consulted his own medical adviser, and has ascertained that the working capacity of his right hand is completely and permanently destroyed. It is further explained and averred that, in terms of paragraph 12 of the Act of Sederunt of 26th June 1907, these questions fall to be settled by arbitration.'

"The Sheriff-substitute, after hearing parties, held that the proposed procedure was not competent under the statute, the grounds stated in the minute not, in his view, raising a question of genuineness. He accordingly dismissed the same, and granted warrant to record the memorandum of agreement." *

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), enacts :—

"Second Schedule. (9) Where the amount of compensation under this Act has been ascertained . . . by agreement, a memorandum thereof shall be sent . . . to the [Sheriff-clerk], who shall, . . . on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a [recorded decree-arbitral], provided that : . . .

"(d) Where it appears to the [Sheriff-clerk], on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum . . . ought not to be registered by reason of the inadequacy of the sum . . . or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the [Sheriff], who shall, in accordance with [Act of Sederunt], make such order . . . as under the circumstances he may think just.

"(e) The [Sheriff] may, within six months after a memorandum of an agreement as to the redemption of a weekly payment by a lump

The questions of law for the opinion of the Court were :—“(1) Was I right in holding that the appellant's procedure, *per* minute No. 1 of process, was not competent under the Workmen's Compensation Act, 1906? (2) Was I entitled to dismiss said minute without proof of the grounds of opposition to the recording of the alleged memorandum of agreement set forth therein?”

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The case was heard before the Second Division (without Lord Guthrie) on 27th November 1912.

Argued for the appellant;—The application to record together with the minute opposing it fell to be dealt with as arbitration proceedings.¹ It was the policy of the Act that in such proceedings all questions relevant to the issue should be determined,² and, accordingly, under an application to record, the Court had considered the effect of an alleged discharge of his claim by the workman.³ If necessary, the appellant was prepared to maintain that the agreement was not “genuine,” in the sense that, having been executed by him under essential error as to his rights, it was not his deed. But it was enough for him to found on paragraph 9 (*d*) of the Second Schedule to the Workmen's Compensation Act, 1906, which provided that inadequacy and improper means were good grounds for objecting to registration. It was true that this section contemplated the case of objections taken by the Sheriff-clerk, but it would be an idle technicality to draw a distinction between the case where the Sheriff-clerk referred the matter to the Sheriff *ex proprio motu* and the case where he did so at the instigation of a party.

Argued for the respondents;—The objections stated in the minute were irrelevant as an answer to the application for warrant to record, since they did not impeach the genuineness of the agreement.⁴ The “genuineness,” or, in other words, the question whether the memorandum correctly set forth the agreement, was the only matter which

sum . . . has been recorded in the register, order that the record be removed from the register on proof to his satisfaction that the agreement was obtained by fraud or undue influence or other improper means, and may make such order . . . as under the circumstances he may think just.”

The Act of Sederunt of 26th June 1907, provides :—“XII. When the genuineness of a memorandum under paragraph 9 of the Second Schedule appended to the Act is disputed, or when an employer objects to the recording of such memorandum under subsection (*b*) of said paragraph, or the Sheriff-clerk refuses under subsection (*d*) of said paragraph to record such memorandum, the person disputing the genuineness, or the employer or the Sheriff-clerk, as the case may be, shall lodge a minute stating clearly all the grounds for his action, and the memorandum shall thereupon be dealt with as if it were an application to the Sheriff for settlement by arbitration of the questions raised by the minute.”

¹ Act of Sederunt, 26th June 1907, sec. 12; John Brown & Co., Limited, v. Orr, 1910 S. C. 526; Lochgelly Iron and Coal Co., Limited, v. Sinclair, 1909 S. C. 922, *per* Lord President Dunedin, at p. 928.

² Ellis v. Lochgelly Iron and Coal Co., Limited, 1909 S. C. 1278, *per* Lord President Dunedin, at p. 1281.

³ Hanley v. Niddrie and Benhar Coal Co., Limited, 1910 S. C. 875; Macandrew v. Gilhooly, 1911 S. C. 448.

⁴ Macdonald v. Fairfield Shipbuilding and Engineering Co., Limited, (1905) 8 F. 8; Coakley v. Addie & Sons, Limited, 1909 S. C. 545; Binning v. Easton & Sons, (1906) 8 F. 407.

Dec. 10, 1912. could competently be considered in these proceedings,¹ since the only function of the Sheriff was to see that the memorandum corresponded to the agreement.² In the present case it was not disputed that an agreement had been made in the terms of the memorandum. The objections were as to the adequacy of the redemption money and the means by which the agreement was obtained. The conditions under which alone these objections could be entertained at this stage were dealt with in paragraph 9 (d) of the Second Schedule and section 12 of the Act of Sederunt, from which it appeared that the matter could only be referred to the Sheriff by a minute lodged by the Sheriff-clerk. The procedure in this case was incompetent and without warrant. Once the agreement was recorded, the workman would have his remedy under paragraph 9 (e) of the Second Schedule.

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At advising on 10th December 1912,—

LORD SALVESSEN.—[After the narrative quoted *supra*].—If this question had arisen under the former Act, I think the Sheriff would have been right. In the case of *Macdonald*³ an objection to the recording of a memorandum of agreement that the agreement had been made under essential error, and that the sum agreed to be paid was more than half the workman's average weekly earnings, was held to be irrelevant. Lord Kyllachy said: "The genuineness of the agreement is admitted. It is admitted to be as much a genuine agreement as if it had been in writing and signed by both parties. The objection to it stated by the respondents is only this, that although in fact made between the parties, it was induced by essential error; in other words, that, although a genuine agreement, it was not a valid agreement. . . . That being so, it does not appear to me to be possible to doubt that the Sheriff-substitute was right in granting the special warrant which is in question." The reason of the decision, as afterwards explained, was that the Sheriff-substitute's function was merely ministerial, and that the moment it was conceded that the agreement was genuine he had no option but to grant warrant to have it recorded.

This decision has very little bearing on the provisions contained in the Second Schedule to the Workmen's Compensation Act, 1906, and especially paragraph 9 (d) and (e). Under the former subsection, if it appears to the Sheriff-clerk, on any information which he considers sufficient, that an agreement as to the redemption of the weekly payments by a lump sum ought not to be registered by reason of the inadequacy of the sum, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum and refer the same to the Judge, who shall, in accordance with rules of Court, make such order as under the circumstances he may think just. By the latter subsection the Judge may, within six months after such an agreement has been recorded, order that the record be removed from the register on proof that the agreement was obtained by fraud or undue influence or other improper means. Had, therefore, the Sheriff-clerk lodged a minute con-

¹ *Traill & Sons v. Cochrane*, (1901) 3 F. 1091, *per* Lord Adam, at p. 1093.

² *M'Lean v. Allan Line Steamship Co., Limited*, 1912 S. C. 256.

³ 8 F. 8.

taining the same statements as those in the minute lodged by the appellant's Dec. 10, 1912. agent, there can be no doubt that it would have been the duty of the Sheriff-substitute to inquire into the facts and to make such order thereafter as he thought just. The question of law accordingly appears to be whether, when the minute is lodged by the appellant and the matter is referred to the Sheriff, he is precluded from considering any objection except one that goes to the genuineness of the agreement.

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Lord Salvesen.

I am unable to agree with the Sheriff-substitute. What the Sheriff-clerk in effect did was to refer the whole matters as to the inadequacy of the compensation and as to the alleged improper means by which the agreement fixing this sum was obtained; and I think it must be assumed that he regarded the agent's statements as constituting information which he considered sufficient to justify him in so doing. If he had not thought so, it was his duty to have recorded the memorandum; but I think he acted quite properly when, after considering the correspondence and the minute lodged on behalf of the appellant, he laid the whole papers before the local Judge. It was not within his power to order inquiry into the statements made, nor was it within his competency to consider their relevancy, although I do not suggest that he might not have disregarded merely frivolous objections. The alternative view would lead to very strange results. Although the adequacy of the compensation is not objected to by the workman, the Sheriff-clerk may on his own initiative refer that matter to the Sheriff for his determination. Can he not do so when the workman takes the objection and brings it pointedly under his notice? Again, although the register may be corrected within six months after the memorandum has been recorded on the ground of fraud or undue influence or other improper means, yet, if the Sheriff is right, no such objection will be listened to at the instance of the workman when it is stated before the memorandum has been recorded. Nothing could be more opposed to the interests of the employer. It is far better that averments challenging the validity of an agreement should be inquired into at once than that they should be delayed in the option of the workman until six months have elapsed. It would also be most unjust that the workman should be deprived of having the Sheriff's decision as to the adequacy of the compensation paid to him because, forsooth, the objection was not taken by the Sheriff-clerk on his own initiative, but was brought under his notice by the workman himself. Mere inadequacy is not a ground for correcting the register if the memorandum has once been recorded; and it would utterly stultify this provision, which is made for the protection of the workman, if it were held that inquiry as to adequacy could only take place when the Sheriff-clerk had stated the objection in spite of the apparent satisfaction of the workman. There is no duty laid upon the Sheriff-clerk to make inquiry into the facts of every agreement that is presented to him for registration; and in practice I fancy he would not feel himself called upon to act unless there appeared on the face of the agreement a manifest disproportion between the agreed-on compensation and the injuries. I am therefore clearly of opinion that the Sheriff-substitute has erred in granting warrant to record this memorandum without inquiry as to the facts averred. The statute contemplates that the procedure in determining questions of this kind shall be simple,

Dec. 10, 1912. inexpensive, and summary; and it would defeat this very laudable purpose if we were to support the decision of the Sheriff-substitute here.

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None of the cases cited to us appear to have any very direct bearing on the question here in dispute. In the case of *Ellis*,¹ it was held that the validity of a discharge was a question arising in the proceedings as to the

Lord Salvesen.

liability to pay compensation, and that the arbitrator was acting within his jurisdiction in determining it; but there the inquiry was held in an application to award compensation. The case of *Brown*² is more in point, because it was there decided that an action at common law for reduction of a registered memorandum was incompetent as the recording was a judicial act in arbitration proceedings under the statute, and that the remedies for improper registration must be sought within the statute. In *Hanley v. The Niddrie and Benhar Coal Company*,³ it was held competent for the arbitrator to determine the question as to the validity of a discharge in an application to record the memorandum; and in *Macandrew v. Gilhooley*,⁴ the validity of a discharge pleaded by the employers as an objection to recording a memorandum of an agreement was held by this Division to have been properly inquired into and set aside by the arbitrator. All these cases, although decided on different sections of the Workmen's Compensation Act or its schedules, tend to support the conclusion that questions, whether of fact or law, arising with regard to disputed claims for compensation must be determined in the first instance by the arbitrator. I propose, therefore, that we should answer both the questions of law stated by the Sheriff-substitute in the negative; and remit to him to inquire into the facts alleged in the appellant's minute.

The LORD JUSTICE-CLERK and LORD DUNDAS concurred.

THE COURT answered both questions of law in the negative, and remitted the cause to the arbitrator to inquire into the circumstances.

NORMAN M. MACPHERSON, S.S.C.—W. & J. BURNES, W.S.—Agents.

No. 51.

JANET HELEN DOBBIE AND ANOTHER, Pursuers (Appellants).—
J. R. Christie—J. Macdonald.

Dec. 10, 1912.

THE EGYPT AND LEVANT STEAMSHIP COMPANY, LIMITED, Defenders
(Respondents).—*Horne, K.C.—J. H. Henderson.*

Dobbie v.
Egypt and
Levant
Steamship
Co., Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 13, and First Sched. (1) (a) (ii).—“Dependants”—Children deserted by father—Prospects of future support.

Dependency is always a question of fact; and, even where children have been deserted by their father for three years before his death and have received no support from him during that time, they may still be held to be partially dependent upon him if there was a reasonable probability that, had he lived, he would in the future have contributed to their support.

¹ 1909 S. C. 1278.

² 1910 S. C. 875.

³ 1910 S. C. 526.

⁴ 1911 S. C. 448.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court of the Lothians and Peebles at Leith, Janet Helen Dobbie and another, the pupil children of John Dobbie, claimed compensation from the Egypt and Levant Steamship Company, Limited, owners of the steamship "Wingrove," in respect of the death of their father. The Sheriff-substitute (Guy) assolized the defenders, and at the request of the pursuers, stated a case for appeal.

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Dobbie v.
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Co., Limited.

1ST DIVISION.
Sheriff of the
Lothians and
Peebles.

The case set forth :—

"The following facts were proved by the evidence led before me for the appellants. The appellants' mother died on 22nd December 1906, and thereafter their father, the said deceased John Dobbie, who was in the employment of a fish merchant in Glasgow, continued to live for some time in the same house as that in which he had lived with his wife, maintaining in family with him the appellants. His mother also resided with him. Thereafter he removed with his children and mother to the house of Mr and Mrs Yates, Mrs Yates being his sister. In February 1909 the deceased, who had lost his situation, and had been out of employment for several weeks, left his home to look for work, but did not return. He then deserted the appellants and left without informing any of his relations where he was going, and without making any provision for the appellants. The appellants were then taken to the house in Glasgow of Archibald Robson, whose wife was a sister of the appellants' deceased mother. This was done at Mrs Robson's request, in the expectation by her and her husband that the deceased would soon be heard of and that he would repay the sums expended on their maintenance. The said Archibald Robson thereafter maintained the appellants in the expectation that their father would recoup him when he returned. The only alternative was to send them to be inmates of the poorhouse, the Parish Council having refused outdoor relief. The said Archibald Robson from time to time made inquiries to discover the whereabouts of the appellants' father, but was unable to do so, and did not hear of him till after his death. The whereabouts of the appellants' father between the time when he deserted the appellants, as aforesaid, till 1st October 1909, has not been ascertained, but it is now known that on that date he went to live as a lodger in the house of John Smith, 2 Bothwell Street, Leith. He was then in a destitute condition, and for about six months thereafter he was able to obtain some employment, but did not earn sufficient to maintain himself, and he incurred considerable debt to the said John Smith for his board and lodging. He then got employment in a brewery as a fireman at a wage of £1 a week, and thereafter week by week repaid his indebtedness to the said John Smith for his board and lodging. In October 1910 he went to sea as a fireman on board the s.s. 'Drumlanrig,' at a wage of £4, 10s. a month. In the month of July 1911 he met with an accident on board said steamer, when his leg was broken, and he was laid up in hospital at Hamburg till the end of September 1911, when he returned to 2 Bothwell Street, Leith, and thereafter attended for treatment at the Royal Infirmary, Edinburgh. From the time of his return from Hamburg till he sailed on his last voyage, as after mentioned, he was in receipt of workmen's compensation in respect of said accident to his leg. During that period he for the first time informed his landlady, Mrs Smith, that he had two children, and he thereafter had frequent conversations with her regarding them, when he expressed his desire to have his children brought to 2 Bothwell

Dec. 10, 1912. *Street, Leith*, to live with him there, and his intention to maintain them. On one occasion during this time he stated his intention to go to Glasgow that day and bring his children to Mrs Smith's house, and would have then done so had he not been dissuaded from doing so by Mrs Smith, who advised him to delay doing so till he was able to do something towards repaying the sum due to Mr Robson for their maintenance. Shortly before he sailed from Leith on 1st December 1911, on board the s.s. 'Wingrove,' the deceased arranged with Mrs Smith that he would send her an allotment-note for £4 a month when the steamer arrived at Port Said, stating that the master of the steamer would not give an allotment-note before this time, and that Mrs Smith should then bring to her house his children (whose address he then gave to Mrs Smith), and should pay to Mr Robson £3 a month till the sum due to him was repaid, and apply the balance of £1 a month for the maintenance of the appellants in her house. Though the deceased John Dobbie knew of his obligation to support the appellants, and expressed an intention to support them, he as a matter of fact deserted them, and was on the date of his death, and had been for nearly three years, in desertion of them.

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"In these circumstances, I found in fact and in law that the appellants were not dependent upon the earnings of the deceased John Dobbie, their father, at the time of his death, within the meaning of the Workmen's Compensation Act, 1906, and that the appellants were not entitled to compensation under the said Act in respect of his death. I therefore assolized the defenders, and found them entitled to expenses."

The questions of law for the opinion of the Court were:—"On the facts above set forth—(1) Were the appellants dependent upon the earnings of their deceased father at the time of his death, within the meaning of the Workmen's Compensation Act, 1906? (2) Were the appellants wholly dependent upon the earnings of their deceased father at the time of his death, within the meaning of the said Act?"

The case was heard before the First Division (without Lord Johnston) on 23rd November 1912.

Argued for the appellants;—In holding that the pursuers were not dependent upon their father the arbitrator had erred in law, because it could not be said there was no evidence of dependency, if at his death there was a probability of his discharging his legal obligation to support.¹ That the pursuers were not being supported by their father at the time of his death—on which fact alone the arbitrator had apparently proceeded—was not conclusive proof of the absence of dependency.² The case, accordingly, should be sent back to the arbitrator for consideration of the question whether it was probable that the children would have received support had the father lived.

Argued for the respondents;—The question of dependency was a pure question of fact for the arbitrator's decision, and in view of the facts which he had stated in the case, it was evident that he had all

¹ *New Monckton Collieries, Limited, v. Keeling*, [1911] A. C. 648, Lord Loreburn, L. C., at p. 649, Lord Atkinson, at p. 653; *Coulthard v. Consett Iron Co., Limited*, [1905] 2 K. B. 869; *Lee v. Owner of the Ship "Bessie,"* [1912] 1 K. B. 83.

² *Williams v. Ocean Coal Co., Limited*, [1907] 2 K. B. 422; *Stanland v. North-Eastern Steel Co., Limited*, *ibid.*, note, at p. 425. The Lord President referred to *Bowhill Coal Co., Limited, v. Smith*, 1909 S. C. 252.

the probabilities and improbabilities of support clearly before him in deciding it. Therefore his decision was final, and the case should not be sent back to him for reconsideration. But even if the facts fell to be considered, they clearly justified the arbitrator's decision. The appellants having in fact received no support from their father, dependency upon him was excluded, because any prospect that they had of future support was too trifling to receive consideration.¹ The opinion of Lord Atkinson in the case of *New Monckton Collieries, Limited, v. Keeling*,² was not really in point, because his Lordship referred, not to the probability of support being tendered, but to a different probability, viz., the probability of an obligation to support being enforced against a workman whose whereabouts was known.³

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At advising on 10th December 1912,—

LORD PRESIDENT.—[After summarising the facts, and quoting the findings of the Sheriff-substitute and the questions of law]—Those questions are really wrongly stated. It is not for us to say whether the appellants were dependent either wholly or in part. It is now perfectly well settled that dependency is a question of fact and a question of fact alone, and it is for the Sheriff-substitute to say whether they were dependent or not. Now, if the Sheriff-substitute had simply found, as a matter of fact, on the facts I have stated, that the children were not dependent upon the father at all, I do not think we could have altered his decision, because, upon the facts as stated, it seems to me there was evidence upon which he could competently come to a conclusion that the children, as matter of fact, were not to any extent dependent upon the father. But the Sheriff has so worded his judgment that I am quite unable to say myself whether that is the result at which he has arrived. He has, as your Lordships see from what I have read, stated the simple fact of desertion, and then stated that in these circumstances he found in fact and in law that the children were not dependent. And therefore I cannot say whether he really went upon the fact—whether he valued, so to speak, the dependency as worth nothing—or whether he went upon the supposed legal proposition that if the father had, as a matter of fact, deserted the children for three years, that ended the whole matter. If the Sheriff-substitute did that, then I think he went upon a legal proposition which is clearly wrong.

I do not think there is any doubt as to the law upon this matter. I think it is absolutely settled by what the House of Lords said in the case of *New Monckton Collieries, Limited, v. Keeling*.⁴ In that case the House of Lords upheld a view that had been previously taken in this Court,⁵ namely, that dependency was a question of actual fact, and that that actual fact was not settled by a consideration of the legal proposition

¹ *Young v. Niddrie and Benhar Coal Co., Limited*, 1912 S. C. 644, Lord Justice-Clerk, at p. 650.

² [1911] A. C., at p. 653.

³ *Lee v. The Owner of the Ship "Bessie,"* [1912] 1 K. B. 83, Farwell, L.J., at pp. 91-2; *Briggs v. Mitchell*, 1911 S. C. 705, Lord Dundas, at p. 708.

⁴ [1911] A. C. 648.

⁵ *Baird & Co., Limited, v. Birsztan*, (1906) 8 F. 438, followed in *Briggs v. Mitchell*, 1911 S. C. 705.

Dec. 10, 1912. of obligation of either the husband to the wife or the parent to the child. But, on the other hand, the existence of that legal obligation has of course a very strong bearing upon the fact. A man is, according to his circumstances, more or less likely to fulfil his legal obligations, and, if he is likely to fulfil this legal obligation to support, then that points to an actual fact of dependency. But the result of that is not only that the question is not a mere question of legal obligation, but also that you cannot entirely turn your eyes to the past and hold them quite shut to the future—the point of time with regard to which I speak of past and future being, of course, the date of the death of the parent or husband as the case may be. That is quite clearly put by Lord Atkinson in *Keeling's* case,¹ where he says: “the existence of the obligation, the probability that it will be discharged, either voluntarily or under compulsion, the probability that the wife will ever enforce her right if the obligation be not discharged voluntarily, are all matters proper to be considered by the arbitrator in determining the question of fact whether or not the wife at the time of her husband's injury, looked to his earnings for her maintenance and support in whole or in part. It is one of the many elements to be taken into account.” And when that case came to be applied by the Court of Appeal in *Lee v. Owner of Ship “Bessie,”*² the matter is exceedingly clearly put by Lord Moulton (as he is now) in two sentences. He first of all summarises *Keeling's* case³ in a single sentence. He says (at p. 88): “In my opinion the effect of this decision is that legal obligations to support must not be taken at their theoretic value but at their practical value.” And then he says again: “If on the evidence there is any fair probability that the legal rights would, at any future time, have been actually and effectually asserted by the wife, then there is evidence of dependency.” In another passage his Lordship applies *Keeling's* case³ to the case of children, where he says (at p. 89), “In my opinion . . . the decision of the House of Lords in *New Monckton Collieries, Limited, v. Keeling,*³ although it does not refer to the case of infant children, logically carries with it the result that in their case the County Court Judge is bound to consider the practical value of the father's legal obligation to support them, and that if he comes to the conclusion that there is a reasonable probability that this will be enforced in the future he is entitled and bound to hold them to be dependants and to award compensation accordingly.”

Now, I think that all those passages, with which I respectfully concur, really bring the matter to this—It is a question of fact, and it is a practical question. In a case like this, so far as the past is concerned we must consider what support the children have been in fact getting. They have been getting nothing; therefore the past is gone. So far as the future is concerned one must make a valuation of what one thinks the dependency is worth in the whole circumstances. Now, in this case I do not wish to prejudge the learned arbitrator in this matter. I think he is entirely master of the situation. If he came to the conclusion that in the whole circumstances of this case the probability of getting £1 in the future, after £3 out

¹ [1911] A. C., at p. 653.

² [1912] 1 K. B. 83.

³ [1911] A. C. 648.

of the £4 had been otherwise applied, was practically worth nothing, I Dec. 10, 1912. think he could competently so find. But I do not know whether he has found so or not. What he undoubtedly must find is some answer to the question that is implicitly put by subhead (a) (ii.) of paragraph (1) of the First Schedule, which says this: "If the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants." I am treating this, of course, as a case of partial dependency, because I think it is perfectly clear on the facts that the arbitrator never would come to the conclusion that there was total dependency. What he would value the partial dependency at, I cannot say.

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I think, upon the whole matter, that we cannot answer the questions as put, and that the case must go back to the arbitrator in order that he may indicate the ground of his decision. He may repronounce his decision if he wishes, or he may do otherwise. But I think it would not be just to the pupil children not to send the case back, because I think it is impossible to say whether the arbitrator has gone upon the view of fact and fact alone—and if he has done so I do not think that *Keeling's* case¹ touches the result he has arrived at—or whether he has gone upon the proposition in law that when you find that as a matter of fact a father has deserted his children for three years and paid nothing towards their support during that period, that necessarily ends the matter, a proposition which, so stated, is not in accordance with the authorities.

LORD KINNEAR concurred.

LORD MACKENZIE.—I agree with your Lordship on the simple ground put by Lord Justice Fletcher Moulton in the case of *Lee*,² in the passage already read, in which his Lordship says that the legal obligation of support must be taken not at its theoretic but at its practical value. It is because I am not quite sure, from the way in which the case has been stated, that the Sheriff-substitute dealt with the matter upon that footing, that I agree that the case must go back. The arbitrator has an entirely free hand to dispose of the matter as he thinks just.

THE COURT pronounced an interlocutor in the following terms:—
"Refuse to answer the questions of law as stated in the case:
Sustain the appeal: Recall *in hoc statu* the determination of the Sheriff-substitute as arbitrator, and remit the cause back to him to reconsider his judgment."

T. M. POLE, Solicitor—BOYD, JAMESON, & YOUNG, W.S.—Agents.

¹ [1911] A. C. 648.

² [1912] 1 K. B. 83.

No. 52. THE SCHOOL BOARD OF GLASGOW, First Parties.—*Constable, K.C.*—

D. P. Fleming.

Dec. 10, 1912.

ELIZA SPENCE ALLAN, Second Party.—*Murray, K.C.*—

J. R. Christie.

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School—Powers of School Board—“Medical examination and supervision” of pupils—Provision of medical or dental treatment—Education (Scotland) Act, 1908 (8 Edw. VII. cap. 63), secs. 4 and 6.

Held that the power conferred on school boards by sec. 4 of the Education (Scotland) Act, 1908, to provide, out of the school fund under their administration, for the medical “examination and supervision” of pupils attending school, did not authorise them to provide medical or dental “treatment.”

1ST DIVISION. ON 5th November 1912 a special case was presented for the opinion and judgment of the Court by the School Board of Glasgow, *first parties*, and Eliza Spence Allan, the testamentary trustee of James Allan senior, ironfounder, Glasgow, *second party*, with reference to the right of the first parties to make provision, out of the school fund under their administration, for medical or dental treatment of pupils in schools within their district.

The case stated as follows:—

“1. The parties of the first part are the School Board of Glasgow. The party of the second part, as trustee foresaid and also as an individual, is a ratepayer liable to contribute to the assessed school rate in respect of heritable properties of substantial rentals within the area for which the first parties are the School Board.

“2. [Reference was made to sections 4, 6, and 17 of the Education (Scotland) Act, 1908.*]

* The Education (Scotland) Act, 1908 (8 Edw. VII. cap. 63), enacts:—
Sec. 4. “A school board may, and where required by the Department shall, provide for the medical examination and supervision of the pupils attending schools within their district to such extent and subject to such requirements as may from time to time be prescribed by any code or minute of the Department, and, for the purposes of this section, the school board may employ medical officers or nurses, or arrange with voluntary agencies for the supply of nurses, and provide appliances or other requisites. It shall be a condition of grant to the managers of any school within the district of the school board at which there is not provision to the satisfaction of the Department for the medical examination and supervision of the pupils, that such managers shall give admission and all necessary facilities for the discharge of his duties to any person so employed or supplied.”

Sec. 6. “(1) When as the result of medical inspection or otherwise it is brought to the notice of a school board that a child attending a school within their district is in a filthy or verminous state, or is unable by reason of lack of food or of clothing to take full advantage of the education provided, it shall be the duty of the school board, after due warning, to summon either or both of the parents or the guardian of such child to appear before them to give an explanation of the child's condition, and, if the school board shall find that such explanation is not forthcoming or is insufficient or unsatisfactory, and that the condition of the child is due to neglect, they shall transmit a copy of such finding to the parent or parents or guardian of the child and to the procurator-fiscal, and it shall be the duty of the procurator-fiscal to institute a prosecution under the subsection immediately following.

“(2) Without prejudice to the general operation of the Prevention of

"3. The Scotch Education Department issued a memorandum on Dec. 10, 1912, 31st March 1909,* dealing with the medical examination and supervision of school children. This memorandum is printed as an appendix to this special case, and its terms are to be held as if fully incorporated by quotation herein. It was sent to the first parties along with a circular letter which requested them to prepare a scheme for the approval of the Department, and thereafter the first parties formulated a scheme which was duly approved. On 18th April 1912 the Scotch Education Department issued a circular which is also

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Cruelty to Children Act, 1904 (4 Edw. VII. cap. 15), or any Act amending the same, neglect to exercise due care of a child as aforesaid shall be deemed wilful neglect likely to cause the child unnecessary suffering within the meaning of such Act, punishable summarily as an offence of cruelty in terms of such Act, and subject to the provisions thereof as to the committal and custody of the child and otherwise:

"Provided that if it shall be shown to the satisfaction of the school board, or in the event of a prosecution under such Act of the Sheriff, that such parent or parents or guardian are unable by reason of poverty or ill-health to supply sufficient and proper food or clothing for the child, or to give the child the necessary personal attention, the school board, if satisfied that the necessities of the case will not be provided for by voluntary agency, shall make such provision for the child out of the school fund as they deem necessary during such period while the child is under obligation to attend school as they may determine: But it is hereby provided that any aid given in terms of this section shall not deprive such parent or guardian of any franchise, right, or privilege, or subject him to any disability:

"Provided also that the school board, where they deem it necessary owing to the condition of the child, shall have power to make temporary provision for the child out of the school fund pending the completion of the procedure hereby prescribed; and to recover the cost of such provision from such parent or guardian as an alimentary debt, unless it is shown to the satisfaction of the school board that such parent or guardian was unable by reason of poverty or ill-health to supply sufficient and proper food or clothing for the child, or to give the child the necessary personal attention."

Sec. 17, subsec. (6). "Where under section 4 of this Act a school board provide for the medical examination and supervision of the pupils attending schools within their district in accordance with a scheme prepared by the committee, or where a school board district is co-extensive with the district of a committee by the school board, and in either case approved by the Department, there shall be paid in each year to the school board a sum equal to one half of the cost incurred by them in making such provision."

* The memorandum contained, *inter alia*, the following clause:—

"5. *Amelioration and Physical Improvement.*

"The object of medical inspection would be defeated if the examination stopped short at the mere discovery of diseases and defects. The school boards have powers to enforce attendance at school, but effective attendance at school presupposes the physical and mental fitness of the child to profit by the education offered, and, therefore, if a child is found, for any reason, unfit, the school board are entitled to require of the parent or guardian that all necessary measures shall be taken to remedy any defects, and to have any diseases properly treated. Where the parents or guardians fail the school board are themselves empowered, in certain cases, to take full personal charge of the child, and do what is needed to restore him to a condition of fitness for effective attendance."

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printed in the appendix hereto and held to form part of this case.* It is admitted that such part of the £7500 referred to in the latter circular as may be allocated to the first parties will be inadequate to meet the whole cost of medical or dental treatment, of the nature hereinafter specified, required by necessitous children attending schools within the district of the first parties.

"4. The first parties have had to deal, *inter alia*, with the cases of two children who, on examination, were found to be in urgent need of the treatment aftermentioned. The particulars of one of the cases are as follows:—Teresa M'Veigh, aged 7½ years, daughter of and residing with James M'Veigh, boot finisher, 79 Ladywell Street, Glasgow, a pupil in St Mungo's Roman Catholic School, Glasgow, was found, when examined medically, to require the extraction of several temporary and permanent teeth. The condition of the child's teeth was such as to cause injury to her health and to necessitate immediate treatment by a skilled dentist, and to render the child incapable of taking full advantage of the education provided by the first parties. In this case the parent of the child was in such financial circumstances as to be able to provide the child with the dental treatment required.

"5. The particulars of the other case are as follows:—Mary Norman Ferguson, aged 6½ years, daughter of and residing with John Young Ferguson, white lead worker, 96 Oran Street, Maryhill, Glasgow, a pupil in Eastpark Public School, was found, when examined medically, to require the extraction of several temporary teeth and the filling of four permanent teeth. In addition, it was found that two of her permanent teeth were misplaced. In this case also the condition of the child's teeth was such as to cause injury to her health and to necessitate immediate treatment by a skilled dentist. Further, the chief medical officer of the first parties reported that it rendered her incapable of taking full advantage of the education provided by the first parties. These facts having been brought to the knowledge

† The circular of 18th April 1912 was in the following terms:—

"I am directed to inform you that a sum of £7500 has been assigned for the purpose of medical treatment of school children in Scotland.

"I am to remind you that the expenditure of school boards on medical inspection under section 4, Education (Scotland) Act, 1908, is being aided by grants under section 17 (6). The further grant now available is to be applied mainly for the medical treatment of necessitous children in terms of section 6.

"The Department have under consideration the question of how this grant can be most equitably and most usefully distributed, and it would materially assist their deliberations if you can let them know, at your early convenience, and in any case not later than 10th May, what amount (if any) your board have expended during the year ended 31st ultimo in providing medical treatment for necessitous children under section 6, Education (Scotland) Act, 1908, and also what amount (if any) they estimate that they may require to expend in a similar way during the year ending 31st March 1913.

"The Department are at the same time prepared to consider the question of making grants in aid of open-air schools for children suffering from tuberculosis or other ailments requiring open-air treatment or in aid of any similar arrangement for improving the health of school children. They will be glad to have before them the proposals of any boards which may be contemplating arrangements of the special character indicated."

of the first parties, they made inquiry and satisfied themselves—and it is the fact—that the parent of the child was unable, on account of poverty, to provide the child with the dental treatment required, and that the necessities of the case would not be provided for by voluntary agency. Dec. 10, 1912.
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"6. The first parties, considering that they were entitled to provide and pay out of the school fund under their administration for the dental treatment required by the children, proceeded to arrange for the children receiving the same at places outside the school and from persons not on the ordinary school medical staff, when they were threatened with an action of declarator and interdict at the instance of the second party, who contended that the first parties had no power to do what they proposed. The effect of such provision and payment would be to throw the cost of the treatment, in whole or in part, upon the school rate, for which the second party is assessed.

"7. The cases of Teresa M'Veigh and Mary Norman Ferguson, before mentioned, are typical of many cases which are discovered in the course of the medical examination of children conducted by the first parties. In such cases children are discovered to be in a condition requiring individual medical or dental treatment, and in many of these cases the parents are unwilling or unable, by reason of poverty or ill-health, to provide the necessary medical or dental treatment.

"8. The first parties maintain that they are entitled to provide, and to pay out of the school fund under their administration, for the appropriate medical or dental treatment required in such cases, either (a) by providing the necessary apparatus and medical staff at one or more schools or other places, or (b) by sending the children to be treated by competent private practitioners or at hospitals or infirmaries; and that at all events they are entitled to do so in cases where the parent is unable, on account of poverty or ill-health, to provide the necessary medical or dental treatment. With reference to the cases of Teresa M'Veigh and Mary Norman Ferguson, the first parties maintain that they are entitled to provide and pay for the dental treatment required by them, as aforesaid.

"9. The second party, on the other hand, maintains that the first parties are only entitled to provide for the medical examination and supervision of pupils attending schools within their district. She maintains that the first parties are not entitled to expend the school fund under their control or any part thereof in providing for individual remedial medical or dental treatment, which, consequent on said medical examination or supervision, may be found to be required by pupils attending such schools, either generally or even in cases where the parent is unable, on account of poverty or ill-health, to provide same, so as to throw the cost or any part thereof upon the rate-payers assessed for school rates; and in particular that the first parties are not entitled to provide medical or dental treatment in the manner stated in their contention. With reference to the particular cases of Teresa M'Veigh and Mary Norman Ferguson, the second party maintains that the first parties are not entitled to provide the dental treatment indicated at the expense of the school fund."

The questions of law were:—"(1) Where any pupil in a school within the district of the first parties requires individual medical or dental treatment, are the first parties entitled to provide and pay out of the school fund under their administration for such medical or dental treatment, either (a) by providing the necessary apparatus

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and medical staff at their own schools or other places, or (b) by sending the children to private practitioners or to hospitals or infirmaries? (2) If the first question be answered in the negative, are the first parties entitled to make provision and payment as aforesaid in cases where the parent is, by reason of poverty or ill-health, unable to provide the necessary medical or dental treatment? (3) In the case of the child Teresa M'Veigh above referred to, are the first parties entitled so to provide and pay for the dental treatment required by her? (4) In the case of the child Mary Norman Ferguson above referred to, are the first parties entitled so to provide and pay for the dental treatment required by her?"

The case was heard before the First Division on 15th November 1912.

Argued for the first parties;—Section 4 of the Act of 1908¹ gave school boards powers of "medical examination and supervision." "Supervision" necessarily involved providing medical treatment; and that this was intended was clearly shown by the terms of section 6, which enacted that, if required by the necessities of the case, a school board might make "provision" for a child out of the school fund. It was also to be inferred from the language of section 4 with reference to the supplying of "nurses" and "appliances," which could only be required if treatment were to be provided. That this was the intention of the Legislature was clearly seen if reference were made to the analogous provisions of the English Education (Administrative Powers) Act of 1907.² Further, the memorandum issued by the Department stated that "the object of medical inspection would be defeated" if it were not followed up by further attention, and the circular of 18th April stated that the grant of £7500 therein referred to was assigned for, and was to be applied to, the "medical treatment" of school children in Scotland.³

Argued for the second party;—Section 4 of the Act was quite explicit in its terms, and gave powers of medical examination and supervision only. That could only mean examination and supervision in school, and could not be held to imply medical treatment at home or elsewhere. The only extension of that power given by section 6 was with reference to children in a filthy or verminous state or insufficiently fed or clothed. Had it been intended by the Legislature that school boards should have power to supply medical treatment out of the school fund, this would certainly have been made the subject of express provision. In the absence of any such provision it would be an unwarrantable extension of the phraseology of the Act to supply that power by inference; and, accordingly, all the questions should be answered in the negative.

At advising on 10th December 1912,—

LORD PRESIDENT.—This special case has been brought to determine the powers of the School Board of Glasgow as to expending the money raised by rates in providing for the dental and medical treatment of children attending the Board Schools. Two concrete cases are put before us, viz., those of two little girls whose teeth are in a bad condition, and who, if treated by a skilled dentist, would in both cases be in need of teeth extrac-

¹ 8 Edw. VII. cap. 63.

² 7 Edw. VII. cap. 43, sec. 13 (1) (b).

³ Sec. 17 (6) of the 1908 Act was also referred to.

tion and teeth stopping, and in one case also in need of a plate in the Dec. 10, 1912. mouth. The only difference between the two cases is that in one case the parents are able to employ a dentist if they choose, while in the other case they are unable, owing to poverty, to do so. The questions, however, as put to us are general and, in view of the widespread operations of the School Board, important.

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The powers of the School Board in such matters are admittedly contained in the Education (Scotland) Act of 1908. The sections to which the School Board particularly appeal are sections 4 and 6. Section 4 reads thus:—[His Lordship quoted the section]. Now, it is certain that what the School Board is thereby empowered, and bound if required by the Department, to provide is medical examination and supervision of children. Accordingly, it is somewhat instructive to find that in the questions put to us those framing the case have really found it impossible to express—and I do not blame them—what the School Board really contend for without substituting for the words “examination and supervision” the word “treatment.” And a very short answer at once suggests itself, viz., that “supervision and examination” are one thing and “treatment” is another, and that if Parliament had meant “treatment” it could easily have said so.

This view is, I think, enforced by two considerations, one, so to speak, intrinsic, and the other extrinsic, of the phraseology of the Act. The first will be understood by looking at section 3, which is a comprehensive section, detailing what may be called the general powers of the School Board. The first subsection deals with education in general, the other subsections deal with things which are not educational in themselves, but are each in their own way helpful to education. Then, look at subsection (2), which deals with the supply of meals. If it had been intended to authorise the School Board to incur expenditure, and to defray it out of the school fund, in providing for the medical and surgical treatment of children—for dentistry is just a branch of surgery—I cannot help thinking there would have been a section corresponding to subsection (2). The other consideration is found in reflecting upon the enormous expense which might be incurred if the contention of the School Board were correct. There is no half-way house in this matter so far as power is concerned. It means the whole expense of the medical and surgical treatment of all children of school age. It is no answer to say that the School Board may be trusted not to act foolishly and extravagantly in such a matter. The point is, did Parliament entrust to an educational body the power of incurring enormous expense and charging it against the ratepayers, leaving it to the educational authorities to determine whether an obligation which has hitherto been regarded as lying on the parent should be placed upon the public generally? It is, to say the least, unlikely that this would be done by words which need, so to speak, sedulous construction to bear that meaning, when plain and appropriate words would suggest themselves to the veriest tyro in draughtsmanship.

It is said, however, that if we examine section 4 more closely, then, notwithstanding such general considerations, we shall be driven to the conclusion that “examination and supervision” include “treatment.” In the first place, it is urged that this is the natural inference to be drawn from

Dec. 10, 1912. the words "may employ medical officers or nurses, or arrange with voluntary agencies for the supply of nurses, and provide appliances or other requisites." This seems to me to go a very short way. These phrases are just as consistent with the ordinary meaning of "examination and supervision" as with the extended interpretation which is now sought to be put upon them. The School Board cannot examine and supervise the children themselves, they must have others to do it. A medical "officer" is the appropriate term for an official who is to examine and supervise. It is not an appropriate term for a doctor who is to treat. It is evident that for examination at home, of a certain sort, a nurse may be much less expensive and just as efficient as a doctor, and it is quite unnecessary to draw from the term "nurse" the idea that there is to be attendance during sickness. And lastly, the word "appliances" may easily and naturally be taken to refer to the provision of laryngoscopes, auriscopes, &c., for the examination of children in a room at school.

Next, it is pointed out that the provision for medical examination and supervision is to be to such extent, and subject to such requirements, as may from time to time be prescribed by any code or minute of the Department, and it is said that the Department has authorised the kind of expenditure here contended for. Now it must be obvious that whatever be the true construction of the words, "medical examination and supervision," it is only as to that that the Department can prescribe the "extent" and the "requirements," so that if a minute or code of the Department did enlarge the meaning of the words, "medical examination and supervision," it would be *ultra vires*. A minute or code of the Department with an accompanying memorandum was issued on 31st March 1909, and has been printed as an appendix to this case. As I have already said, nothing therein contained could really affect the question to be decided, but, as it has been mentioned and commented on, I think it is only fair to the Department to say that I cannot find in it the slightest justification for the wider contention pleaded. It is possible, by taking single phrases away from the context, to pick out expressions which might seem to contemplate treatment of school children at home by the school authorities; but, taking the document as a whole, it seems to me to be carefully worded, and not to go a whit beyond recommendations in connection with proper inspection and supervision. I would refer particularly to the passage dealing with the provision of spectacles as necessarily inconsistent with the idea that the School Board should itself provide them. I would refer also to the way in which other Acts of Parliament are prayed in aid, which would not be necessary if the School Board had the powers contended for. And there are many other passages which point in the same direction.

We were also referred to a circular of 18th April 1912 dealing with a sum of £7500, which, the letter bears, "has been assigned for the purpose of medical treatment of school children in Scotland." The letter asks, ". . . what amount (if any) your board have expended during the year . . . in providing medical treatment for necessitous children under section 6" of the Act of 1908. I think the phrase is an unfortunate one, for it is absolutely clear that section 6 deals exclusively with the case of children who are (first) in a filthy or verminous state, or (second) who are underfed

or underclothed, and does not deal with medical treatment at all, except to Dec. 10, 1912. the limited extent that medical treatment may be necessary for a verminous child. But, as I have already indicated, this circular cannot affect the mean-^{Glasgow} School Board ing of the statute. It must also be remembered that if the House of ^{v. Allan.} Commons choose to put a sum in the estimates, commit that sum to the Ld. President. Department, and allow them to spend it, it would need no statutory authority to allow a school board to spend the money for the purpose for which it was given them. It is a different thing when they propose to raise more money and charge it on the rates. No department and no resolution of the House of Commons can authorise them to do that. They must find that power in an Act of Parliament.

Accordingly, in my opinion, section 6 does not extend the scope of section 4, or give in any way independently of that section the power that is here contended for.

The only other section alluded to in the argument was section 17 (6), but that merely repeats the words of section 4. I am therefore of opinion that we should answer all the questions in the negative.

LORD KINNEAR and LORD MACKENZIE concurred.

The Lord President intimated that LORD JOHNSTON, who was absent at advising, concurred.

THE COURT answered all the questions of law in the negative.

SIMPSON & MARWICK, W.S.—DUNCAN MACLENNAN, Solicitor—Agents.

HEGARTY & KELLY, Pursuers (Respondents).—*Chree, K.C.—Paton.*
THE COSMOPOLITAN INSURANCE CORPORATION, LIMITED, Defenders
(Reclaimers).—*Morison, K.C.—Wark.*

No. 53.

Dec. 10, 1912.

Contract — Breach — Rescission — Arbitration — Exclusion of arbitration clause by rescission of contract.

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A contract between an insurance company and a firm of cattle salesmen, for the insurance of cattle sold by the firm, contained an arbitration clause providing that any dispute between the parties as to the construction of the contract should be referred to an arbitrator, and that "no action shall be maintainable against the insurers except upon" the award of such arbitrator. The insurers, having taken exception to certain actings of the firm, declined to do further business with them. The firm replied that they would continue to insure live stock on the insurers' account in terms of the contract.

In an action of damages at the instance of the firm against the insurers for breach of contract, the question whether there had been breach of contract or not depended on the construction to be put upon a certain clause of the contract. The defenders maintained that the construction of this clause fell to be determined by arbitration before any action of damages could be maintained.

Circumstances, in which held (rev. judgment of Lord Skerrington) that the parties had not treated the contract as rescinded, and, accordingly, that the arbitration clause was still binding; and action sisted that the construction of the clause in dispute might be determined by arbitration.

Municipal Council of Johannesburg v. D. Stewart & Co. (1902), Limited, 1909 S. C. (H. L.) 53, distinguished.

Dec. 10, 1912. ON 28th June 1910 Hegarty & Kelly, live-stock agents, Glasgow, brought an action against the Cosmopolitan Insurance Corporation there, in which they concluded for £6000 (restricted to £4500), as damages for breach of contract.

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1st DIVISION.
Lord
Skerrington.

The contract referred to was constituted by minute of agreement entered into between the pursuers, therein described as the sellers, and the defenders, therein described as the insurers, dated 2nd and 3rd March 1909. The terms of the minute of agreement, so far as material to the present report were as follows:—

“Now these presents witnesseth that the insurers hereby agree to pay the full value of all insured home-bred (*i.e.*, bred in the United Kingdom) live-stock sold by the sellers for killing purposes that may be condemned as being unfit for human food, at the following rates, viz.:— . . . And the parties also agree upon the following conditions, viz.:— . . .

“IV. This agreement to be in force for three years from 1st March 1909. . . .

“VI. The sellers shall observe the following further conditions:—

(a) The sellers shall warrant all fat cattle and pigs sold by them to pass the authorised meat inspectors subject to the conditions herein-after stated. . . . (n) The sellers shall exercise all due discretion regarding the risks undertaken by them on behalf of the insurers, and shall decline to insure any animal which, in their opinion, is suffering from disease. And

“VII. Any dispute or difference between the insurers and the sellers as to the construction of this agreement, or any matter arising out of or in connection with the same, shall be referred to a single arbitrator, to be mutually chosen or, failing agreement, to be appointed by the Court on the application of either party, and the award of such arbitrator shall be final, and no action shall be maintainable against the insurers except upon such award.”

The circumstances out of which the action arose were as follows:— By letters of 1st, 6th, 13th, and 23rd September 1909 the insurers formulated complaints to the sellers of their failure to observe the terms of Article VI. (n) of the agreement, in respect that they were selling an undue number of animals that were afterwards condemned; and they, the insurers, claimed the right to insure only such animals as should be passed by their representative at the sales, a veterinary surgeon. In reply the sellers wrote repudiating entirely the interpretation put upon the agreement by the insurers.

On 9th October 1909 the insurers wrote to the sellers as follows:— “We have your memo. of 8th inst., together with cheque value £153, 15s., but regret we must return the latter, and same is enclosed herewith. We are compelled to decline further business in view of your total disregard of our letters of 1st, 6th, 13th, and 23rd September last, all of which we confirm.”

The sellers replied on 11th October as follows:—“We are in receipt of your communication of 9th Oct., with enclosure as advised. We regret the attitude you take up with reference to the contract entered into between your Corporation and this firm, which leaves but one alternative open to us. The adoption of this course is not pleasant to us, and, before taking further steps in the matter, we give you the opportunity of reconsidering your decision, and shall be pleased to return our cheque to you, on your applying for same. Meantime, we shall continue to insure live stock on your account in

terms of the contract." The insurers then wrote suggesting the nomination of an arbitrator "to determine the questions which have arisen." Dec. 10, 1912.

Thereafter Mr William Gillies, writer, Glasgow, was appointed arbitrator to determine these questions, and proof in the arbitration proceedings was fixed for 17th March 1910. On the morning of the proof the insurers sought to amend their condescendence and claim by including therein an averment that the sellers were in breach of Article VI. (a) of the agreement, in respect that they failed to warrant (and so to insure) all fat cattle sold by them at their sales. The arbitrator disallowed the amendment, on the ground that it raised a question which was not submitted to him under the minute of reference.

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On 9th June 1910 the arbitrator issued his decree-arbitral in which he found that the sellers had not, in any of the ways claimed by the insurers in their condescendence and claim, committed a breach of the agreement, but that the agreement still subsisted, and that both parties were bound to perform their respective parts of it for its full course of three years. He further found that the insurers were not entitled by their representative to reject animals put forward for insurance; that they were not warranted in refusing to implement the agreement after 9th October 1909, and were therefore in breach of the agreement; and found them liable in expenses.

On 18th April 1910 the insurers had written to the sellers as follows:—"In view of the fact which has recently come to our knowledge, and which has been admitted by you in the proof in the arbitration presently before Mr Gillies, that you have not insured *all* the fat cattle, which in your opinion were not diseased, sold by you for killing purposes since the commencement of the contract between us, we beg to intimate that you have thereby broken the contract. On that ground—which, notwithstanding of our contention to the contrary, Mr Gillies has held is not covered by the reference to him—quite apart from other grounds maintained in the reference, the contract is at an end." After the arbitrator had issued his proposed findings, though before his final decree, the sellers' agents wrote to the insurers' agents asking if they were prepared to pay the damages due, and stating that if the damages were not paid, they were instructed to initiate proceedings in the Court of Session for payment. The insurers' law-agents replied as follows:—"In respect that your clients were in breach of the contract, as mentioned in our clients' letter to your clients of 18th ult., of a date prior to the alleged breach of contract on our clients' part, there can be no damage due your clients as now claimed. On the contrary, our clients maintain that your clients are liable to them in damages, the claim for which is meantime reserved. As you are already aware, our clients desired to raise this question in the arbitration, and were denied an opportunity of doing so. They accordingly intend to challenge the arbiter's award."

The insurers thereafter brought an action in the Court of Session for reduction of the decree-arbitral, on the ground that the arbitrator was wrong in refusing to allow the amendment referred to above. The Lord Ordinary, holding that the arbitrator was justified in his refusal, dismissed the action, and, on a reclaiming note, the First Division, on 9th December 1911, adhered.

The present action of damages, which had been brought on 28th

Dec. 10, 1912. June 1910, immediately after the final decree-arbitral was issued, but which had been sisted pending the decision of the action of reduction, was then awakened and the sist recalled.

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In their condescendence the pursuers (the sellers) quoted the defenders' letter of 9th October 1909, and averred:—"The defenders on said date refused, and since said date have continued to refuse, to implement said contract, and at said date they were in breach of contract in respect that they then refused to accept further premiums or to pay any losses arising out of said contract. Since said date, and until the raising of the present action, the defenders have never withdrawn from the position that they repudiated the contract, and that the same was at an end." They also referred to the arbiter's award, and averred:—"The defenders have finally repudiated said contract, and the present action of damages in respect of their breach has accordingly been rendered necessary. The defenders having repudiated said contract, and refused to recognise in any way said arbiter's award, and having declined all further business with the pursuers, the pursuers have been compelled to treat and have treated said contract as being now at an end, and, as after stated, have made other arrangements for protecting themselves against risks arising in connection with their sales of insured cattle." They also denied that they were in breach of Article VI. (a) of the agreement, and explained that they had customers who would not buy insured cattle and that:—"The words 'all fat cattle and pigs' occurring in clause VI. (a) of the said contract were used as meaning 'all fat cattle and pigs which may be sold as insured by the sellers,' and this was the meaning contemplated and intended by both parties to the contract."

In their answers the defenders averred that the pursuers were in breach of Article VI. (a) of the agreement in respect that they were in the habit of selling fat cattle without warranting them and therefore as uninsured. They also averred that they themselves had all along been willing to refer the whole matters in dispute to arbitration, and that the pursuers were bound to refer the present dispute to arbitration, and to obtain the arbitrator's award thereon as a condition precedent to maintaining an action of damages for breach of contract against the defenders.

The pursuers pleaded, *inter alia*;—(1) The defenders, being in breach of their contract with pursuers as condescended on, are liable to the pursuers for the loss and damage thereby sustained and to be sustained by them. (2) The pursuers, having suffered loss and damage as condescended on in consequence of said breach, are entitled to be compensated by defenders therefor, and the said loss and damage being reasonably estimated at the sum sued for, the pursuers are entitled to decree accordingly. (3) The defenders having repudiated said contract of insurance, are barred from now founding upon its terms.

The defenders pleaded, *inter alia*;—(1) The action is incompetent in respect it is not laid upon an award of an arbitrator finding that the position taken up by the defenders in their letter of 9th October 1909 was not justified by the facts. (2) The action is excluded by the arbitration clause in the contract founded on, and should accordingly be dismissed. (6) The pursuers being in breach of the contract founded on are barred from maintaining the present action.

On 5th July 1912 the Lord Ordinary (Skerrington) pronounced the following interlocutor:—"Repels the first plea in law for the

defenders: Allows the record to be amended in terms of the minutes of amendment for defenders and pursuers respectively, Nos. 19 and 20 of process: Opens up the record in order that said amendments may be made, and the same having been made, of new closes the record: Allows parties a proof before answer of their averments, and to the pursuers a conjunct probation, on a day to be afterwards fixed: Reserves all questions of expenses." * Dec. 10, 1912.
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* "OPINION.—The pursuers are a firm of live-stock agents, and the defenders are an insurance company. On 2nd and 3rd March 1909 the parties entered into a somewhat obscure written agreement, which was to remain in force for three years, and which was intended to indemnify the pursuers against loss arising from the live stock which they sold for killing purposes being condemned as unfit for human food. I do not need to explain how it came about that the pursuers, as auctioneers, were interested in the fate of the animals which they sold. . . .

"In the present action the pursuers claim £6000 (restricted to £4500) in name of damages through the defenders having since 9th October 1909 refused to do any business with the pursuers or to insure any of their live stock. The defence is primarily founded upon the 7th clause in the insurance agreement:—'Any dispute or difference between the insurers and the sellers as to the construction of this agreement, or any matter arising out of or in connection with the same, shall be referred to a single arbitrator, to be mutually chosen or, failing agreement, to be appointed by the Court on the application of either party, and the award of such arbitrator shall be final, and no action shall be maintainable against the insurers except upon such award.' The defenders' first plea in law is:—'The action is incompetent in respect it is not laid upon an award of an arbitrator finding that the position taken up by the defenders in their letter of 9th October 1909 was not justified by the facts.'

"The dispute, which in the defenders' view ought to be decided by arbitration, arises out of clause 6 (a) of the insurance agreement, which, as the defenders construe it, bound the pursuers to pay premiums upon all the live stock which they sold, and did not entitle them to insure the bad and doubtful animals, while refusing to pay premiums upon the good ones. The defenders' sixth plea in law is that 'the pursuers being in breach of the contract founded on are barred from maintaining the present action.' The defenders' advisers seem to have had so much confidence in their first plea that they did not think it necessary to make their averments in support of this sixth plea with proper specification or in such a form as to elicit a reply from the pursuers. Accordingly, the defenders will require to amend their pleadings if, contrary to their contention, the present action is held to be competent.

"I am unable to hold that in the circumstances disclosed and admitted in the pleadings, the present action is incompetent. However wide a construction one may put upon the arbitration clause, the fact remains that at the date when the present action was instituted (28th June 1910) the pursuers held (as they still hold) a decree-arbitral, dated 9th June 1910, by which the arbiter (Mr Gillies) found 'that the said Hegarty & Kelly did not in any of the ways claimed by the said The Cosmopolitan Insurance Corporation, Limited, in the said condescendence and claim commit a breach of the said agreement, but that the said agreement still subsists, and that the said The Cosmopolitan Insurance Corporation, Limited, and the said Hegarty & Kelly are bound to perform their respective parts of the said agreement for its full course of three years from 1st March 1909 as therein provided; . . . and further, I find that the said Cosmopolitan Insurance Corporation, Limited, were not warranted in refusing to implement their part of the said agreement from and after 9th October 1909,

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The defenders reclaimed, and the case was heard before the First Division on 13th and 14th November 1912.

Argued for the reclaimers (defenders);—The award of an arbitrator finding that there had been breach of this contract was a condition precedent to any action for recovery of damages therefor.¹ There had been no breach of contract on the part of the defenders, and there had been no repudiation thereof such as might bar them from founding upon the arbitration clause, and therefore the circumstances were distinguishable from those in *Municipal Council of Johannesburg v. D. Stewart & Co. (1902), Limited.*² Even if the defenders had intended by their letter of 9th October 1909 to renounce the contract, their intention would have been defeated, because renunciation by one party did not amount to rescission of a contract,³ and the pursuers had not adopted the renunciation, but by their letter of 11th October 1909 had clearly refused to accept it. The pursuers having adopted

and are therefore in breach of said agreement.' It is true that the arbiter did not adjudicate upon the particular dispute which I have already explained, because he considered, and (as the Court afterwards decided) rightly considered, that he had no jurisdiction to do so. The question whether the present pursuers had contravened article 6 (a) of the insurance agreement was raised by the present defenders for the first time on 16th March 1910, the day before the proof in the arbitration, whereas Mr Gillies (and subsequently the Court) held that by the terms of the minute of reference of 10th and 16th November 1909, his jurisdiction was limited to the decision of the disputes which were in existence at the last-mentioned date. The defenders protested against the arbiter's decision upon this point, and after the issue of his award they unsuccessfully attempted to reduce it upon the ground that he had refused to decide a question which was within the submission. The summons of reduction was signeted on 20th June 1910 and was finally dismissed by the Inner House on 9th December 1911. Pending this action the present action of damages was sisted, but the sist was recalled on 15th December 1911. From the foregoing statement it is, I think, apparent that when the present action was instituted the defenders had never made any competent demand upon the pursuers to submit to arbitration the new dispute as to the pursuers' alleged violation of article 6 (a) of the insurance agreement. I do not require to consider how the rights of parties would have stood if, immediately on the issue of the decree-arbitral, the defenders had intimated that they acquiesced in it, and if they had then called upon the pursuers to join with them in a new reference to an arbiter. Instead of taking this course the defenders persisted in their erroneous contention that the new dispute had already been submitted to Mr Gillies. In these very special circumstances I am of opinion that the pursuers were entitled to sue upon the award in their favour, and that they were entitled to treat the defenders as persons who refused to go to arbitration before a new arbiter.

'The defenders' second plea in law raises somewhat awkwardly the question whether, assuming the action to be competent, I ought not to sist process until the dispute as to the pursuers' alleged breach of contract has

¹ *Caledonian Insurance Co. v. Gilmour*, (1892) 20 R. (H. L.) 13, Lord Chancellor Herschell, at p. 15, Lord Watson, at p. 18; *Scott v. Avery*, (1855) 5 H. L. C. 811, Lord Chancellor Cranworth, at pp. 847-849, Lord Campbell, at pp. 853-4; *Anstruther v. Burns*, (1894) 1 S. L. T. 421; *Hamlyn & Co. v. Talisker Distillery*, (1894) 21 R. (H. L.) 21.

² 1909 S. C. (H. L.) 53, Lord Shaw, at p. 56.

³ *Johnstone v. Milling*, (1886) 16 Q. B. D. 460, Lord Esher, M.R., at p. 467.

that attitude, were barred from now maintaining that the contract was at an end in order to avoid the operation of the arbitration clause. If there was a material breach of contract by one party the other might either rescind the contract altogether, or might hold to it and claim damages; but if he took the latter course—as the pursuers were doing here—he was then bound by all its terms, including the arbitration clause.¹

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Argued for the respondents (pursuers);—The question raised by the pursuers' averment that the defenders had repudiated their contract was one for the determination of the Court, and until it was decided, the defenders were not entitled to appeal to the arbitration clause.² Further, that clause could not stand in the way of the present claim for damages, because by the defenders' repudiation of the contract and refusal to fulfil their part of it, the pursuers were forced to make other arrangements, and were accordingly relieved of all the

been decided by arbitration. The pursuers' counsel argued that, although a question had arisen as to the construction of article 6 (a), that question did not fall to be decided by arbitration, because admittedly the arbitration clause does not empower the arbiter to assess damages, and because the arbiter is entitled to construe the contract only so far as is necessary in order to explicate his own jurisdiction. The Court took this view in the case of *Mackay v. Leven Police Commissioners*, 20 R. 1093, but the arbitration clause there was not identical with that now under construction. He also argued that the clause was executorial only and could have no further effect seeing that the contract time expired on 1st March 1912. I am not prepared to sustain either of these contentions. If both parties had treated the contract as binding and subsisting for the whole period of three years, and if their only dispute had been whether the defenders were justified in having refused during these years to insure a particular kind of stock, e.g., sheep, as not being 'live stock' within the meaning of the agreement, I should have thought that the question whether the defenders were liable in damages ought to be decided by arbitration, in spite of the fact that the arbiter could not assess the damages and in spite of the fact that the contract period had now expired. The peculiarity in the present case is that the defenders' position ever since October 1909 has been a complete refusal to insure any of the pursuers' live stock. That looks very like a repudiation of the contract on the part of the defenders, but I do not propose to pronounce any decision to that effect, because the position taken up by the pursuers and also the arbitration proceedings may have to be considered in their bearing on the question of repudiation. The safer course is to allow the pursuers a proof of their averments including those in support of their third plea in law, 'The defenders having repudiated said contract of insurance, are barred from now founding upon its terms.' That was the course adopted by the House of Lords in the case of *Johannesburg v. Stewart*, 1909 S. C. (H. L.) 53. If it be the fact that either justifiably or unjustifiably the defenders have refused to fulfil their part of the contract, *prima facie* I should think that they cannot demand specific performance of the arbitration clause. If they were right in the dispute and acted justifiably, then the defenders will be assoizied in the present action of damages, and can in their turn sue the pursuers for

¹ Pollock on Contracts (8th ed.), 621; *Mersey Steel and Iron Co. v. Naylor, Benzon, & Co.*, (1884) 9 App. Cas. 434, Lord Chancellor Selborne, at p. 439; *Turnbull v. M'Lean & Co. et c contra*, (1874) 1 R. 730, Lord Justice-Clerk Moncreiff, at p. 738.

² *Municipal Council of Johannesburg v. D. Stewart & Co.* (1902), Limited, 1909 S. C. (H. L.) 53.

Dec. 10, 1912. contractual obligations arising under it, including those imposed by the arbitration clause.¹

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At advising on 10th December 1912,—

LORD MACKENZIE.—The only point argued on this reclaiming note was whether the question now in dispute between the parties should be settled by arbitration, or whether the pursuers are entitled to the proof which the Lord Ordinary has allowed. Now, the nature of the present dispute turns upon the proper construction to be put upon clause VI. (a) of the contract.—[His Lordship read that clause and the arbitration clause, and continued]—In the previous arbitration between the parties, the Cosmopolitan Insurance Corporation, Limited, the insurers, had proposed to raise by amendment the question whether Hegarty & Kelly were bound, on a construction of VI. (a), to pay premiums to them on all fat cattle and pigs sold by them, or whether they were entitled to sell certain of these without insurance. The position of Hegarty & Kelly upon clause VI. (a) was that it is permissive and not obligatory in its terms, and did not prohibit them from selling cattle uninsured. The arbiter refused to allow the amendment, and your Lordships have held by interlocutor of 9th December 1911 that he was within his rights in taking this course. This question has therefore never been considered or determined, and the reference clause in the contract applies in terms to such a dispute as the present.

The difficulty which the pursuers seek to introduce into the case arises on their averment that the defenders repudiated—to use their phrase—the contract, and that they are entitled to a proof of this. Their argument upon this point was really founded solely upon the case of *The Municipal Council of Johannesburg v. D. Stewart & Company* (1902), Limited.² I think this argument proceeded on a misapprehension of the term repudiation. If one party to a contract is in breach of it as regards a stipulation which goes to the root of the contract, the other party has the option of rescinding the contract. If he does, then the contract with all its clauses goes, and amongst them the clause providing for a reference to arbiters. In the view taken in the House of Lords the facts averred in the *Johannesburg* case² were of a character to bring that case within this category. In the present case it sufficiently appears, in my opinion, without any proof, that the parties never treated the contract as rescinded. The pursuers found upon

damages. On the other hand, if the defenders were in the wrong in refusing performance, the damages due to the pursuers will be assessed in the present action.

“I repel the defenders' first plea in law, and I allow the record to be amended as proposed by the defenders in their minute and by the pursuers in their answers thereto. I close the record of new, and before answer I allow the parties a proof in common form. I do not repel the defenders' second plea in law as it is possible that the agreement for arbitration may still be held binding upon the parties, though not as a condition precedent to the present action.”

¹ *Shiells v. Scottish Assurance Corporation, Limited*, (1889) 16 R. 1014; *Leake on Contracts* (6th ed.), §39; *Ripley v. M'Clure*, (1849) 18 L. J., Exch. 419; *M'Donald v. Kydd*, (1901) 3 F. 923; *Munro v. M'Geogha*, (1888) 16 R. 93.

² 1909 S. C. (H. L.) 53.

the letter which the defenders wrote to them on 9th October 1909 stating Dec. 10, 1912. that they were compelled to decline further business in view of the pursuers' total disregard of certain of their previous letters. These were the letters which raised the questions in dispute in the previous arbitration. The reply to this was dated 11th October and contains this passage: "Meantime we shall continue to insure live stock on your account in terms of the contract." On 13th October the defenders wrote to the pursuers that they had nothing to add to their letter of the 9th inst., except to invite them to concur in nominating a suitable arbitrator as provided by the agreement to determine the questions which had arisen. These were the questions which were disposed of in the previous arbitration. Messrs Hegarty & Kelly were thus at this date treating the contract as a going contract. This is entirely in harmony with what they wrote on the 14th September 1909: "We have a good-going plain-worded contract which admits of only one interpretation, is valid for three years, and any breach of the whole, or part of which, will involve the committal of the whole matter into a Court of law." The arbiter endorsed this view when he found by his decree-arbital that the agreement still subsisted, and that both parties were bound to perform their respective parts of the agreement for its full course of three years from 1st March 1909.

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Limited.
Lord Mac-
kenzie.

On the 18th of April 1910 the defenders wrote to the pursuers that in view of the fact which had recently come to their knowledge, and which was admitted in the proof in the arbitration, that they had not insured all the fat cattle, they intimated that they had broken the contract, and that on that ground, apart from other grounds maintained in the reference, the contract was at an end. Messrs Hegarty & Kelly did not assent to this view, and on 28th June 1910 raised the present action to recover damages for the difference between the rates at which they had been compelled to insure as compared with those agreed on with the defenders.

The action was sisted on the 18th of October 1910. After the decision in the action of reduction the sist was recalled. As I understood the argument put by pursuers' counsel, they founded not on the letter of the 9th October 1909 alone, but on the fact that the defenders did not say that they were going to the arbiter to see if they were entitled to end the contract or not. The question, however, whether they were entitled to take up the position they did in their letter of 9th October 1909 is just the question of which party is right in the construction to be put upon clause VI. (a) of the contract.

In such circumstances as these the judgment in the case of *Johannesburg*¹ does not help the pursuers, and the expressions of opinion in it do not apply to the facts of this case. The arbiter in this case has not power to award damages, but the question whether the defenders are liable in damages or not depends upon the view whether they are in breach of contract. In my opinion the interlocutor of the Lord Ordinary should be recalled, and the case sisted that parties may go to the arbiter and get him to decide the dispute between them as to the proper construction to be put upon clause VI. (a).

¹ 1909 S. C. (H. L.) 53.

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LORD PRESIDENT.—I am of the same opinion. Lord Watson, in the House of Lords, in the case of *Hamlyn & Company v. Talisker Distillery*,¹ says this:—"The jurisdiction of the Court is not wholly ousted by such a contract"—viz., the contract to submit the matter in dispute to arbitration. "It deprives the Court of jurisdiction to inquire into and decide the merits of the case, while it leaves the Court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration from any cause prove abortive, the full jurisdiction of the Court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded *in limine*, the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration. The latter course was adopted in *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company*,² where the reference was to arbiters unnamed, but had been confirmed by statute. I cite that case, not as establishing, but as illustrating, the rule of procedure, which was in force long before its date."

Now, in the case of the *Caledonian Railway Company v. Greenock and Wemyss Bay Railway Company*,² the extent of the arbitration clause was as follows:—"All differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation. . . ." I think that is about as near the clause in the present case as one could well wish, for the clause here reads thus:—"Any dispute or difference . . . as to the construction of this agreement, or any matter arising out of or in connection with the same, shall be referred to a single arbitrator."

I humbly think that that law, which is treated by Lord Watson as being the well-established law of Scotland, and of which a previous illustration may be found in Lord Rutherford Clark's opinion in the case of *Mackay v. The Parochial Board of Barry*,³ was not altered—as was pled to us—by the judgment of the House of Lords in the *Johannesburg* case.⁴ In the *Johannesburg* case⁴ it was held that the contract had been so thoroughly repudiated that it was gone altogether. But I concur with Lord Mackenzie in the distinction he has drawn between the *Johannesburg* case⁴ and this case. I would also beg leave to repeat what I said in the *North British Railway Company v. Newburgh and North Fife Railway Company*,⁵ to the effect that, although there are traces in the *Johannesburg* case⁴ of a doctrine which seems to be good law in England, and which I assume was rightly applied in the *Johannesburg* case⁴—a case in which the whole stipulations fell to be construed by English law—viz., the doctrine that the Court may apply the arbitration clause or not, as it thinks right in the circumstances, such a doctrine is wholly alien to the law of Scotland. If there is a binding reference, then to the tribunal which the parties have thus chosen the parties must go, and the Court has no dispensing power.

¹ 21 R. (H. L.) 21.² (1883) 10 R. 1046.³ 10 Macph: 892.⁴ 1909 S. C. (H. L.) 53.⁵ 1911 S. C. 710.

LORD KINNEAR concurred.

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The Lord President intimated that LORD JOHNSTON, who was absent at advising, also concurred.

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THE COURT pronounced an interlocutor in the following terms:—
“Recall said interlocutor in so far as it repels the first plea in law for the defenders and allows proof: *Quoad ultra* adhere to the said interlocutor: Sist the cause to allow the parties to determine by arbitration the true meaning of clause VI (a) of the contract between them.”

MAXWELL, GILL, & PRINGLE, W.S.—J. & J. GALLETTY, S.S.C.—Agents.

RICHARD DARROLL, Appellant.—*Moncrieff, K.C.—Fenton.*
THE GLASGOW IRON AND STEEL COMPANY, LIMITED, Respondents.—
Horne, K.C.—Hon. W. Watson.

No. 54.

Dec. 10, 1912.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule (16)—Review of weekly payments—Industrial disease—Recovery—Susceptibility to recurrence—Question whether susceptibility due to original attack—Onus of proof.

Darroll v.
Glasgow Iron
and Steel Co.,
Limited.

In an application by employers for the ending or diminishing of a weekly payment of compensation it was proved that the workman, after being duly certified as suffering from miner's nystagmus (an industrial disease), was awarded compensation, that he had “now completely recovered from this attack,” but that he was susceptible to a recurrence of the disease. It was not proved whether the susceptibility was due to the original attack or to constitutional predisposition, the evidence being inconclusive.

Held that, as the workman had recovered from the original attack, and as he had failed to discharge the onus which lay on him of proving that his susceptibility to recurrence of the disease was due to that attack, the compensation fell to be ended.

In an arbitration under the Workmen's Compensation Act, 1906, under a minute presented by the Glasgow Iron and Steel Company, Limited, craving review of a weekly payment of 8s. 10d. made by them to Richard Darroll in respect of nystagmus acquired by him while employed as a miner at their Parkneuk Colliery, Motherwell, the Sheriff-substitute at Hamilton (Shennan) ended the compensation and, at the request of the workman, stated a case for appeal.

2D DIVISION.
Sheriff of
Lanarkshire.

The case set forth:—

“The respondents desire to have the weekly payment of compensation ended or diminished in respect it is alleged that the incapacity of the said appellant for work for which the said weekly payment was awarded has entirely ceased, or at least has become greatly lessened.

“Proof was taken before me on 29th July 1912, when the following facts were admitted or proved:—(1) The appellant having been duly certified as suffering from miner's nystagmus from 3rd September 1910, was paid full compensation at the rate of 13s. 10d. per week down to 27th October 1911. (2) On 27th October 1911, in proceedings for review instituted by the respondents, the appellant's compensation was reduced to 8s. 10d. per week on the ground that he was fit for

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surface work of a limited character. (3) The medical witnesses for both parties concurred in stating that Darroll has now completely recovered from this attack of nystagmus. No one could now detect that he has ever suffered from nystagmus, and he has good sight. (4) The medical witnesses on both sides also agreed in thinking that it would be unwise for Darroll to resume work underground, because of the danger of a second attack of nystagmus, but the evidence was inconclusive as to the cause of this liability to recur. On the one side, the opinion was given that the liability to recur was due to the constitutional predisposition of the appellant, which the first attack merely revealed. On the other side, the opinion was expressed that the first attack left a condition of susceptibility to subsequent attacks. The evidence was entirely in the region of opinion and was inconclusive.

"I held that the onus was on the appellant to prove that his present susceptibility to a recurrence of nystagmus is due to the attack of September 1910, from which he has now recovered. As he had failed to discharge this onus and had completely recovered from the first attack, I ended his compensation."

The questions of law for the opinion of the Court were:—"(1) Was the onus on the appellant to prove that his existing susceptibility to a recurrence of nystagmus is due to his previous attack? (2) On the facts stated was the appellant's compensation rightly ended?"

The case was heard before the Second Division (without Lord Guthrie) on 26th November 1912.

Argued for the appellant;—Nystagmus was an industrial disease under the Workmen's Compensation Act, 1906,¹ and was equivalent to an injury caused by accident.² The certificate required by section 8 (1) merely determined that the workman was suffering from an industrial disease, and did not otherwise affect the adjustment of compensation and everything incidental thereto.³ It was found as a fact that the appellant was still liable to a recurrence of the disease, and this amounted to "incapacity" within the meaning of the Act.⁴ No employer knowing of the appellant's susceptibility would ever give him work, and this inability to obtain work, being due to a cause personal to the appellant following on an "accident," entitled him to compensation.⁵ The only difficulty in the case lay in the question upon whom the onus rested of proving the connection, or want of connection, between the original attack of the disease and the liability to a recurrence. The answer was that the onus rested upon the party

¹ 6 Edw. VII. cap. 58, sec. 8; Statutory Rules and Orders, No. 407, May 22, 1907.

² *Jones v. New Brynmally Colliery Co., Limited*, (1912) 5 B. W. C. C. 375, *per* Cozens-Hardy, M.R., at p. 378.

³ *Garrett v. Waddell & Son*, 1911 S. C. 1168, *per* Lord Johnston, at p. 1172.

⁴ *Thomas v. Fairbairn, Lawson, & Co., Limited*, (1911) 4 B. W. C. C. 195.

⁵ *Carlin v. Stephen & Sons, Limited*, 1911 S. C. 901, *per* Lord Salvesen, at p. 907; *Duris v. Wilsons and Clyde Coal Co., Limited*, 1912 S. C. (H. L.) 74; *Ball v. William Hunt & Sons, Limited*, [1912] A. C. 496, also reported as footnote to *Duris*, 1912 S. C. (H. L.), at p. 77; *Garnant Anthracite Collieries, Limited, v. Rees*, (1912) 5 B. W. C. C. 694; *Clelland v. Singer Manufacturing Co.*, (1905) 7 F. 975.

who was the true pursuer in the issue before the Court.¹ In the pre-
 sent case the onus was on the employers, since they were applying
 for review of an existing award, and it was for them to show a change
 of circumstances.² *Jones v. New Brynmally Colliery Company*,³ relied
 on by the respondents, was distinguishable, because that was the case
 of an application at the instance of a workman, where the burden of
 proof lay on him and he failed to discharge it.

Dec. 10, 1912.
 Darroll v.
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Argued for the respondents;—The appellant was originally found
 entitled to compensation because he was certified to be suffering from
 an industrial disease. But the arbitrator had found as a fact that the
 man had “completely recovered” from that attack. This exhausted
 the effect of the certificate, and on the strength of that finding the
 employers were entitled to have the compensation ended. It was
 not disputed that susceptibility to nystagmus, if it was due to the
 original attack, would be a good ground for claiming compensation,
 but it would be a new ground, and the workman would have to
 establish it by evidence. This he had failed to do, and the compensa-
 tion accordingly fell to be ended. The case was ruled by *Jones v.*
New Brynmally Colliery Company, Limited,³ and *M’Ghee v. Summerlee*
Iron Company, Limited,⁴ and was distinguishable from *Garnant*
Anthracite Collieries, Limited, v. Rees,⁵ where the susceptibility to
 recurrence was proved to be due to the previous attack, and from
M’Callum v. Quinn,⁶ where the employers failed to prove that the
 workman had ever recovered.

At advising on 10th December 1912,—

LORD JUSTICE-CLERK.—By statutory rules passed under authority of the
 Workmen’s Compensation Act an affection of the eyes to which miners are
 liable, and which is called nystagmus, is placed in the category of accidents
 falling under the statute. This affection is one from which complete
 recovery is possible, so that a miner who has suffered from it may be found
 in a condition in which he is quite fit to resume his work. Such is the
 case now before us. We are informed that the arbitrator has found it to
 be proved by the evidence of the medical witnesses, both for the appellant
 and the respondents, that the appellant has now “completely recovered
 from this attack of nystagmus,” and that “no one could now detect that
 he has ever suffered from nystagmus,” and that “he has good sight.” In
 ordinary circumstances such findings would be conclusive against the appel-
 lant. The employer, in applying for an ending of the compensation, dis-
 charges the onus resting upon him by bringing evidence to the satisfaction
 of the arbitrator that there has been complete recovery from the attack,
 just as he would discharge the onus in a case of injury by accident if he
 proved complete restoration to present health and strength. The proof of
 being well and fit for work is all he is called on to establish.

¹ *M’Callum v. Quinn*, 1909 S. C. 227; *Borland v. Watson, Gow, & Co.*, 1912 S. C. 15.

² *Higgins v. Poulson*, [1912] 2 K. B. 292, *per* Cozens-Hardy, M.R., at p. 294; *M’Ewan v. William Baird & Co., Limited*, 1910 S. C. 436; *Cory Brothers & Co., Limited, v. Hughes*, [1911] 2 K. B. 738.

³ 5 *Butterworth’s W. C. C.* 375.

⁴ 1911 S. C. 870.

⁵ 5 *Butterworth’s W. C. C.* 694.

⁶ 1909 S. C. 227.

Dec. 10, 1912. On the other hand, it is true that although a man may be able for his work he may, in certain circumstances, be entitled to resist the ending of the compensation if there is a proved liability to recurrence of evil consequences of the original injury; in short, that recovery, though complete at the present time as regards present health and capacity, may not be complete as regards probable emerging consequences, causing breakdown of existing capacity, such breakdown being directly associated with the original evil, as effect with cause. But if such a case for not ending the compensation is to be made out, it rests with the workman to make it good; the burden of proof of such a case rests upon him. He cannot call upon the employer to prove a negative,—viz., to prove that if he gets another attack of the disease it will not be a result of the previous attack. If the workman who is proved to have recovered his capacity is not as a consequence to have the door closed on him, it is he who must take action to keep it open. He must show cause by proof that he is entitled to have it kept open.

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Lord Justice-
Clerk.

In this case can it be said that the appellant has brought such proof? I do not think it can. What is found is not fact, but rather that fact is unascertainable. It is true that the medical opinion on both sides is to the effect that it would be unwise for the appellant to resume work underground, because he might again be attacked by nystagmus. But this, which is of course only opinion of what may be, is not based on any distinct ground. On the one hand it is suggested that the man has a constitutional predisposition to this particular disease, on the other that the attack left the sufferer in a condition of susceptibility which might lead to another attack. But the arbitrator felt himself quite unable to give a finding of fact one way or the other; he merely found that the evidence was entirely in the region of opinion, and was inconclusive, and therefore he held that the appellant had not discharged the burden of proof which rested on him. This being so, the arbitrator has ended the compensation. I am of opinion that his decision was right, and that no other course was open to him.

I consider that the present case is *a fortiori* of the case of *M'Ghee*.¹ There a development of evil had taken place for the second time, but, as it was not possible to prove in fact that the new development was a result of the original accident, the workman was held not entitled to succeed. It is also important to notice that in the case of *Jones*,² the workman, who had suffered from an attack of the same disease as the workman in this case, and who had recovered but was found susceptible to a recurrence of the disease, failed in his application for an award of compensation because he did not prove that his susceptibility was due to the original attack. The whole matter turns on what is to be proved and who is to prove it. A tendency to a recurrence of evil may be incapacity under the Act, but unless the workman can prove that such tendency is connected with the original evil condition produced by the accident—as in this case by the attack of nystagmus—the employer cannot be called on to pay any further compensation. Should it happen that a miner in the position of the appel-

¹ 1911 S. C. 870.

² 5 Butterworth's W. C. C. 375.

lant returns to work, and that he has another attack of nystagmus, he would, of course, have his claim for an award—as for a new injury producing incapacity—against the employer in whose employment he then be; just as a workman who has recovered from an accident can have a claim for compensation if he has the misfortune to meet with another injury when at work.

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LORD DUNDAS.—This case raises purely a question of *onus probandi*. It arises out of an application by the employers to have a weekly payment of compensation to the appellant—a miner named Darroll—ended or diminished, in respect that his incapacity has entirely ceased, or at least become greatly lessened. The essential facts are few and simple. Darroll, having been duly certified as suffering from miner's nystagmus as from 3rd September 1910, was paid full compensation at the rate of 13s. 10d. per week down to 27th October 1911. On this latter date, in proceedings for review instituted by the employers, the compensation was reduced to 8s. 10d. per week, on the ground that Darroll was fit for surface work of a limited character. As the result of the proof in the present application the learned arbitrator found—“(3) The medical witnesses for both parties concurred in stating that Darroll has now completely recovered from this attack of nystagmus. No one could now detect that he has ever suffered from nystagmus, and he has good sight.” Counsel for the employers contended, and I think rightly, that the primary onus incumbent upon them as applicants is sufficiently discharged by this finding of the man's complete recovery from the attack which had incapacitated him. But the point of the case is raised by the arbitrator's fourth finding, which bears that “the medical witnesses on both sides also agreed in thinking that it would be unwise for Darroll to resume work underground because of the danger of a second attack of nystagmus, but the evidence was inconclusive as to the cause of this liability to recur.” It is further explained in the finding that the evidence, which was inconclusive and entirely in the region of opinion, left it open whether the liability to recurrence of nystagmus was due to a constitutional predisposition, or to a susceptibility to subsequent attacks left by the first attack.

The appellant's counsel urged that it was for the employers to prove that the liability to recurrence of nystagmus was not due to the previous attack; and that, as they had failed to do so, the compensation could not be ended. I think this contention is wrong. It seems to me that when the employers have proved the man's complete recovery from the original attack of nystagmus the *onus probandi* shifts to the workman to prove, if he can, that any liability to a second attack which may exist is a direct consequence of the first. This view appears to me to be in accordance with reason and good sense, and I think it is supported by authority. In *M'Ghee v. Summerlee Iron Company, Limited*,¹ the employers sought to have the compensation reviewed and ended, and they discharged their primary *onus probandi* by producing the certificate of a medical referee, conclusive as at its date, that the man was then fit to work as a miner. The workman

¹ 1911 S. C. 870.

Dec. 10, 1912, pleaded that he had, since the date of the certificate, again become incapacitated, and was, and would be for the future, unfit for his work. The arbitrator made a remit to a medical referee, who reported that M'Ghee was again incapacitated and unfit for his former work as a miner; that he was fit for work on the surface; and that the reporter could not say whether M'Ghee's present incapacity was the result of his accident. The arbitrator held that the onus lay on the workman to prove that the supervening incapacity was due to the accident, and that he had failed to do so; and ended the compensation. The Court upheld the arbitrator's decision on the ground that the employers having by the medical referee's certificate established the man's recovery (as the employers here have done, looking to the terms of the third finding), the onus fell upon the workman to prove that the supervening incapacity was due to the accident, just as in an original application he must show that his incapacity is due to an accident arising out of and in the course of his employment. An earlier case—*M'Callum v. Quinn*¹—where the facts were peculiar and rather complicated, was distinguished. The employers were unsuccessful in their application for review, because, as the rubric bears, they had failed to prove that the workman had recovered from his injuries. That that was the proper and sufficient ground of judgment in *Quinn's* case¹ appears clearly from Lord M'Laren's opinion; but I must frankly say that my own brief observations in the case seem to have been erroneously expressed. A decision bearing even more closely upon the point than *M'Ghee's* case² is to be found in *Jones v. New Brynmally Colliery Company*.³ A workman who had suffered from miner's nystagmus had recovered, but was unable to resume his old employment by reason of his liability to recurrence of the disease. The County Court Judge awarded compensation; but the Court of Appeal held that, in the absence of evidence that the liability to such recurrence was due to the previous attack, the award of compensation could not be sustained. Cozens-Hardy, M.R., observed: "There was no evidence that he [the workman] was rendered, by reason of the past nystagmus, liable to a recurrence of nystagmus, and unless that can be made out it seems to me that the applicant must fail." Buckley, L.J., said that the County Court Judge "found that he [the workman] was now quite well, but that if he resumed occupation underground he would not continue to be quite well. But he does not find, which I think is the crucial fact to be found, that if he went back underground the recurrence would be attributable to the previous attack of nystagmus. In the absence of any evidence to that effect, and I find none, I think that this compensation cannot be sustained." It seems to me that this English case was rightly decided, and that it is in no material way distinguishable from that now before us. Still more recently, in *Garnant Anthracite Collieries, Limited, v. Rees*,⁴ the opinions expressed in *Jones's* case³ were approved by the Court of Appeal, though their decision went in favour of the workman, because the County Court Judge had found that the effects of the attack of nystagmus had not in fact disappeared, and that

¹ 1909 S. C. 227.

² 1911 S. C. 870.

³ 5 Butterworth's W. C. C. 375.

⁴ 5 Butterworth's W. C. C. 694.

the man's subsequent susceptibility to further attack was therefore attributable to the first. I think we are not here at all in the region of cases like *Daris*,¹ which the appellant's counsel pressed upon our attention. The appellant is not, in my judgment, entitled to plead that his sphere of employment is restricted by his susceptibility to a recurrence of nystagmus, for the simple reason that he is unable to connect that susceptibility, as effect with cause, with his original attack.

On the grounds now stated I agree with the reasoning and the conclusions which are thus expressed by the learned arbitrator in the case before us: "I held that the onus was on the appellant to prove that his present susceptibility to a recurrence of nystagmus is due to the attack of September 1910, from which he has now recovered. As he had failed to discharge this onus, and had completely recovered from the first attack, I ended his compensation." The two questions put to us should, in my opinion, be answered in the affirmative.

I ought, perhaps, to add a few words in regard to a topic mooted, but not exhaustively argued, during the discussion at our bar. Miner's nystagmus, though not among the industrial diseases specified in the Third Schedule to the Act of 1906, has been brought within the scope of the Act by the statutory rules and orders of 1907. The point mooted was whether or not such an industrial disease is precisely equivalent to a personal injury by accident, so that the whole statutory consequences must be held to follow as much in the one case as in the other. The question might open a large field; it seems already to have been the subject of divergent judicial opinions—see *Jones*²; it may come up sharply hereafter for decision; and it is unnecessary in the present case to decide it. In these circumstances I desire to reserve my opinion upon the matter.

LORD SALVESEN concurred.

THE COURT answered both questions of law in the affirmative.

SIMPSON & MARWICK, W.S.—W. & J. BURNES, W.S.—Agents.

(*Poor*) CATHERINE E. FLORENCE, Pursuer (Appellant).—*Paton*.
GEORGE SMITH, Defender (Respondent).—*Lippe*.

No. 55.

Dec. 11, 1912.

Process—Mandatory—Defender and Respondent in appeal abroad but within British Dominions.

Florence v.
Smith.

In March 1912 *Poor* Catherine E. Florence brought an action of affiliation and aliment against George Smith, bank-clerk, Dundee, in the Sheriff Court at Dundee. On 26th July 1912 the Sheriff-substitute (Neish) assoilzied the defender. The pursuer appealed to the Court of Session, and thereafter lodged a note in which she stated that "the defender and respondent has been out of the country for some weeks," and craved the Court to ordain him to find caution or to sist a mandatory. On the case appearing in the Single Bills of

2D DIVISION.
Sheriff of
Forfarshire.

¹ 1912 S. C. (H. L.) 74.

² 5 Butterworth's W. C. C. 375.

Dec. 11, 1912. the Second Division of 11th December 1912, counsel for the appellant moved in terms of the prayer of the note.¹

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It was stated at the bar that the respondent had intended to leave this country before the action was brought; but that he had remained to await the issue of the action, and had, since being assoltized in the Sheriff Court, left for South Africa where he had obtained an appointment.

THE COURT—after delivering opinions in which they founded on the circumstances that the respondent (1) had been assoltized in the Sheriff Court, (2) had left the country *bona fide* for the purpose of his business, and (3) was within the jurisdiction of a Court of the British Dominions—*refused* the prayer of the note *hoc statu*.

CLARK & MACDONALD, S.S.C.—DOUGLAS & MILLER, W.S.—Agents.

No. 56.

MRS AGNES HUGHES AND OTHERS, Pursuers (Respondents).—
Crabb Watt, K.C.—A. M. Mackay.

Dec. 11, 1912.

ROBERT C. ROBERTSON, Defender (Reclaimer).—*Wilson, K.C.—
D. M. Wilson.*

Hughes v.
Robertson.

Process—Proof or jury trial—Averments of pursuer stating competent and incompetent grounds of action—Danger of jury being misled—Several pursuers—Non-community of interest.

Reparation—Solatium—Unauthorised post-mortem examination.

In an action of damages brought against a doctor by the widow and children of a deceased miner the pursuers averred (1) that the defender had made an unauthorised post-mortem examination of the body of the deceased; and (2) that, in consequence of the method in which it had been performed and of certain other actings of the defender, difficulty, delay, and expense had been incurred in prosecuting a claim under the Workmen's Compensation Act. Some of the pursuers were not persons entitled to compensation under the Act. The issue proposed and allowed by the Lord Ordinary for the trial of the cause by jury was whether the defender "did wrongfully make a post-mortem examination and dissection of the body of the deceased."

Held that, while the action was competent (and was appropriate for jury trial) in so far as founded on the wrong done to all the pursuers jointly by the unauthorised post-mortem examination, it was incompetent in so far as founded on the second wrong which affected certain of them only; and, the pursuers having declined to amend their record by deleting the averments which related to the second wrong, issue *refused* and case sent to trial before a Judge, in view of the likelihood of a jury confusing the competent and incompetent grounds of action.

1ST DIVISION. ON 28th June 1912 Mrs Agnes Hughes, widow of Thomas Hughes, miner, Kilmarnock (as an individual, and also as tutor and administrator-in-law of his five pupil children), and his five other children, of whom four resided with their mother, and the fifth, Mrs Ledger-

¹ The following authorities were referred to:—*For the appellant.*—D'Ernesti v. D'Ernesti, (1882) 9 R. 655; Aitkenhead v. Bunten & Co., (1892) 19 R. 803. *For the respondent.*—Mackay's Manual, p. 235; Bank of Scotland v. Rorie, (1908) 16 S. L. T. 130; Young v. Carter, (1906) 14 S. L. T. 411, (1907) 14 S. L. T. 829.

wood, resided with her husband, brought an action of damages against Dr Robert C. Robertson, Kilmarnock. Dec. 11, 1912.

The pursuers averred that Thomas Hughes, on 31st May 1911, was injured in the abdomen by a fall of coal in a pit belonging to the Caprington and Auchlochan Collieries, Limited, with whom he was employed as a miner; that he was removed to the Kilmarnock Infirmary where he died on 7th June 1911, and that the defender, a surgeon in the infirmary, thereafter made a post-mortem examination and dissection of the body wrongfully, illegally, and without the consent and contrary to the expressed wishes of the pursuers. Hughes v.
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They further averred:—(Cond. 6) "Shortly before his removal to the infirmary the deceased Thomas Hughes instructed an intimation and claim under the Workmen's Compensation Act, 1906, to be made against his employers, the Caprington and Auchlochan Collieries, Limited. The said intimation and claim were made on or about the 6th of June 1911 by the pursuer Michael Hughes on his behalf. Following upon the said intimation and claim, an arbitration under the said Act was instituted after Hughes's death by the pursuer Mrs Hughes on behalf of the dependants of Thomas Hughes, and upon 20th March 1912 Sheriff-substitute Mackenzie, as arbitrator therein, pronounced a finding that Hughes's death was caused by injury by accident arising out of and in the course of his employment, and awarded the dependants a sum of £196, 6s. sterling as compensation. The sum so awarded was compensation provided by Act of Parliament for the loss of means of support resulting to the dependants from the said accident. . . ." (Cond. 8) "The defender is and has been

familiar with compensation claims and other legal claims arising out of accidents in connection with the industry of coal mining. He was, accordingly, bound to understand from the circumstances stated, and he did in fact understand, that a question or questions of legal liability depended upon the determination of the cause of Hughes's death. All such questions within the district in question, and particularly those arising with Hughes's employers, are conducted on the employers' behalf by the Ayrshire Coalowners' Association, for whom the defender has regularly and constantly acted as chief medical and surgical expert in contested cases for at least the past ten years. The defender had accordingly a strong interest in respect of his connection with the Caprington and Auchlochan Collieries, Limited, and the other coalowners belonging to the said association to ascertain whether the origin of the inflammatory condition of Hughes's intestines could be ascribed to any other origin than that of accident in the course of his employment, and to procure and preserve evidence, if such were forthcoming, to that effect. It is believed and averred that, on or about Tuesday, 6th June 1911, he formed the desire and intention, arising from his said interest, to procure a further examination of the body of Thomas Hughes, to be conducted after the death of Hughes by himself. It is further believed and averred that his object in so desiring was to collect, if possible, and preserve evidence pointing to a cause of death other than accident in the mine. . . ." (Cond. 12) "In the course of the said illegal proceedings certain portions of the body of the said Thomas Hughes were removed by the defender from the rest, and, in particular, the whole affected portion of the intestines and the heart were so removed. These portions were not, as they ought to have been, replaced *in situ*, but were, by the instructions, or at least with the assent and authority of the defender, taken

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away and burned or destroyed or otherwise dealt with for the purposes of the infirmary. Thereafter, the incomplete body was carried to the home of the pursuer Mrs Hughes, and deposited there. . . .” (Cond. 13) “As a consequence of the said illegal proceedings the pursuers have suffered severely in their feelings, and the defender is liable to them in reparation therefor. In particular, the pursuer Mrs Hughes, who was already in deep grief, was greatly distressed and shocked when she learned what had transpired, and when the mutilated body of her husband was brought home to her house. The notion of a mutilated body only being left to her was extremely repugnant and horrifying, and she became ill and was confined to the house for some days in consequence. The other pursuers and the pupil children, for whom the pursuer Mrs Hughes sues as tutor, also suffered similarly in their feelings, and are entitled to *solatium* for the wrongous and illegal actings of the defender. Moreover, by reason of the said wrongous and illegal actings of the defender, and the destruction of most important articles of evidence thereby sanctioned, and by the dealings of the defender with the report after-mentioned, the pursuers, other than Mrs Ledgerwood, who were all dependants of the deceased Thomas Hughes, have been made to endure an unnecessary amount of anxiety, delay, and expense in obtaining the compensation to which they were justly entitled. *Inter alia*, the solicitors for the deceased’s trade society were authorised by its officials to inquire into the circumstances with a view to taking action on behalf of the relatives, if such were justified, and for that purpose, after ascertaining that a post-mortem had already been made, to instruct a fresh one on behalf of the said society. They did so, but in consequence of the previous mutilation of the body by the defender the result was purely negative. In consequence, they felt themselves bound to advise the said society to withdraw their financial support, and the relatives were consequently at the necessity of finding fresh agents, and of instructing the prosecution of a claim on their own behalf. This in their impoverished circumstances they found it very difficult to effect, and in the result a much longer time elapsed before they could establish their rights, and more expense was incurred than would have been necessary but for the defender’s illegal actings. . . .” (Cond. 14) “ . . . Within a few days of the said post-mortem examination the defender prepared, and obtained the signatures of the two other medical gentlemen to, a report of the result of the post-mortem examination, and sold the same to the agents of the said Ayrshire Coalowners’ Association, whom he knew to be acting in the interests of the Caprington and Auchlochan Collieries, Limited, and who had an adverse interest to that of the pursuers who were dependants of Hughes. Further, upon application being made to the defender on behalf of the pursuer Mrs Hughes for information as to the whereabouts and as to the condition of the missing parts, he replied in terms importing that the examination was conducted on behalf of the said Coalowners’ Association, and that the report thereof was consequently their property. The pursuers understood this (as it was intended to be understood) as a refusal to impart to them the information obtained by him through his said unwarranted examination of the body of their relative, on the ground that it was made in furtherance of other interests than theirs. They made application as suggested by the defender to the said association’s agent, who refused to supply a copy of the report,

and the report was held up against her by the opposing agents, with the defender's knowledge, approval, and sanction, and its terms were, with his knowledge and approval, sedulously concealed from her during the subsequent course of the proceedings under the Workmen's Compensation Act, and until a late stage in the resulting proof in the arbitration."

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The pursuers pleaded, *inter alia*;—(1) The defender, having wrongfully and illegally made the post-mortem dissection libelled, and having authorised or permitted the illegal destruction of parts of the body as alleged, to the loss, injury, and damage of the pursuers, is liable in reparation for the injury done to them, and this being moderately estimated at the sum sued for, decree should be pronounced as concluded for.

The defender pleaded, *inter alia*;—(1) No title to sue. (3) (a) The averments of the pursuers are irrelevant, (b) the action is incompetent as laid. (4) The post-mortem examination having been duly authorised by or on behalf of the pursuers, the defender should be assoilzied. (5) The post-mortem examination having been performed regularly and lawfully, and without any illegal or improper destruction of parts of the body, the defender should be assoilzied. (6) In any view, the pursuer Michael Hughes's claim is unfounded, in respect that he consented to the post-mortem examination being made. *Separatim*, he is barred by personal exception, by his own admissions and actings, from insisting in the claim now made by him. (7) The averments of the pursuers, so far as material, being unfounded in fact, the defender should be assoilzied."

On 27th November 1912 the Lord Ordinary (Dewar) approved of the following issue for the trial of the cause:—"Whether, on or about the 7th of June 1911, and in the Kilmarnock Infirmary, Kilmarnock, the defender did wrongfully make a post-mortem examination and dissection of the body of Thomas Hughes, miner, the husband and the father of the pursuers respectively, to the loss, injury, and damage of the pursuers?"

"Damages laid as follows:—[Here followed the name of each pursuer with a separate sum of damages appended.]"

The defender reclaimed, and the case was heard before the First Division (consisting of Lord Kinnear, Lord Mackenzie, and Lord Skerrington) on 11th December 1912.

Argued for the reclaimer;—The action was incompetent because the issue referred to one wrong only, viz., the making of the unauthorised post-mortem, whereas in the action a lump sum was claimed in name of damages for each of the pursuers for two different wrongs, viz., (1) making the post-mortem without consent, (2) obstructing and delaying the recovery of compensation under the Workmen's Compensation Act. It was not competent thus to claim a lump sum in respect of two different wrongs, particularly where one at least of the pursuers, Mrs Ledgerwood, had no interest in the second wrong, having no claim under the Workmen's Compensation Act.¹ Only if the averments with reference to the second wrong were deleted, and the pursuers' first plea amended, would the action be competent. If the record were not so amended the action should be dismissed. In any event it should be tried before a Judge and not a jury, because

¹ Killin v. Weir, (1905) 7 F. 526; Conway v. Dalziel, (1901) 3 F. 918, Lord President Kinross, at p. 921.

Dec. 11, 1912. the alleged injury to each pursuer was separate, and demanded separate conclusions and separate issues,¹ the interest of the pursuers not being identical as they were not all dependants of the deceased.

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Argued for the respondents;—The wrong complained of, viz., an unauthorised post-mortem, was a relevant ground of action²; and the action as laid was competent and should be sent to a jury on the issue allowed by the Lord Ordinary, which was in the usual and proper form setting forth as it did a separate sum for each pursuer and not merely a lump sum.³ The respondents did not propose to amend their record, for there was no averment here of two separate wrongs, but of one wrong committed in a continuing series of acts, the sequence and the consequences of which were relevantly averred. If it was proved that the post-mortem examination was made with consent, the presiding Judge would guard against the jury drawing any wrong inferences from the evidence as to the other actings of the defender.

LORD KINNEAR.—I am not prepared to hold, in accordance with one part of the reclaimer's argument, that there is not a relevant case in this action to go to a jury. I think that the main cause of action is just one of those which are most appropriate for jury trial, and in ordinary circumstances I should have no hesitation in sending it to a jury, even although there might be some perplexities suggested on record which might embarrass the trial. But then I think that in the present case there is a little more than the suggestion of such perplexity. I think the case is so laid as to raise a very troublesome question for the consideration of the tribunal—whatever it be—that has to consider the facts. The action is, in my opinion, competent in so far as it is founded on the wrong done to all the pursuers jointly. It is plainly incompetent in so far as it is founded on a separate and distinct wrong done to certain of the pursuers, and not to others who are nevertheless joined with them in one summons. I think that it might have been maintainable, in these circumstances, that the action should be dismissed as laid, leaving it to the pursuers to frame a different condescendence in support of a second action. But that, to my mind, would be too harsh a view to take of the actual record before us, because the only issue allowed is confined to the joint wrong. But the pursuers insist on retaining in their record averments which go to support the incompetent and not the competent claims. It is not for us to make a new record; and—as the difficulties are all occasioned by the introduction into the condescendence of statements which do not directly go to prove the only wrong which the pursuers ask to be sent for the verdict of a jury, and as these are difficulties which might be, I think, very simply removed by amendment of the condescendence so as to make it clear that the case to be actually tried must be limited by the terms of the issue sent to the jury, and as the pursuers have declined to make these amendments—I am afraid there is no other

¹ Paxton v. Brown, 1908 S. C. 406; Harkes v. Mowat, (1862) 24 D. 701, Lord Justice-Clerk Inglis, at p. 703.

² Pollok v. Workman, (1900) 2 F. 354.

³ Gray v. Caledonian Railway Co., 1912 S. C. 339; Smyth v. Muir and Another, (1891) 29 S. L. R. 94; Gibson v. Macqueen, (1866) 5 Macph. 113.

course, in order to do justice between the parties, than to allow a proof and Dec. 11, 1912. let the case be tried by a Judge. Personally, I have a very strong feeling of sympathy with the pursuers' argument that cases of this kind should go to a jury. I think they might easily have had this case sent to a jury by making sundry simple amendments upon the record; but as they decline to do so, I propose to your Lordships that it should be sent for proof before the Lord Ordinary.

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LORD MACKENZIE.—I am entirely of the same opinion. If the pursuers' averments had been of the same nature as the averments in the case of *Pollok v. Workman*,¹ I should then have taken the view Lord Kyllachy took in that case and held that the case was one which was appropriate for jury trial. The leading averments of the pursuers are directed to the same issue that was adjusted in the case of *Pollok v. Workman*,¹ but they go on to overlay those leading averments with a great deal of matter which in my opinion might create a difficulty in disposing of this case by way of jury trial.

No doubt, theoretically, it would be possible to obtain directions at various stages of the case to keep the jury right; but as I read the record I am unable to be sure that the jury might not go entirely wrong in consequence of the way in which the evidence could be presented which bears upon the articles in the condescendence we were referred to, and more particularly, the passages in Cond. 13. I think it might well be that a jury, under this issue, might take the view that there had been a failure to prove that there was no consent; but, at the same time that, although the consent had been given by the pursuers, they never sanctioned the mode of carrying out the post-mortem which the pursuers describe in article 13. And therefore, under this issue, the result might be that, although the pursuers failed to establish what is essential to obtaining a verdict, nevertheless the jury might, considering that the defender's actings had been of such a character, award them damages; that is to say, they might apply, as Lord Adam points out in the case of *Conway v. Dalziel*,² the view that the mode of conducting the post-mortem as described by the pursuers here went far beyond the mere wrong which is done by performing a post-mortem on a relative without obtaining the necessary consents.

Accordingly, I think that the pursuers have really brought the result your Lordship proposes upon themselves. If they desired to try the simple issue whether there was an unauthorised post-mortem they could have done that by framing their record in exactly the same way as in *Pollok v. Workman*,¹ and have proved all necessary incidents in connection with the post-mortem examination, that is to say, proved so much of what they aver in Cond. 13 as has a bearing upon the damages due in name of *solatium*. But they trace out the bearing of those averments upon the preparation of a case under the Workmen's Compensation Act, and they condescend upon the expense they were put to in preparing that case in consequence of the way in which the defender is alleged to have acted; and that seems to me to bring in what might be considered an entirely separate and different ground

¹ 2 F. 354.² 3 F. 918.

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from the said representative of the insurance company the sum of £6, and granted therefor a receipt, which the defenders are hereby called upon to produce. With reference to the averments in answer, denied that the pursuer had no claim to compensation from the defenders under the Workmen's Compensation Act, 1906. In accepting the said sum of £6, the pursuer understood that his claim to such compensation was admitted by the defenders." (Cond. 4) "In so far as the said receipt bears to be a discharge of all claims competent to the pursuer, it was granted by him without any consideration. The sum of £6 paid to the pursuer represented compensation at the rate of 12s. 9d. per week for ten weeks, and no consideration whatever was paid to the pursuer in respect of a discharge by him of claims that might be competent to him after the expiry of that time. Further, at the time when the said receipt was granted both the pursuer and his agent, and also the insurance company's representative, were in total ignorance of the true nature of the pursuer's injuries. All of them thought that the injuries were only superficial, and that the pursuer would not require to be off work for more than ten weeks altogether. In point of fact, at the date when the said receipt was signed the pursuer was suffering from septic poisoning of the hand. The entries in the Infirmary books show that such was the fact, though the pursuer had not been so informed by the doctor, and was unaware of it. After the said date the pursuer continued to attend the Infirmary regularly until 30th December 1909, when he entered the hospital of Govan Poorhouse to undergo an operation. The thumb, forefinger, and part of the second finger of the pursuer's right hand have since been removed, and he is now totally and permanently incapacitated for work. The said incapacity arises from the accident condescended upon." (Cond. 5) "Up to the date of granting the said receipt the pursuer had received no weekly payments by way of compensation, and he and his family were in great straits for want of money. In accepting the sum of £6 the pursuer understood that this was in lieu of compensation at the rate of 12s. 9d. per week for ten weeks, and it was upon that understanding, and on a representation to that effect made to him by the representative of the insurance company, that he granted the said receipt. While he did not anticipate being off work for a longer period, the pursuer understood that he would be entitled to further compensation in the event of his disablement being protracted beyond that time. The pursuer is an illiterate man, and the pain in his hand was so great on the occasion referred to that he was unable to sit still, and was pacing the floor during the whole interview with the insurance company's representative." (Cond. 6) "Following upon the granting of the said receipt by the pursuer, the memorandum of agreement of which reduction is now sought was drawn up, and, on the application of the defenders, it was recorded in the register on 19th November 1909. No such agreement was arrived at between the pursuer and the defenders. In accepting the said sum of £6 the pursuer understood that the defenders' liability was admitted, and that, as the representative of the insurance company stated, he was getting ten weeks' compensation, whereas the insurance company's representative did not admit the defenders' liability to compensate the pursuer, and looked upon the £6 as an *ex gratia* payment. There was, accordingly, no *consensus in idem placitum* between the parties. Further, at the date of the said alleged agreement, the parties were in error as to the

nature of the pursuer's injuries, and it was not till after the said memorandum of agreement had been recorded that the fact that the pursuer's hand was poisoned came to the knowledge of the parties." (Cond. 7) "The sum of £6, which, according to the said recorded memorandum, the pursuer is said to have accepted in full settlement of all claims in respect of the said accident, was quite inadequate compensation for the injuries sustained by him. No sufficient information was laid before the registrar, or asked for by him, to enable him to judge of the adequacy of the said sum as consideration for a discharge of all the pursuer's claims in respect of the said accident. Had the registrar been in possession of such information, he would have refused to record the said memorandum, as he was entitled to do under section 9 (d) of the Second Schedule to the Workmen's Compensation Act, 1906."

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The defenders averred:—(Ans. 2) " . . . The pursuer's said injuries did not arise from an 'accident' in the sense of the Workmen's Compensation Act, 1906." (Ans. 3) " . . . The pursuer had no claim to compensation from the defenders, in respect that the pursuer's injuries were not caused by an 'accident' within the meaning of the Workmen's Compensation Act, 1906. The defenders and the insurance company did not admit liability, but made the said payment in order to obtain a full discharge and avoid further dispute and expense."

Both parties referred to prior proceedings in the Sheriff Court at Glasgow, which were thus narrated in the answers for the defenders:—"On 18th May 1910 the pursuer presented an application in terms of the Workmen's Compensation Act, 1906, in the Sheriff Court of Lanarkshire, at Glasgow, craving the Court to grant warrant to remove from the register the said memorandum of agreement, upon the ground as stated in the initial writ in the said application, 'that the same was obtained by improper means, the pursuer having granted the discharge under essential error as to the nature and effect of the injury from which he was suffering, it being represented to him by a representative of the insurance company acting on behalf of the defenders that he would be incapacitated only for a few weeks, whereas the injury was serious and permanent, mortification having set in resulting in the amputation of the thumb and two fingers of his right hand; he . . . is still under treatment.' Explained, further, that the parties lodged a joint minute of admissions in the process, and that the Sheriff-substitute refused the application by award dated 22nd July 1910. The said award is in the following terms:—'Glasgow, 22nd July 1910.—The Sheriff-substitute having heard parties' procurators and considered the cause, finds it admitted (by joint minute of admissions for parties) that, when £6 was paid by the defenders to the pursuer as compensation for the alleged injuries sustained by him on 4th October 1909, he was advised by a law-agent as to his rights, and that the agent explained to him, in the presence of the representatives of the insurance company with whom the defenders were insured, that the £6 was in settlement of all his claims under the Act: Finds it also admitted that neither the defenders nor the insurance company nor anyone on their behalf used or tried to use any improper means to bring about said settlement: Therefore refuses the present application; finds no expenses due to or by either party; and decerns. JOHN CRAIGIE.' The pursuer thereafter intimated that he desired to bring the said award under

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review in the Court of Session by a stated case, and a draft stated case was in course of adjustment by the parties, but the pursuer abandoned his intention and raised the present proceedings. Reference is made to the proceedings in the said applications in the Sheriff Court. Explained that by said award it was conclusively settled as between the parties that the pursuer had received the £6 in consideration of a discharge of all his claims, and that the pursuer was advised to that effect by his own law-agent at the time. The pursuer's averments to the contrary are not only unwarranted, but cannot now be competently made by him or further inquired into. Further, in the joint minute of admissions it was agreed, *inter alia*, as follows:—

“ 4. That on 20th October pursuer consulted a law-agent, who on same day intimated a claim for compensation to the defenders; that pursuer and his agent had several meetings with the representative of the company with whom defenders are insured; and that on 9th November 1909, in presence of the pursuer, terms of settlement of the claim were arranged between the pursuer and his agent on the one hand and the insurance company's representative on the other hand, whereby the insurance company, on behalf of the defenders, paid the pursuer the sum of £6, 12s. 6d. in settlement of the claim and expenses.

“ 5. That pursuer's agent explained to him in the presence of the representative of the insurance company that the receipt was in settlement of all claims under the Act.

“ That pursuer casually mentioned to his agent some days before the settlement that the arm was becoming inflamed, and that the doctor was afraid it might prove a bad arm, that his agent formed the opinion that this was a very remote contingency.

“ 6. That neither pursuer's agent nor the representative of the insurance company saw the pursuer's hand, and had no medical advice as to the nature and extent of the injury he had received, and that all they knew of the progress of the injury was gathered from the pursuer.

“ 7. That the entry in the Dispensary Journal of the Royal Infirmary on 18th October 1909 showed that pursuer was then “suffering from septic hand.” Neither pursuer's agent nor the representative of the insurance company knew of this entry at that time.”

The pursuer pleaded, *inter alia*;—(3) No agreement under the Workmen's Compensation Act, 1906, having been concluded between the pursuer and the defenders, decree of declarator should be pronounced as concluded for. (5) The said recorded memorandum of agreement ought to be reduced, in respect that the discharge upon which it proceeds was granted by the pursuer without consideration, at a date when both parties were in error as to material facts. (6) The consideration for the discharge of the pursuer's claims contained in the said memorandum of agreement being grossly inadequate, and no sufficient information having been furnished to the registrar to enable him to test its adequacy, the record of the said memorandum should be expunged from the register, and decree of reduction pronounced as concluded for.*

* The Second Schedule to the Workmen's Compensation Act, 1906, enacts, paragraph (9):—“Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by [Act of

The defenders pleaded, *inter alia*;—(4) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action ought to be dismissed.

On 18th January 1912 the Lord Ordinary (Ormidale) sustained the fourth plea in law for the defenders, and dismissed the action.*

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Sederunt], . . . to the [Sheriff-clerk] who shall, subject to such [Act of Sederunt], on being satisfied as to its genuineness, record such memorandum in a special register. . . . Provided that . . . (d) Where it appears to the [Sheriff-clerk], on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum . . . ought not to be registered by reason of the inadequacy of the sum . . . or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the [Sheriff] who shall, in accordance with [Act of Sederunt], make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just. (e) The [Sheriff] may within six months after a memorandum . . . has been recorded in the register, order that the record be removed from the register on proof to his satisfaction that the agreement was obtained by fraud or undue influence or other improper means. . . ."

* "OPINION.—[After narrating the circumstances and stating that both parties founded on the joint minute of admissions lodged in the proceedings before the Sheriff]—The pursuer maintained that the parties, in concluding the alleged agreement, were in mutual error as to an essential fact, viz, the nature of the pursuer's injuries, and further, that there was no *consensus in idem placitum*, in respect that while the pursuer understood that his claim to compensation under the Act was admitted by the defenders, the defenders did not regard his claim as a competent claim under the Act at all, but agreed to make the payment of £6 *ex gratia*, and without admitting liability, that the agreement therefore was in fact not an agreement to settle an admitted claim under the Act, but an agreement that no claim should be made under the Act. The averments, on which the pleas of no *consensus in idem placitum* and of mutual error are founded, are contained in Condescendence 6.

"I am of opinion that these averments are not relevant to infer the conclusions of the summons. The pursuer's averments as to *consensus in idem placitum* come to no more than this that, while agreeing to settle the pursuer's claim as a claim under the Act, the defenders did not admit that the claim was a competent claim under the Act. But both parties were none the less at one as to what the agreement was intended to effect. There was no difference of view as to either the subject-matter, the terms, or the consideration. The defenders were under no mistake as to what the pursuer's claim was, and for the purpose of settling it, they agreed to pay a certain amount of compensation. In so doing, they assumed that it was, and treated it as, a claim properly arising under the Act, and it seems to me a matter of no relevancy whatever what mental reservation they made as to its competency. There was no expressed reservation of any kind. For the purposes of the claim they admitted liability, and so entitled the workman to take all the steps competent to him under the Act, including the recording of a memorandum of the agreement. That they were bound by the memorandum was assumed and admitted by both parties in the proceedings in the Sheriff Court. In the face of its express terms, it seems to me impossible to pronounce a decree of declarator in the terms concluded for, solely on the ground that the defenders, though consenting to be parties to the agreement, declined to admit the validity of the pursuer's claim.

"The other ground on which the pursuer founded was, that there was

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The pursuer reclaimed, and the case was heard before the Second Division (consisting of the Lord Justice-Clerk, Lord Salvesen, and Lord Hunter) on 1st and 7th November 1912.

Argued for the reclaimer;—The agreement should be reduced and expunged from the register, because the statutory procedure for obtaining warrant to record had not been observed. Paragraph 9 (d) of the Second Schedule to the Act of 1906 empowered the Sheriff-clerk in certain cases to refuse to record, and to refer the matter to the Sheriff. Inferentially this laid on him the duty of applying his mind to the considerations enumerated in that paragraph, and obtaining information. This was the view taken in England,¹ and it was not inconsistent with the rules of procedure in Scotland.² In the present case the Sheriff-clerk had made no investigation. If he had done so, he would have ascertained that the agreed-on sum was wholly inadequate to the injury, and that in fact there was no agreement at all under the Act. There was never any *consensus*, because of the mutual error as to the extent of the injuries, and also because the parties were not at one as to the nature of the transaction they were entering into, the pursuer thinking that he was receiving compensation, and the respondents thinking they were making an *ex gratia* payment. The employers never admitted liability to pay compensation. The payment they made was no evidence of such an admission, and the fact that the payment had been received did not bar the workman from now claiming compensation.³ The agreement, not being an agreement under the Act, should never have been put on the register.⁴ It was the compromise of a disputed claim, not the "redemption of a weekly payment,"⁵ and the latter was the only kind of "lump sum" agreement recognised by the Act. The present action was competent, and the pursuer was not

mutual error as to a material fact which existed at the date of the agreement, namely, that whereas the parties thought that the workman was merely suffering from superficial injuries done to his hand by lime burning, he was, in fact, suffering from septic hand—that the true nature of the injury was therefore unknown. It seems to me that at the best for the pursuer the ignorance of the parties was only as to the extent of the injuries he was suffering from, but the pursuer is not entitled to go back upon an agreement to accept a certain sum as in full settlement of his claim merely because he now finds that the injury has proved more serious than he anticipated, and that he under-estimated the compensation which he might have demanded. It is not said that the defenders were acting *in mala fide* in coming to terms with the pursuer. It seems to me a hard case for the pursuer, but I cannot give him the relief which he seeks in this action. The fact that a man has made a bad bargain is no reason for holding that he has made no bargain at all.

"In dismissing the action on the ground that the pursuer's averments are irrelevant, I have assumed that it is competent, but I do not decide that it is."

¹ Workmen's Compensation Rules, 1907, 49 (1) (a), and Form 36 (a); *Mortimer v. Secretan*, [1909] 2 K. B. 77; "*Segura*" v. Blampied, (1911) 4 Butterworth's W. C. C. 192.

² Act of Sederunt, June 26, 1907, (11) (12).

³ *Rendall v. Hill's Dry Docks and Engineering Co., Limited*, [1900] 2 Q. B. 245.

⁴ *M'Ewan v. William Baird & Co., Limited*, 1910 S. C. 436, *per* Lord President Dunedin, at p. 438, Lord Kinnear, at p. 442.

⁵ Workmen's Compensation Act, 1906, First Schedule (17).

barred by the previous proceedings. Having failed to get redress under paragraph 9 (e) of the Second Schedule, he was still entitled to his common law remedy of reduction,¹ notwithstanding that the memorandum had been recorded.² In fact he had no other remedy, for paragraph 9 (e) did not provide for the case of inadequacy, which was the point he now wished to raise. The Lord Ordinary's interlocutor should be recalled, and proof allowed.

Argued for the respondents;—There was nothing in the Act by which any duty was laid on the Sheriff-clerk to inquire into the matters mentioned in paragraph 9 (d) of the Second Schedule before recording an agreement. The English Rules had no bearing in Scotland where the procedure was wholly regulated by the Act of Sederunt, which contained no provisions corresponding to the English Rule 49 (1) (a). If the agreement were obviously inequitable, or if facts were brought to his notice by either party, the Sheriff-clerk might be bound to investigate, but that was not the state of matters in the present case. In any event, the result would have been the same even if the Sheriff-clerk had made inquiry. The agreement was perfectly in order, and was a typical case of an agreement for the redemption of a weekly payment by a lump sum, for the sum was calculated on the amount of the weekly payments which would have been due. Since the workman had been settled with on the footing that he was entitled to compensation, and had received all that he could get under the Act, it was immaterial whether or not his claim was formally admitted or denied. The pursuer was personally barred from following out the present action. Having admitted that the agreement was an agreement under the Act—as he did by the request for recording which it contained—he could not now maintain that no such agreement was in existence.³ The averments as to the extent of the injuries and the inadequacy of the compensation were irrelevant. The pursuer might have made a bad bargain, but he was not on that account entitled to have it set aside.⁴

At advising on 13th December 1912,—

LORD SALVESEN.—This is an action of reduction of a memorandum of agreement dated 9th, and recorded in the register kept by the Sheriff-clerk at Glasgow on 19th, November 1909, which bears that the pursuer accepted the sum of £6 sterling in full settlement of all claims in respect of an accident which happened to him while in the defenders' employment. The pursuer also seeks a declarator that no agreement as to compensation to be paid to him under the Workmen's Compensation Act, 1906, in respect of the injuries so sustained, has been concluded between the parties.

On the facts averred, the sole ground of reduction is that the parties were in error at the time when the agreement was made as to the extent of the pursuer's injuries, that at the time it was thought that recovery would be complete within ten weeks from the date of his ceasing work, whereas, as matters have turned out, parts of his fingers have had to be amputated, and

¹ Robertson v. S. Henderson & Sons, Limited, (1904) 6 F. 770.

² Hughes v. Thistle Chemical Co., 1907 S. C. 607.

³ Robert Forrester & Co., Limited, v. Fleming, (1908) 16 S. L. T. 139.

⁴ North British Railway Co. v. Wood, (1891) 18 R. (H. L.) 27; Dornan v. Allan & Son, (1900) 3 F. 112.

Dec. 13, 1912. he is permanently incapacitated for work. It appears that in making the settlement of his claims the pursuer had the assistance of a law-agent, that M'Guire v. Paterson & Co. no undue representations were made to him by or on behalf of the defenders, and that they as well as he believed that the injuries were alight. I

Lord Salvesen. agree with the Lord Ordinary in holding that these averments disclose no relevant ground at common law for setting aside the agreement. The decision of the House of Lords in *The North British Railway v. Wood*,¹ appears to be conclusive on this point. The facts there were very much more favourable to the pursuer, for he had not had the benefit of an agent to consult with, and was suffering from the effects of the accident at the time when the settlement was made; whereas here in a minute of admissions which was produced in certain other proceedings at the pursuer's instance it is expressly stated that both the pursuer's agent and the representative of the insurance company who carried through the settlement acted in good faith. As the Lord Ordinary points out, the fact that a man has made a bad bargain is no reason for holding that he has made no bargain at all. In making the bargain he took his chance that he might not recover within the period of ten weeks for which he was allowed compensation.

A second ground upon which the agreement was challenged was that it was not an agreement which could be properly registered under the Workmen's Compensation Act. It was said that at the time when it was made the defenders did not admit liability under that Act, having taken up the position, to which they still adhere, that the pursuer had not met with an accident. According to the pursuer the transaction was a compromise of a disputed claim and not a redemption by way of a lump sum of a weekly payment due under the Workmen's Compensation Act. There would have been force in this argument if the pursuer had averred that he accepted less than he would otherwise have considered himself entitled to under the Workmen's Compensation Act, being apprehensive that if he prosecuted his claim he might recover nothing. There is no such averment on record. On the contrary the pursuer says (cond. 6), "In accepting the said sum of £6 the pursuer understood that the defenders' liability was admitted, and that, as the representative of the insurance company stated, he was getting ten weeks' compensation." He cannot, therefore, maintain that the compensation agreed on was, so far as he and his agent were concerned, fixed with reference to the possibility that he had no legal claim at all. In short, the attitude of the defenders on the question of liability had no bearing on the transaction. Although not admitting liability they were prepared to settle with him on the footing that he had a good claim for compensation under the Act, and the only matter to which the parties applied their minds was the probable duration of his continued incapacity for work. Both parties were honestly of opinion that recovery might be looked for within ten weeks of incapacity emerging, and the sum of £6 is said by the pursuer himself to have represented compensation at the rate of 12s. 9d. per week for that period. This sum is not an exact multiple of 12s. 9d., which would have amounted to 7s. 6d. more for the agreed-on probable duration of the incapacity, but it was explained that some 12s. 6d. more was in fact

¹ 18 R. (H. L.) 27.

paid at the time, part of which apparently the pursuer authorised his agent to retain. I am unable to hold that the mere fact that the employer disputes liability will prevent a settlement of a workman's claim under the 1906 Act, if, in fact, he is willing that the compensation should be fixed exactly on the same footing as if liability were admitted.

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Lord Salvesen.

The most serious argument in the case, and the only one which makes it of general interest, was maintained on the terms of paragraph (9) of the Second Schedule to the Workmen's Compensation Act, 1906, which prescribes the procedure for getting a memorandum of agreement recorded. The facts averred are that the memorandum was signed by the pursuer's own law-agent and transmitted by him to the Sheriff-clerk in Glasgow, that intimation was made to the employers of the presentation of the memorandum, and that, no objection having been taken by them, it was placed upon the register. It is not said that the pursuer's agent in so acting acted outwith his authority, and indeed I think it may fairly be taken to have been part of the arrangement that he should present the memorandum to the Sheriff-clerk and be paid for doing so by the employers. So far as the Sheriff-clerk was concerned the procedure specifically prescribed by the Act was apparently complied with. Subhead (d) of paragraph (9), however, introduced a new provision for the purpose of protecting an injured workman against a settlement of his claims for an inadequate sum. It is in these terms :—[His Lordship quoted subhead (d)]; and subhead (e) provides that the Sheriff may, within six months after the recording of a memorandum of agreement as to the redemption of a weekly payment by a lump sum, order that the record be removed from the register on proof that the agreement was obtained by fraud or undue influence, or other improper means. The pursuer has already taken advantage of this latter subsection, but failed to convince the Sheriff-substitute that there were any grounds upon which the register should be corrected. It is noteworthy that while one of the grounds on which the registrar may refuse to allow a memorandum to be recorded is the inadequacy of the sum accepted, no machinery is provided to have the register rectified on this ground after the memorandum has entered it.

The only averment on this head is contained in cond. 7, where, after narrating that the sum of £6 was quite inadequate compensation for the injury sustained, the pursuer goes on to say: "No sufficient information was laid before the registrar, or asked for by him, to enable him to judge of the adequacy of the said sum as consideration for a discharge of the pursuer's claims in respect of the said accident. Had the registrar been in possession of such information, he would have refused to record the said memorandum, as he was entitled to do under section 9 (d) of the Second Schedule to the Workmen's Compensation Act, 1906." An Act of Sederunt was passed in 1907 to regulate the procedure under, *inter alia*, this section, but it makes no provision for the Sheriff-clerk, in the performance of his statutory duty, doing anything more than notifying all parties interested other than the party on whose behalf the application is presented. It leaves it, however, open to him to exercise the power conferred by subsection (d) of refusing to register the memorandum if he has any information which he considers sufficient that it ought not to be regis-

Dec. 13, 1912. **tered by reason of the inadequacy of the sum accepted by the workman.**

M'Guire v. It appears that by the Rules framed by the English Judges the registrar
Paterson & must make certain inquiries of the parties before proceeding to register,
Co. but no such duty is laid on Sheriff-clerks by the Act of Sederunt.

Lord Salvesen. It was argued, however, that he must apply his mind to the question, and that his failure to do so in any given case entitles the workman to disregard the agreement which he had himself made. I am unable to reach this result. I think what the statute primarily contemplates is that there is something on the face of the agreement which the Sheriff-clerk thinks calls for explanation, in which case he is entitled to make inquiries, not necessarily limited to the parties themselves as under the Rules of Court in England, as to whether the workman has not really been taken advantage of; and if he is of that opinion he is to refer the matter to the Sheriff. We were also given by way of illustration the case where the workman himself raises objections; in such a case I think the Sheriff-clerk would be bound to refuse to record without referring the matter to the Sheriff. If it were otherwise we should have to hold that in every case where a lump sum accepted as compensation proved to be inadequate the injured workman was entitled to have the agreement set aside if he could show that the Sheriff-clerk had in fact made no inquiry. No duty of inquiry is laid upon the Sheriff-clerk; and it would involve a very large extension of his duties in a town like Glasgow if it were to be held that in every case of the kind he was bound to ascertain the facts connected with an accident and the probable duration of the injuries resulting therefrom. Where the workman and employer, both acting under legal advice, are agreed as to the amount of compensation payable, it may in the ordinary case be presumed that it fairly represents the amount to which the workman is entitled; and I cannot find that the Sheriff-clerk has any duty of refusing, in the possible future interests of the workman, to record such an agreement. Here there was nothing on the face of the memorandum to show that the parties' estimate of the extent of the injuries was erroneous. The injury is described as an "injury to right hand through being burned by lime caused by accident in the employment of" the defenders. The memorandum further sets out that the question in dispute was as to the amount of compensation payable to the claimant for final settlement, and that it was determined by agreement. All this is an accurate account of what had taken place; and there was nothing to suggest to the mind of the Sheriff-clerk that he ought to suspend the operation of the agreement until he had made inquiry into the facts. At all events it is certain that he had no duty imposed upon him by statute or by the Act of Sederunt to make inquiry; and his failure to do so cannot be described as a departure from the statutory procedure. On these grounds I think this branch of the pursuer's case also fails, and that we ought to affirm the interlocutor appealed from.

LORD HUNTER.—I also think that this reclaiming note ought to be refused. The only question of difficulty appears to me to be whether or not any agreement under the Workmen's Compensation Act, 1906, was entered into between the parties, a memorandum of which could be regi-

tered. Had the payment of £6 by the defenders to the pursuer been a payment of a lump sum without any reference to the amount of the weekly payment to which the pursuer was entitled under the Act, and made with a view to prevent any claim either under the Act or at common law, I do not think that the memorandum would have been registrable under the Act. Such an arrangement would not be an agreement relative either to the amount of compensation payable under the Act during incapacity or to the redemption of a weekly payment by a lump sum payment, but an agreement to exclude the workman from the benefit of the provisions of the Act, and for the registration of a memorandum of such an agreement I do not find any statutory sanction. The defenders have by the statements they have made in defence allowed this point to be taken against them. But the pursuer's case must be judged by his own averments. He says that the payment of £6 represented compensation at the rate of 12s. 9d. for ten weeks, both parties contemplating that his incapacity for work would not be of longer duration. Such a payment is a typical redemption payment under the Act as to which parties may in terms of paragraph (17) of the First Schedule to the Act come to an agreement without having recourse to the machinery of the statute. The agreement is not invalidated by the defenders not admitting liability if they have agreed to the amount being fixed as though they were liable, and that is how the pursuer presents the case against them.

The pursuer founded upon the terms of paragraph (9) (d) of the Second Schedule to the Act, which provides that—[His Lordship quoted the paragraph]—It is plain that the Legislature intended this provision to be some protection to the workman. In the case of *Mortimer v. Secretan*,¹ the Master of the Rolls, at p. 79, says: "He (i.e., the employer) may make an agreement with the injured workman, but not an agreement in the sense in which a master and servant would, under ordinary circumstances, make an agreement, for the Act contemplates that an agreement made between an injured workman and his employer under which the workman is to receive a lump sum, ought to be carefully investigated, and it provides, in order to terminate the liability of the employer to continue the weekly payments, that the memorandum of agreement shall be recorded. The parties first have to go before the registrar, who acts not on evidence, but on information, and if he thinks the amount is inadequate, then he has to report it to the Judge and has to give notice to the parties."

Under Rules of Court in England (49 schedule C of the Act and schedule thereto 36 (a)) provision is made for the registrar getting information from the parties which will enable him to consider as to the adequacy of the lump sum payment. In Scotland there are no similar provisions imposing any duty of inquiry upon the Sheriff-clerk. But sections 11 and 12 of the Act of Sederunt, dated 26th June 1907, passed to regulate the procedure under the Workmen's Compensation Act, contemplate that the Sheriff-clerk may exercise the discretion entrusted to him by refusing to register. To enable him to exercise this discretion I think it would be preferable if the memorandum of agreement were expressed in other language than that

¹ [1909] 2 K. B. 77.

Dec. 13, 1912. adopted in the present case, and bore upon its face to be an agreement for the redemption of a specified weekly payment. There is, however, nothing in the present case to lead one to suppose that if the Sheriff-clerk had received the information from the parties which the registrar in England obtains he would have formed a different opinion as to the nature and extent of the pursuer's incapacity from that formed by the pursuer himself and his agent. It is unfortunate for the pursuer that his injuries have turned out to be more serious than parties contemplated when he received payment of the lump sum, but that is no sufficient ground for reduction of the recorded memorandum of agreement.

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Lord Salvesen intimated that the LORD JUSTICE-CLERK, who was absent at the advising, concurred in Lord Salvesen's opinion, which he had had an opportunity of reading.

LORD DUNDAS and LORD GUTHRIE were present at the advising.

THE COURT adhered.

D. MACLEAN, Solicitor—J. & R. A. ROBERTSON, W.S.—Agents.

No. 58. THOMAS GOODALL NASMYTH AND OTHERS (A. H. Nasmyth's Trustees),
Pursuers and Real Raisers.

Dec. 17, 1912. THE NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN,
Claimants (Reclaimers).—*Constable, K.C.—Hon. W. Watson.*

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Trustees v.
National
Society for
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Cruelty to
Children.
THE SCOTTISH NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO
CHILDREN, Claimants (Respondents).—*Chisholm, K.C.—W. Mitchell.*
*Succession—Testament—Construction—Proof—Admissibility of extrinsic
evidence—Ambiguity in designation of beneficiary.*

A Scotsman living in Scotland left, among other legacies to charities all of which were Scottish, a legacy to "The National Society for the Prevention of Cruelty to Children." In a competition between "The National Society for the Prevention of Cruelty to Children" (London) and "The Scottish National Society for the Prevention of Cruelty to Children" (Edinburgh), held that the designation in the will was ambiguous, and proof allowed of extrinsic facts to show which of the Societies the testator meant.

2D DIVISION. ON 17th August 1911 the testamentary trustees of the late Alexander
Lord Hunter. Hogg Nasmyth of Middlebank, Fife, brought an action of multiple-pounding against The National Society for the Prevention of Cruelty to Children, London, and The Scottish National Society for the Prevention of Cruelty to Children, Edinburgh, to determine the rights of the defenders in a legacy bequeathed by the testator to "The National Society for the Prevention of Cruelty to Children." Claims in the multiplepounding were lodged by both Societies.

The clause in the testator's settlement which contained this legacy was in the following terms:—"To the Dunfermline and West of Fife Hospital, One thousand pounds free of legacy or other Government Duty and other charges, To the Royal Blind Asylum, Edinburgh, Five hundred pounds, free of legacy or other Government Duty and other charges, To the Edinburgh Deaf and Dumb Benevolent Society, Five hundred pounds free of Legacy or other Government Duty and other charges, To The National Society for the Prevention of Cruelty

to Children, Five hundred pounds free of Legacy or other Government Duty and other charges, To the Royal Edinburgh Hospital for Incurables (Longmore Hospital), Five hundred pounds free of Legacy or other Government Duty and other charges, To The Scottish Society for the Prevention of Cruelty to Animals Two hundred and fifty pounds free of Legacy or other Government Duty and other charges, To the Royal Edinburgh Hospital for Sick Children, Five hundred pounds free of Legacy or other Government Duty and other charges, and to the Edinburgh Royal Infirmary, One thousand pounds free of Legacy or other Government Duty and other charges." The settlement was executed in 1911.

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The National Society averred, *inter alia*;—(Cond. 2) "The claimants originated in 1884 as the London Society for the Prevention of Cruelty to Children. In 1889, under a new constitution, they adopted the title of The National Society for the Prevention of Cruelty to Children. In 1895 they were incorporated by Royal Charter as a body corporate under that name. Since 1889 they have continuously borne the name of 'The National Society for the Prevention of Cruelty to Children.' No other society or body is or ever has been known by that name. By the constitution as contained in the Charter the sphere of operations of the Society embraces the whole of the United Kingdom. It is widely known throughout the Kingdom, including Scotland, as The National Society for the Prevention of Cruelty to Children. Its sole right to that name has recently been prominently before the public in Scotland, particularly in 1905 and again in 1907. This right was admitted by the competing society in 1907, and since that year that society has disclaimed that name and prominently published its disclaimer. The present claimants receive financial assistance from supporters in Scotland." (Cond. 3) "The claimants are the only Society for the prevention of cruelty to or otherwise for the furtherance of the interests of children whose constitution and operations are national in their scope by embracing the whole of the United Kingdom. The other defenders are in all respects limited to Scotland and are not entitled to use and do not use the name 'The National Society for the Prevention of Cruelty to Children.' All the charitable societies named as legatees in the will are carefully and accurately designed. Another of those societies is The Scottish Society for the Prevention of Cruelty to Animals, which is so named in the will with the intention and result of distinguishing it from The Royal Society for the Prevention of Cruelty to Animals, whose head office is in London." (Cond. 4) "With reference to the competing claim, denied that the interests of the testator were exclusively Scottish; that the competing claimants are the intended legatees of the fund *in medio*; that they are in Scotland or elsewhere The National Society for the Prevention of Cruelty to Children; that they are usually referred to in Scotland under that name; and that they are the only Society in Scotland devoted to the prevention of cruelty to children. On the contrary, there are in the Edinburgh district alone over 250 societies and agencies engaged in such work. Further, denied that the present claimants' charter was applied for with a view to the inclusion of the competing Society. As to the terms of affiliation referred to in the competing claim, it is explained that at no time were they more than a domestic document regulating how the present claimants should dispose of certain legacies after they had uplifted the same; that the terms were in law *ab initio* null and

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void; and that they were publicly denounced as such as early as 1905. With reference to the case of cruelty in 1909, founded on by the competing claimants, the present claimants have no knowledge and give no admission. It is denied that that case had anything to do with the origin of the legacy now in dispute. So far as regards that legacy, the testator's will of 1911 is a verbatim copy of an earlier will made by him in 1906. This fact was known to the competing claimants when they lodged their claim in this process. Believed and averred that the precise wording of the bequest was prescribed in writing by the testator himself." (Cond. 5) "All the facts regarding the existence of the two Societies, the differences in their names, and the scope of their operations, were well known to the testator."

The Scottish Society averred, *inter alia*;—(Cond. 2) "The claimant Society is the charity intended by the testator to be benefited by his bequest of £500 to The National Society for the Prevention of Cruelty to Children, and is the Society indicated by him under that designation. The claimant Society is in Scotland The National Society for the Prevention of Cruelty to Children, and is commonly referred to in Scotland under that name. It is the only society in Scotland devoted to the prevention of cruelty to children, and its operations in that behalf are widely known and favourably recognised in Scotland by charitable persons, by the authorities, and by the general public. The work of the claimant Society so far as Scotland is concerned is national in its character and scope. Its operations are constantly referred to in the public press and its reports are widely circulated. Subscriptions, donations, and legacies to a large amount are received by the Society from all parts of Scotland." (Cond. 3) "The claimant Society was formed under its present name in the year 1889 as the result of a series of successive amalgamations of a number of smaller bodies devoted to the same charitable work in Scotland. It continued to be known by its present name from 1889 to 1895, when negotiations were entered into with a view to affiliation or incorporation with a similar society which had been founded in London in 1884, and had adopted in 1888 the title of The National Society for the Prevention of Cruelty to Children. The latter society applied in 1895 for a royal charter and with a view to the inclusion of the Scottish Society within the scope of the charter, terms of affiliation, dated 19th January and 5th March 1895, were entered into. Under article 2 (5) of this agreement it was provided that 'all legacies left by Scottish testators, domiciled in Scotland, to the National Society for the Prevention of Cruelty to Children (unless directly specified to the contrary) shall belong to the Scottish Branch.' A charter was thereafter duly granted to the English Society, and in terms of the said agreement the claimant Society in 1895 adopted the designation of The National Society for the Prevention of Cruelty to Children (Scottish Branch). After the said agreement had been acted on for ten years, it was found that the terms used in the said charter were insufficient to include the claimant Society, and in 1907 the latter reverted to the designation of The Scottish National Society for the Prevention of Cruelty to Children. The claimant Society has always maintained a separate and distinct organisation of its own. . . ." (Cond. 4) "The testator was a domiciled Scotsman and his interests and associations were exclusively Scottish. The trust administered by the pursuers is a Scottish trust and all the trustees are Scottish. Under his trust-disposition and settlement the testator also made a

series of bequests in favour of other charities. All these other charities are Scottish, and there are no bequests in favour of any English charities. The bequest in question is preceded by three bequests and succeeded by four bequests, all in favour of Scottish charities. In the year 1909 the attention of the testator was particularly drawn to the operations of the claimant Society by a case of cruelty to children which occurred on his own estate of Middlebank, and in which he was interested. The case was taken up by the claimant Society, and had the accused not pleaded guilty, the testator's gamekeeper and gardener were to have been witnesses for the prosecution. It is believed and averred that the testator then formed a favourable opinion of the charitable work carried on by the claimants, and that the legacy now in dispute was designed by him to assist in the furtherance of their work."

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On 17th January 1912 the Lord Ordinary (Hunter), after hearing counsel in the Procedure-roll, repelled the claim of the National Society, and ranked and preferred the claimants the Scottish Society to the fund *in medio*.*

* "OPINION.—The late Mr Alexander Hogg Nasmyth of Middlebank died on 3rd June 1911 leaving a trust-disposition and settlement, in which, *inter alia*, he directed payment by his trustees of a legacy in these terms:—'To the National Society for the Prevention of Cruelty to Children Five hundred pounds, free of legacy or other Government duty and other charges.' In the present action of multiplepounding that legacy is claimed by two societies, The National Society for the Prevention of Cruelty to Children, incorporated by royal charter, and having its central office in London, and The Scottish National Society for the Prevention of Cruelty to Children, 137 Princes Street, Edinburgh.

"The claimants each asked for a finding in their favour without inquiry, but the Scottish Society maintained that if against them I ought to allow them a proof of certain averments. It appears to me, however, that all the material facts averred are either made matter of admission as after stated, or that they are not of such a character that I could competently allow them to be proved. Neither claimant says that the testator subscribed to their funds, and, even if it be legitimate to inquire into the testator's intention, I think specific facts must be averred from which an inference of intention may be drawn. What the Court has a right to ascertain is, as the Lord Chancellor (Lord Cairns) said in the case of *Charter v. Charter*, L. R., 7 H. L. 364, at p. 377,—'All the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position in order to ascertain the bearing and application of the language which he uses.'

"The National Society were, it seems, incorporated under their name in 1895. They had been known by the same name since 1889. They, therefore, say that, as they are the only one of the two societies claiming which the designation employed by the testator exactly fits, they are entitled to succeed. The strength of their position appears to me to be weakened by the circumstance, which was made matter of admission by their counsel, that their charitable operations do not extend to Scotland, but are entirely confined to England, Ireland, and Wales. They do not aver that the testator knew of their work or took any interest in their existence. The other claimants say they are in a similar position to a society in Australia or America making a claim to a legacy left by a Scotsman in a Scots will.

"The Scottish National Society maintain that the description used fits and designates them. To a Scotsman the Society which is national is, they say, the one which benefits his own nation, and the addition of the word

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The claimants the National Society reclaimed, and the case was heard before the Second Division (without Lord Dundas) on 17th December 1912.

Argued for the reclaimers;—There was no ambiguity in the will. These claimants were correctly named and designed therein, and the Scottish Society was not. The Lord Ordinary was wrong in treating the word "National" as descriptive; it was spelt with a capital letter, and was clearly meant to be nothing more than part of the name. In such circumstances extrinsic evidence of the testator's intention was inadmissible.¹ These claimants were therefore entitled to be ranked and preferred to the legacy *de plano*.

Argued for the claimants the Scottish Society;—The Lord Ordinary was right in holding that, in a Scottish will, "National" meant "Scottish." If, however, there was any ambiguity about the designation, a proof should be allowed to ascertain in what sense it was used by the testator.²

LORD JUSTICE-CLERK.—The Court is of opinion that it would hardly be safe to affirm the Lord Ordinary's interlocutor without inquiry. The case is not sufficiently clear, although, so far as I can see at present, it is extremely probable that the testator was referring to the Scottish National Society for the Prevention of Cruelty to Children. There must be some inquiry, because we are here dealing with a word which is unquestionably ambiguous, the word "National"; and evidence is necessary to show in what sense it was used by this testator.

LORD SALVESEN and LORD GUTHRIE concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and allowed the claimants a proof of their averments.

A. C. D. VERT, S.S.C.—BRUCE, KERR, & BURNS, W.S.—R. C. GRAY, S.S.C.—Agents.

'Scottish' neither adds to nor detracts from the designation. Certain illustrations of this, to which I need not refer, were given in the course of the argument which I heard. These claimants also point out that the will is in Scots form, and that the other charities benefited are all Scottish. These circumstances might, of themselves, have been insufficient to justify my finding in favour of the Scottish Society. They have, however, to be taken in conjunction with the fact that the other Society does no charitable work in Scotland; and that the Scottish Society was for a period of nine years prior to 1907 known as The National Society for the Prevention of Cruelty to Children (Scottish Branch). The importance of the latter circumstance is, if anything, increased on the assumption that the National Society is right in stating that the testator's will of 1911 is a verbatim copy of an earlier will made by him in 1906. On the whole, I think that there is sufficient to justify me in preferring the claim of the Scottish National Society for the Prevention of Cruelty to Children to the fund, and I shall accordingly do so."

¹ Charter v. Charter, (1874) L. R., 7 H. L. 364, *per* Lord Hatherley, at p. 376.

² Charter v. Charter, L. R., 7 H. L. 364; Wedderspoon v. Thomson's Trustees, (1824) 3 S. 396; Scottish Missionary Society v. Home Mission Committee, (1858) 20 D. 634; Jarman on Wills (6th ed.), vol. 1, pp. 513, 518.

Mrs EMMA MARY BROWN OR MEACHER, Pursuer (Respondent).—

No. 59.

M'Lennan, K.C.—T. G. Robertson.

PHILIP LAWRENCE KINGTON BLAIR-OLIPHANT, Defender (Reclaimer).

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—*Macphail, K.C.—Hamilton.*

Meacher v.
Blair-
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Property—Title to Heritage—Inland loch—Riparian proprietors—Prior title to lands with parts and pertinents—Subsequent express title to loch—Prescription—Exclusive possession.

In the case of a grant of lands abutting on an inland loch, with parts and pertinents, there is a presumption that the grantee has a joint right of property in the loch, along with the other proprietor or proprietors whose lands abut upon it. This presumption will not be prejudiced by a subsequent express grant of the loch to another, unless that grant is followed for the prescriptive period by such exclusive possession as would be required by law for the establishment of a new and adverse right in the possessor; any lesser degree of possession, such as might be admissible for the purpose of explaining the limits of a grant or conveyance in a question with its author, being insufficient.

Evidence which was *held* (rev. judgment of Lord Guthrie) to be insufficient to establish exclusive possession of an inland loch.

Property—Title to heritage—Bounding title—Property described as lying within parish—Proof of parochial boundaries—Plans and Ordnance Survey maps.

In an action between two landed proprietors as to the ownership of a loch the pursuer contended that the defender was excluded from the loch by the fact that the latter's estate was described in his titles as lying within the parish of Blairgowrie, and that the loch lay outwith the parish boundaries.

Evidence on which it was *held* that the pursuer had failed to prove that the loch lay outwith the parish boundaries.

Observations (1) on the evidence required to prove parish boundaries, and (2) on the value of plans and Ordnance Survey maps as evidence.

Prescription—Positive—Admissibility of referring to titles prior to title forming basis of prescription.

In a question of prescription it is not permissible to refer to titles prior to the title or series of titles which forms the basis of the prescription for the purpose of explaining away, or altering, or qualifying the investiture secured by prescription.

On 14th November 1910 Mrs Emma Mary Brown or Meacher, EXTRA DIVISION. heiress of entail in possession of the lands and estate of Marlee and Balcairn, in the parish of Kinloch, and county of Perth, brought an action against Captain Philip Lawrence Kington Blair-Oliphant, the owner of Ardblair, in the parish of Blairgowrie and county of Perth, for declarator "that the pursuer has, under her titles, the sole and exclusive right to the Fingask Loch, in the county of Perth, including the *solum* thereof, and to the fishings thereof, together with the sole and exclusive right and privilege of using boats, nets, and rods, and fishing in and shooting from the said loch, and generally of exercising all rights of property in connection therewith, and that the defender has no right of property or servitude or other right whatever *except the servitude of watering cattle or other bestial* * in the said loch or

* The words in italics were added by amendment at the conclusion of the hearing on evidence in the Outer House.

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fishings or shootings and no privilege of using boats or fishing in or shooting from the said loch in any manner of way; and *separatim*, that the pursuer and her predecessors and authors have for time immemorial, or for forty years, been in the exclusive enjoyment and possession under their titles, of the said Fingask Loch, and the fishings and shootings thereof, including all the privileges connected therewith: And further, the defender ought and should be interdicted, prohibited, and discharged by decree foresaid from placing or using boats on the said loch, and from entering or trespassing upon the same, or passing on to or over the *solum* thereof, and from fishing in the said loch, either from the banks or from boats or by means of wading or in any other way, and from shooting from the said loch, and from, in any way, interfering with the pursuer's peaceable possession of the said loch and fishings and shootings in all time coming."

Fingask Loch is a narrow inland loch wholly surrounded by the lands of the pursuer and defender, Marlee, the estate of the pursuer, forming its western boundary, and Ardblair, the estate of the defender, forming its eastern boundary.

The oldest title with which the pursuer could connect herself by progress was a Crown charter of July 1764, of "Totas et integras villam et terras de Kinloch [the old name for Marlee] comprehendentes terras aliaque subscripta vizt., . . . necnon tres lacus et piscationes dictarum terrarum de Kinloch. . . ." One of the "tres lacus" was admittedly the Fingask Loch.

The oldest title with which the defender could connect himself by progress was a Crown charter of novodamus of May 1674 of "Totas et integras terras de Ardblair . . . cum piscationibus . . . annexis connexis partibus pendiculis et earum pertinentiis, quibusque jacen." The same charter contained further on a grant of "totam et integram umbrosam illam dimidietatem vulgariter vocat Shadouhalfe . . . cum partibus pendiculis et ejusdem pertinentiis et cum privilegio et libertate piscandi in tribus illis sive stagnis sive lacubus lee and lochs infra barroniam de Kinloch . . . cum libero introitu et exitu ad dictos lacus." This reference to Shadouhalfe never afterwards appeared in the progress of titles. From 1721 downwards the lands of Ardblair were described in all the titles as lying within the parish of Blairgowrie.

There were also extant other titles of earlier dates, with which, however, the parties could not connect themselves. The earliest of these relating to the defender's lands was a charter by William de Haya confirmed by the Crown, of 1423, the earliest relating to the pursuer's lands a Crown charter of 1541.

The pursuer averred, *inter alia*;—(Cond. 6) "Under her said title the pursuer has the sole and exclusive right to and in the said Fingask Loch, including the *solum*, and to the fishings and shootings thereof of every description; and she has the sole right and privilege of using boats on the said loch, and of fishing therein and shooting therefrom." (Cond. 7) "In virtue of their titles the pursuer and her authors have for time immemorial, or at least for forty years, enjoyed exclusive possession of the said loch and fishings and shootings, and uninterruptedly exercised the said privileges connected therewith. In particular they, and their tenants with their permission, have for the above period kept boats upon the said loch, and used the same without interruption for fishing and shooting over the whole of the loch, including those portions of it lying *ex adverso* of the defender's

lands. In or about the year 1890 the pursuer learned, as was the fact, that one of the defender's tenants named Falconer, had put a boat on the loch. She thereupon ordered him to take his boat off the loch, and he did so in obedience to her orders. The pursuer has been in the habit of letting the sporting rights on certain parts of her lands to the defender. The last lease was granted in 1904 for five years from 1st March 1904, and includes her sporting rights on the said loch. Annexed to the said lease, and signed by both the pursuer and the defender, there is a plan showing the said loch as lying wholly within the lands and estate of the pursuer. For many years, ending about 1860, the pursuer's authors regularly dug marl from the *solum* of the said loch, and either used or sold it as manure. A regular and substantial income was derived by the pursuer's authors from such sales of marl dug from the said loch. Marl digging in the said loch was practised only by the pursuer's authors, who asserted and enjoyed the exclusive right thereto, and exercised it in the knowledge and with the consent and acquiescence of the defender or his authors. In particular the pursuer's authors and they alone dug marl at points in the loch east of a straight line drawn across the loch from north to south connecting the eastmost point of their lands on the north shore of the loch with the eastmost point of their lands on the south shore. This they did unchallenged and in the knowledge of the defender or his authors, both *ex adverso* of their own lands and *ex adverso* of the defender's lands. The defender and his authors have thus acquiesced in the claim of the pursuer and her authors to the sole and exclusive rights in and to the said loch."

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In a statement of facts the defender averred, *inter alia*;—(Stat. 7) "The defender and his authors have at all times, and for far more than the prescriptive period, possessed the said loch as part of the said lands of Ardblair, and exercised the rights of riparian proprietors therein. In particular, the defender's authors, and those in their right have dug and removed marl therefrom and jointly with the pursuer's authors, have granted leases of the fishing and shooting in and upon the said loch. Further, the defender himself, prior to the granting of the leases mentioned in article 7 of the pursuer's condescendence, made use of the said loch for the purposes of fishing and shooting. The tenants of the defender and his authors have constantly exercised the right of fishing in the said loch and of keeping boats thereon, and have watered their cattle at the loch and pastured their cattle down to the water's edge below the flood mark, all with the knowledge and authority of the defender and his authors, and without challenge or interference on the part of the pursuer or her authors."

The pursuer pleaded, *inter alia*;—(1) The pursuer having, in virtue of her titles, the exclusive rights to the Fingask Loch, and to the fishings and shootings thereof, and the defender having challenged said right, decree of declarator should be granted as craved. (2) *Separatim*, the pursuer and her authors having for time immemorial, or at least for forty years, enjoyed the exclusive possession of the said loch and fishings and shootings, upon an express grant thereof in their titles, the pursuer is now exclusively in right of the said loch and fishings and shootings, and the defender having challenged said right, decree of declarator should be granted as craved. (5) The defender's title being a bounding one, and the said loch being situated beyond the boundaries of his lands, the defences should be repelled.

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The defender pleaded, *inter alia* ;—(2) The pursuer having no title either by express grant or otherwise to an exclusive right to the said loch, the defender should be assolizied from the conclusions of the summons. (3) The defender, in respect of his titles, *et separatim* in respect of the possession had by him and his authors under the said titles, has a joint right to the said loch along with the pursuer as the other riparian proprietor, and should be assolizied from the conclusions of the summons.

A proof was allowed and led. The import of the evidence will be found set forth in the opinions of Lord Dundas and Lord Mackenzie.

On 23rd November 1911 the Lord Ordinary (Guthrie) pronounced the following interlocutor:—"Finds and declares in terms of the declaratory conclusions of the summons, and interdicts, prohibits, and discharges, in terms of the conclusion of the summons for interdict, and decerns." *

* "OPINION.—The subject in controversy, namely the right of the defender to joint ownership of the Fingask Loch with the pursuer, while it seems, from the possibility of future feuing, and the advantage the defender's water-side feus would have for that purpose, if they carried a right of boating, bathing, fishing, and shooting on the loch, to be of some conceivable future importance to the defender, is of only nominal value to the pursuer. Her concession of the defender's servitude of watering deprives her right of property of its most important incidents; and her project for killing out the pike and perch, and stocking with trout, would not have been objected to by the defender. The pursuer's position seems to be that of the captain in 'Hamlet':—'Truly to speak, and with no addition, we go to gain a little patch of ground, that hath in it no profit but the name.' And, before this case is ended, it may turn out that Hamlet's reply will be also applicable:—'Twenty thousand ducats will not debate the question of this straw.'

"Fingask Loch is bounded, as near as may be, to the extent of half by the pursuer's property of Marlee, on the west side, and as to the other half by the defender's property of Ardblair, on the east. In these circumstances, the presumption is that both pursuer and defender have a joint right of property in the loch—*Cochrane v. Earl of Minto*, 6 Pat. App. 139; *Scott v. Lord Napier*, 7 Macph. (H. L.) 35; *Stewart's Trustees v. Robertson*, 1 R. 334. The defender has never claimed more; the pursuer claims under her titles, and her titles with possession, an exclusive right.

"The pursuer founds, as her earliest title, on a Crown charter, dated 14th July 1541, in which, among the lands described in the dispositive clause, are the following:—'Easter Kinloch with the mill thereof, and with the three lochs and their fishings.' I hold it sufficiently proved that one of these three lochs was the Fingask Loch now in question, the other two being the Marlee Loch and the Rae Loch. (The defender argues that, because the pursuer does not claim exclusive possession of the Marlee Loch, she cannot claim exclusive possession of Fingask Loch. This is a *non sequitur*.) The title granted in 1604, No. 14, naming the lochs, although only a security writ, is legitimate evidence of this, and is confirmed by the universal understanding, and by the absence of any other lochs on the lands in question. The pursuer's previous title, in 1499, refers to lochs in the tenendas clause only, and does not mention any number. The subsequent titles all refer to three lochs, with the exception of a title in 1657, No. 23, where the number is omitted. From 1700 onwards, the three lochs are conveyed, not '*unacum*,' but as separate subjects, and they are described as lying within the parish of Kinloch. There is a gap in the pursuer's titles between 1700, when they were in the ownership of Gall, and 1757, when, by No. 24, Farquharson of Invercauld conveyed the lands of Kinloch as

The defender reclaimed, and the case was heard before the Extra Division (consisting of Lord Kinnear, Lord Dundas, and Lord Mac-
kenzie) on 24th, 25th, 29th, and 30th October 1912.

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Argued for the reclaimer;—The earliest title with which the pursuer could connect herself was a charter of 1764, the earliest with which the defender could connect himself was a charter of 1674, nearly a hundred years earlier. That charter contained a grant of Ardblair as complete as it was possible to make a grant, viz., a grant of the whole lands with parts and pertinents. The lands of Ardblair in fact abutted on the loch now, and must be held to have abutted on the loch at the date of the grant unless the contrary were proved, and no proof had even been attempted. The result was that the grant of Ardblair was a grant of the dry land of Ardblair with a portion of the *solum* of the loch proportional to the extent of the lands of Ardblair which abutted on the loch, and a right of shooting

proprietor. The Crown charter of 1764, No. 26, is the first with which the pursuer connects herself without a break. The pursuer's father, Mr Brown, acquired the lands in 1844, from the Farquharsons of Invercauld, under the Act of Parliament of 1828, No. 20.

"An express title like the pursuer's, if granted subsequent to a Crown grant to another waterside proprietor of lands adjacent to the loch with parts and pertinents, can only prevail to prevent the proprietor under the earlier title having a joint right of property in the loch, by evidence of exclusive possession for the prescriptive period—*Scott v. Napier*, 7 Macph. (H. L.) 36; *Stewart's Trustees v. Robertson*, 1 R. 334. In the ordinary case of parts and pertinents, possession is necessary to show what the parts and pertinents cover, but, in the case of lands bordering a loch, if these lands are held with a clause of parts and pertinents, a joint right of property in the loch will be presumed, and this presumption can only be overcome, in the case of a subsequent express grant, by proof of exclusive possession by the holder of that express grant.

"The defender's earliest title is in 1423—a grant by a subject superior, confirmed by the Crown, which contains a clause of parts and pertinents connected with the lands of Muirton and Ardblair, one or other of which includes the defender's lands bordering on the loch of Fingask. The defender's earliest title is thus earlier than the pursuer's earliest title. Neither the pursuer nor the defender can connect themselves by an unbroken progress with the earliest title of their lands, namely the pursuer's of 1541 and the defender's of 1423. The defender's progress of titles is continuous after 1674, No. 146. Thus, whether the earliest title of the defender's lands be taken, namely, the title in 1423, or the earliest with which he can connect himself without a break, namely, the title of 1674, in either case his title, with parts and pertinents, is earlier than the pursuer's express title, for her earliest title is in 1541, and the earliest title with which she can connect herself is in 1764.

"The sole question is, has the pursuer, who has an express but subsequent title to the loch, possessed so as to involve an exclusive right of proprietorship? or, has the defender, who has, in an earlier title, a right to parts and pertinents, which may include a joint right in the loch, not possessed sufficiently to prevent a claim of exclusive possession by the pursuer? So stated, the onus is on the pursuer.

"The evidence of general repute does not go far back, and is to some extent discounted by the defender's admission that the pursuer is entitled to the rights of a part proprietor. But, so far as it goes, it may be said to be entirely in favour of the pursuer. Had the question been that of the pursuer's right to part proprietorship, her claim would have been clear from her title and the possession following on it. It is not so clear that she has

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and fishing over the whole in common with the other proprietor. It was a well-established rule of law that, apart from proof to the contrary, where lands abutted on a loch, a portion of the *solum* of the loch belonged to and formed part of those lands, and the owner of the lands had further a common right of shooting and fishing over the whole loch.¹ The loch was not in any sense merely a pertinent of the lands: it was part of the lands granted by the charter and accordingly no possession was required to interpret the grant as including it.² This was in fact just as good a grant of the loch as an express grant of the lands with the loch, and was accordingly as good a title as the title nearly a hundred years later in date produced by the pursuer. It was therefore quite unnecessary for the defender to fortify his title by possession. The case of *Agnew v. Lord Advocate*³ was quite different. That case dealt with the fore-shore, and there it was held that possession was required to give a

ousted the defender from claiming that his title includes a right of part proprietorship in the loch. The pursuer has possessed the loch in every possible way, and has done so continuously and from time immemorial. It is unnecessary to go into details on this point. If she has not had exclusive possession, it must be on account of possession by the defender. The use of the loch by the public of Blairgowrie for boating and fishing was not an assertion of any right, and it is accounted for by the valuelessness of the subject.

"It therefore becomes necessary to consider what possession the defender has had of the loch, and to determine its nature and extent. That question may be looked at in two ways: First, what, if anything, did he do in assertion of his alleged right? Second, what, if anything, did the defender do inconsistent with his alleged right?

"First, what, if anything, did the defender do in assertion of his alleged right of part proprietorship of Fingask Loch?

"1. Watering animals. That the cattle and other animals, in the defender's fields adjoining the loch, drank the water in the loch without objection by the pursuer is admitted. But this use involved no assertion of a right of property on the defender's part. Its effect as establishing a servitude in favour of the defender has been conceded by the pursuer, with the result, probably, that the pursuer will be debarred from fencing, polluting, or draining the loch. It is true that not only did the cattle water, but fences were run into the area of the loch to keep the cattle in their respective fields. But this was a mere innocuous accessory of a servitude, which, as such, I am not satisfied that the pursuer could have prevented.

"2. Boating, fishing, and shooting. There is no evidence that the laird of Ardblair ever had a boat of his own on Fingask Loch down to 1903, when the defender took his Norwegian skiff there from the Rae Loch, at which date he had a sporting lease from the pursuer covering the whole loch. But he used boats belonging to other people, and, in particular, the boat of Menzies, pursuer's tenant. The effect of the evidence of boating, fishing, and shooting is discounted on both sides, when it is found that,

¹ Rankine on Landownership, 4th ed., p. 195; Scott v. Lord Napier, (1869) 7 Macph. (H. L.) 35; Mackenzie v. Bankes, (1878) 5 R. (H. L.) 192, at p. 202, (1877) 5 R. 278; Menzies v. Wentworth, (1901) 3 F. 941, Lord Kinnear, at p. 958; Bankton, ii. 3, 12; Stair, ii. 3, 73; Bell's Prin. (10th ed.) secs. 648-651.

² Stair, ii. 3, 60, and 73; Erskine, Inst. ii. 6, 4, and 5; Bell's Prin., secs. 648-651; Macdonell, &c. v. Caledonian Canal Commissioners, (1830) 8 S. 881, at p. 886; Duff's Feudal Conveyancing, sec. 47 (2).

³ (1873) 11 Macph. 309.

right to the foreshore, the reason being that in the case of the fore-^{Dec. 17, 1912.} shore, in contrast with the case of the *solum* of a loch, there was no presumption that it went with the lands. If, however, it were necessary for the defender to show possession, the evidence showed that he and his authors had all along exercised the ordinary rights of a proprietor in the loch. He accordingly had a good and complete title fortified by possession for the prescriptive period.¹ When the charter of 1674 had been in existence for nearly a hundred years the Crown granted the pursuer's charter of 1764. If it was a grant of the whole loch of Fingask it was a grant *a non domino*, the Crown having already given the defender's author a portion of the loch. It was not, however, if fairly construed, a grant of the whole of the loch: it was not in any sense an exclusive grant, but was merely a grant which expressed in words what was implied in the defender's grant, viz., that the lands abutting on the loch carried with them a right to a certain portion of the *solum* and common rights of shooting and fish-

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owing apparently to the proximity of Blairgowrie and the valuelessness of the fishing and shooting, Fingask Loch was free to all.

"3. Taking marl from the bed of the loch. The defender tried to prove the taking of marl. In my opinion, he has not done so. In view of the convenient situation of Fingask Loch, and of the value of marl, and of the defender having taken it from adjoining places, but never from Fingask, there is a strong presumption against his right of proprietorship in the loch.

"4. Taking reeds and sand. It is not proved that the reeds were taken in the loch. Sand has only been taken within the last twenty years, and only on two or three occasions, in insignificant quantities.

"5. Preparation of plans showing part of the loch within his property. The defender founds on plans prepared by Stobie, No. 168, and a copy in the Advocates' Library, and some evidence was led about the different versions of these plans. This point seems to me unimportant. Any proceeding by the defender, which could constitute an interference with the pursuer's exclusive possession, must have been one of which the pursuer knew or was bound to know—*Place v. Breadalbane*, 1 R. 1202; *Reid v. Haldane's Trustees*, 18 R. 744.

"Second, what, if anything, did the defender do inconsistent with his alleged right?

"1. Inserting a statement in his titles on and after 1721, No. 38, that his estate is all within the parish of Blairgowrie, whereas the loch is entirely within the parish of Kinloch. I do not found on this point. The proof is not clear that the Ordnance Survey map is right in taking the boundary of Blairgowrie parish outside the area of the loch—*Gibson v. Bonnington Co.*, 7 Macph. 394. The two statistical accounts of 1796 and 1845 do not agree. Besides, the title of 1721 and subsequent charters by progress could not affect the defender's feudal estate if once duly constituted—*Boyd*, 11 Macph. 243, 246.

"2. Failing to challenge the action of the pursuer's authors in applying to Parliament and obtaining the Act of 1828, and selling under the Act, on the basis that the whole loch belonged to Marlee. The pursuer is entitled to make this point; but I do not attach much importance to it. The defender was not directly concerned with the parliamentary application.

"3. Accepting a lease from the pursuer on the footing that the pursuer was sole proprietor of the loch. In 1904 the defender took a sporting lease from the pursuer, No. 22, the terms of which, and plan attached,

¹ Lord Advocate v. McCulloch, (1874) 2 R. 27, at p. 32; Menzies v. Macdonald, (1854) 16 D. 827.

Dec. 17, 1912. ing over the whole. Taking it, however, as an express and exclusive grant, it was nearly one hundred years later than the defender's grant and could only give the pursuer a right to the loch if followed by continuous, exclusive, and adverse possession of the whole loch during the prescriptive period.¹ No lesser degree of possession was of any avail. In *Lord Advocate v. Wemyss*² Lord Watson's opinion that a lesser degree of possession might suffice to explain an antecedent grant than was required to establish a new right was limited to the case of a question between the author of the grant and the grantee. Here the *de quo queritur* was whether the pursuer had a right to the whole loch; and it was accordingly obvious that evidence that she had exercised rights in the loch along with the defender was quite immaterial and would only help to establish what the defender admitted and contended for, viz., a joint right. There was in the case no evidence of exclusive possession, but, on the contrary, evidence that both the pursuer and the defender had used the loch in the ordinary way as joint proprietors. The pursuer's suggestion that the defender's use of the loch for the purpose of watering cattle was in virtue of a right of servitude was merely an ingenious invention to explain away an adverse item of evidence. With regard to the argument that the defender was excluded from the loch by the fact that in certain of his titles the lands were stated to be within the parish of Blairgowrie, whereas the loch was outwith the parish, the answer was two-fold. In the first place it was not proved in the case that the loch was outwith the parish, the evidence of the maps and plans being contradictory and worthless.³ In the second place the description by parish boundary did not appear in the original grant, and the defender or his authors had acquired a good title to the loch before its introduction.⁴ If it were legitimate to go back to the earliest titles, it was in the defender's favour that his earliest title

show the whole loch as part of the pursuer's estate. This strongly suggests that the defender did not at the time maintain his present contention.

"4. Framing estate plans on the footing that Fingask Loch was excluded. This involves a comparison between Nos. 168 and 183 of process, and depends on points which the evidence leaves obscure.

"5. Allowing pursuer's authors to make a road on the east side of the loch. The evidence about this road is too vague to be of any value. The point is not made on record.

"6. Allowing pursuer to take marl from the eastern side of the loch. This is not proved.

"7. Granting a lease on the footing that the defender had no interest in the loch. See the lease of 1897 by the defender to Thomas Henry Smith, No. 145.

"On the whole, with some reluctance, I hold that the pursuer has proved possession of all kinds in the loch for time immemorial, and has sufficiently shown that there was no possession of the loch by any other person, and, in particular, by the defender or his predecessors, to exclude her claim founded on exclusive possession."

¹ Scott v. Lord Napier, 7 Macph. (H. L.) 35; Stewart's Trustees v. Robertson, (1874) 1 R. 334.

² (1899) 2 F. (H. L.) 1.

³ Place v. Earl of Breadalbane, (1874) 1 R. 1202.

⁴ Boyd v. Bruce and Others, (1872) 11 Macph. 243; Reference was also made to Bell's Lectures on Conveyancing, (3rd ed.) vol. i., pp. 599, 603; Baird v. Robertson, (1836) 14 S. 396; Dick v. Earl of Abercorn, (1769) M. 12,813.

was one with a clause of parts and pertinents prior in date to the pursuer's earliest title which referred to lochs in the tenendas clause only, and did not mention the three lochs.

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Argued for the respondent;—On a sound view of the titles and the evidence as to possession, the pursuer was entitled to the whole loch. The defender's case broke down at its very outset. The foundation of the defender's case was the alleged grant in 1674 of lands *de facto* abutting on the loch. The defender had however completely failed to prove that in 1674 the lands of Ardblair did abut upon the loch, and therefore the whole of his subsequent argument fell to the ground. The fact that Ardblair at the present time reached the loch was no evidence that it did so in 1674. This in itself disposed of the defender's case. Assuming however that that fact had been proved by the defender, the pursuer's title, followed by the possession which had been proved, gave her the whole loch. Her title was equivalent to an express grant of the loch, while the defender's title made no mention of the loch and could only cover it as a "part and pertinent." At best the defender's was an ambiguous title with perhaps a presumption of right in the loch, and, in a competition between an earlier ambiguous title and a later express title, the later title prevailed, at any rate if there had been sufficient possession under the later title to explain away the earlier title and redargue the presumption.¹ Exclusive and adverse and continuous possession, such as was required for the acquisition of a new right, was not necessary.² In *Stewart's Trustees v. Robertson*³ the *dicta* that exclusive possession was necessary were accounted for by a misapprehension of the facts in *Scott v. Lord Napier*.⁴ In *Baird v. Robertson*⁵ the later title *cum lacubus* with possession was upheld against the earlier *cum pertinentibus*. It was a general rule applicable to all subjects that "where a tenement of land is possessed by one barely as pertinent, and by another in virtue of an express right, he who possesses under the express right is *in dubio* to be preferred to the other."⁶ In the present case the pursuer had proved possession of the loch exercised by all the known means of exercise, and in view of the fact that she or her authors had alone worked the marl, the most important adjunct of the loch, there were good grounds for saying that her possession had been exclusive, had it been necessary for her to prove exclusive possession. The defender however failed upon another and independent ground. All his later titles described the lands as lying within the parish of Blairgowrie. That was a bounding title, and excluded from his lands everything which lay beyond the parish boundary.⁷ The Ordnance Survey map and the other plans produced showed that the loch was beyond the limits of the parish, and there was no contradic-

¹ *Scott v. Lord Napier*, 7 Macph. (H. L.) 35, at pp. 74 and 81; *Scott v. Lindsay*, (1635) M. 12,771; *Menzies v. Macdonald*, (1856) 2 Macq. 463, at p. 474.

² *Lord Advocate v. Wemyss*, 2 F. (H. L.) 1, *per* Lord Watson, at pp. 9 and 10; *Earl of Fife's Trustees v. Cuming*, (1830) 8 S. 326; *Agnew v. Lord Advocate*, (1873) 11 Macph. 309; *Macdonald v. Farquharson*, (1836) 15 S. 259; *Auld v. Hay*, (1880) 7 R. 663; *Young v. North British Railway Co.*, (1887) 14 R. (H. L.) 53.

³ 1 R. 334.

⁴ 7 Macph. (H. L.) 35.

⁵ 14 S. 396.

⁶ *Ersk. Inst.* ii., 6, 3.

⁷ *Gordon v. Grant*, (1850) 13 D. 1; *Lord Advocate v. Wemyss*, 2 F. (H. L.) 1, *Lord Watson*, at p. 10.

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tory evidence. Doubtless an Ordnance Survey map was not in itself conclusive evidence,¹ but in the present case there was proof that it had been compiled from the best contemporaneous evidence, and it was borne out by the estate plans.² The defender could not get rid of this boundary limitation by the simple expedient of going back to his earliest title in which it did not appear.³ The only charter to which it was lawful to go back to correct an error in a charter by progress was the original investiture,⁴ and the charter of 1674 was not an original investiture but a charter of novodamus. The case of *Boyd v. Bruce and Others*⁵ referred to by the Lord Ordinary was distinguishable on various grounds, and, *inter alia*, on the ground that the question there was one between a superior and his vassal. The fact too that the lands of Shadonhalfe, granted in the same deed to the same grantee, had annexed to them a permit or right of access to the "three lochs," tended to show that the grantee had no right of ownership in the lochs. If he had had any such right, the permit would have been superfluous and unnecessary. It was illegitimate in any case to go back beyond the progress of titles with which the parties could connect themselves.

At advising on 17th December 1912,—

LORD DUNDAS.—The pursuer of this action, Mrs Meacher, is heiress of entail in possession of the estate of Marlee in Perthshire. The defender is proprietor of the estate of Ardblair, which lies immediately to the east of and marches with Marlee. The dispute is as to the parties' rights of ownership respectively in Loch Fingask, which is 23 acres in extent, and is bounded in about equal proportions by lands admittedly belonging to the parties. The pursuer claims to be sole proprietrix of the loch. The defender says that he is owner of its *solum* to an extent corresponding with his riparian ownership, and has joint rights with the pursuer in and over its waters. The summons concludes for declarator of Mrs Meacher's sole and exclusive right in virtue of her titles; *et separatim*, of those titles followed by exclusive possession. The Lord Ordinary has granted decree "in terms of the declaratory conclusions of the summons." It is admitted that the interlocutor as framed cannot stand.

One must consider, in the first place the respective titles of the parties. Ancient deeds are produced upon both sides, with which it is admitted they cannot connect themselves by an unbroken progress of title. These may be dismissed from consideration; they are not the title-deeds of the parties to the case. The earliest title produced by the defender with which he can validly connect himself is a Crown charter of novodamus, dated in 1674, in favour of John Blair of Ardblair and his son, of the lands of Ardblair with parts and pertinents. It is admitted that the defender's estate now abuts

¹ *Gibson v. Bonnington Sugar Refining Co., Limited*, (1869) 7 Macph. 394.

² *Reid v. Haldane's Trustees*, (1891) 18 R. 744. Sec. 17 of the Ordnance Survey Act, 1841 (4 and 5 Vict. cap. 30), was also referred to.

³ *Threipland v. Rutherford*, (1848) 10 D. 1079, Lord Fullerton's dissenting opinion.

⁴ *Durie's Trustees v. Earl of Elgin*, (1889) 16 R. 1104, Lord Adam, at p. 1117.

⁵ 11 Macph. 243.

on Loch Fingask, as already stated. The pursuer's counsel suggested rather Dec. 17, 1912. than argued that it is not proved that it did so in 1674. There is, I think, ^{Meacher v.} no substance in the suggestion. No notice of any such point is given by Blair-^{Oliphant.} the pursuer on record; she avers that the defender's lands "abut on the east side of the Fingask Loch"; and the present description of the defender's lands in his title has been substantially the same for a very long period of time. The defender's charter of 1674 therefore must be taken to be a grant by the Crown of lands *de facto* abutting on this loch. I think that such a grant, with parts and pertinents, is sufficient, apart from possession, to carry a joint right of property in the *solum* of the loch; and that a subsequent grant by the Crown to another, expressly conveying the entire loch, would be *pro tanto ultra vires* of the Crown, as proceeding *a non domino*, and inept, unless followed by exclusive possession of the whole loch for the prescriptive period. This is, in my opinion, the correct result of the authorities to which we were referred, particularly of *Scott v. Napier*¹ and *Stewart's Trustees v. Robertson*.²

The earliest title upon which the pursuer can found is a Crown charter in favour of her author in 1764,—ninety years later than the defender's title already referred to,—of, *inter alia*, the lands of Kinloch Easter and others, *necnon tres lacus et piscationes dictarum terrarum de Kinloch*. It is admitted that one of the *tres lacus* here referred to is Loch Fingask. It is unnecessary, in the view I take of the case, to consider or decide whether this grant of lands *necnon tres lacus*, &c., conferred any better or higher right on the grantee than one of the lands with parts and pertinents; but there seems to be authority in support of a negative answer to that question. It is, I think, clear that the pursuer's title cannot prejudice or prevail against the defender's earlier grant, unless it has been fortified by exclusive possession of the whole loch in question for the prescriptive period.

One must next consider whether or not the pursuer has proved such exclusive possession. Her counsel, as I understood them, suggested that possession might in this case be sufficient for their purpose, though falling short of the exclusive possession which has been held necessary in the ordinary cases with which one is familiar. They were not, however, able to explain what amount of possession might be considered sufficient; and I confess I find it difficult to understand the legal basis of their contention. We were referred especially to a dictum by Lord Watson in *Lord Advocate v. Wemyss*,³ where a distinction is recognised between "the prescriptive possession which establishes a new and adverse right in the possessor, and the prescriptive possession which the law admits for the purpose of construing or explaining, in a question with its author, the limits of an antecedent grant or conveyance." The pursuer cannot, in my opinion, derive the smallest aid from the distinction thus recognised. She is not here in a question with her author—I suppose the Crown; but is endeavouring to fortify—in a question with an earlier grantee from that author—a title which, according to my view, proceeded *a non domino* in so far as it pur-

¹ 7 Macph. (H. L.) 35.² 1 R. 334.³ 2 F. (H. L.) 1, at p. 9.

Dec. 17, 1912. Meacher v. Blair-Oliphant. Lord Dundas. reported to carry right to the whole *solum* of the loch, by prescriptive possession, which must, I apprehend, be of a character and quality sufficient to establish, as against the prior grantee, a better right to the portion of the *solum* which he claims. If, then, as I think, the possession had by the pursuer must, in order to establish the right she asserts, be continuous, exclusive, and adverse possession of the whole loch for the prescriptive period, I am of opinion, upon the evidence, that she has entirely failed to prove her case. The Lord Ordinary has held "with some reluctance, . . . that the pursuer has proved possession of all kinds in the loch, for time immemorial, and has sufficiently shown that there was no possession of the loch by any other person, and, in particular, by the defender or his predecessors, to exclude her claim founded on exclusive possession." I am unable to agree with this conclusion, or with the views expressed by the Lord Ordinary in support of it. It seems to me that, upon his Lordship's own showing, the pursuer's possession has not been exclusive.

I do not propose to deal in detail with the voluminous evidence in the case, but I shall endeavour to summarise such points in it as are sufficient, in my judgment, to negative the Lord Ordinary's conclusion. The most important acts of possession averred by the pursuer relate to the digging or "fishing" of marl from the loch. It is, I think, proved by the evidence, documentary and oral, that the pursuer's authors at one time dug marl to a considerable extent, and used or sold it as manure; they had a boat, or boats, for the purpose; the remains of an old pier used in connection with the "fishing" are spoken to; and the estate accounts produced, though they relate only to a comparatively recent period (1847-1856), show that marl was being dug, though not to a very remunerative extent, at that time. It also appears that several marl-pits have been dug in that part of the *solum* of the loch which the defender claims as his property; and the traces of at least one marl "midden" on the defender's land near the loch are deponed to. The pursuer's counsel urged that, as no positive evidence is forthcoming to the effect that the Ardblair proprietors or their tenants ever dug marl in the loch, the Court must infer that the operations just described were done by Marlee, in the exercise or assertion of a proprietary right, and with the knowledge and acquiescence of Ardblair. I do not think such an inference can, upon the evidence, be justifiably drawn. We know nothing of the time at which, or the circumstances in which, or the persons by whom, the pits were dug in the part of the loch claimed by the defender, and there is no proof that the digging in it was not done, as, for all we know, it may have been, by the proprietors of Ardblair or their tenants. Next, the pursuer avers that, a tenant of Ardblair named Falconer having put a boat on the loch, she ordered him to take it off and he accordingly did so. But this averment is, I think, not only not proved, but is disproved by the parole evidence. And, apart from Falconer's boat, it seems clear that the Ardblair tenants (the Scotts) have had boats on the loch from time to time, apparently without remonstrance on the part of Marlee. I refrain from commenting on such acts of possession as the cutting of reeds or taking of sand from the loch further than to say that the evidence is scanty and inconclusive on either side. Fishing (such as it is) stands in a similar position; but in so far as the proof shows that almost anyone who chose to

do so fished in the loch unchecked and unheeded, it militates *pro tanto* against the pursuer's theory of exclusive possession. I next notice two points (of slight importance) which the Lord Ordinary thinks adverse to the defender's case. In 1904 the defender leased from the pursuer the shooting on some of the Marlee farms, "together with the sporting rights of the proprietrix in the adjoining loch of Fingask," for five years, at a rent of £15. The map annexed to the lease shows the farm lands coloured pink, and a pink line enclosing the whole of the loch. The Lord Ordinary observes that "this strongly suggests that the defender did not at the time maintain his present contention." The Lord Ordinary's view is, I think, unfair to the defender. It was, to my mind, quite right that the entire loch should be so shown on the plan, as the sporting rights which the pursuer admittedly has over the whole of it, even upon the defender's theory of joint proprietorship, were included in the subject of the lease. Then, in 1907, the defender granted a lease to a Mr Smith of "the exclusive right of sporting and shooting over the estate of Ardblair (including the White-loch),"—this express inclusion was, as the correspondence shows, specially desired by Mr Smith,—and also over the portion of Marlee let by the pursuer to the defender by the lease before mentioned, "and the sporting and shooting rights of the said proprietrix of Marlee in the adjoining loch of Fingask, all as presently possessed by the" defender. The Lord Ordinary says that this lease was granted "on the footing that the defender had no interest in the loch." But I do not think the terms of the lease, though perhaps unhappily expressed, are inconsistent with the defender's present contention that he is joint owner of the loch along with the pursuer. I next advert to a point which I consider to be of real importance on the question of possession, and as to which the Lord Ordinary has, in my judgment, gone materially astray. It is proved, and indeed I think admitted by the pursuer, that the cattle and other animals in the defender's fields adjoining Loch Fingask have always watered in the loch, and that fences have been run by the Ardblair tenants into the area of the loch to keep the beasts in their respective fields. The pursuer's counsel, very adroitly I think, sought to negative the effect of these *prima facie* formidable and adverse facts by tendering (at the conclusion of his speech upon the evidence) an amendment of the summons to the effect of admitting the existence of a "servitude of watering cattle or other beastial" in favour of the defender. The Lord Ordinary allowed the amendment, and in his opinion merely observes that the watering of cattle "involved no assertion of a right of property on the defender's part," and that the extension of the fences upon the *solum* of the loch "was a mere innocuous accessory of a servitude which, as such, I am not satisfied that the pursuer could have prevented." This method of dealing with the matter is, to my thinking, fallacious. If the pursuer's right to the whole *solum* of the loch was otherwise established, the watering of the defender's cattle might well be ascribed to a servitude acquired by him by way of burden on the pursuer's right. But the pursuer's right is not so established; it was, upon the assumption of the whole case, in the course of making, so to speak, by possession upon a title *habile* as a basis for prescription, but not in itself a complete or sufficient title of ownership.

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Dec. 17, 1912. The actings, therefore, of the defender's authors by way of watering and fencing cannot, in my opinion, be ascribed to servitude, but constitute evidence of an assertion by them of a proprietary right, sufficient probably by itself to negative the pursuer's claim to exclusive possession of the entire

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loch. Upon a consideration of the whole evidence, it appears to me that the defender and his authors have throughout acted in a manner quite consistent with his present claim, and that the pursuer has entirely failed to prove exclusive possession of the loch for the prescriptive period.

Lord Dundas.

There remains, however, for consideration one matter which is not wholly free from difficulty. In the defender's titles from 1721 onwards, his lands are described as lying within the parish of Blairgowrie. The pursuer says that Loch Fingask lies wholly outside that parish, and that, the defender's title being a bounding one, he can have no right to any part of the *solum*. The Lord Ordinary is in the defender's favour on this point; he passes over the matter rather lightly in his opinion, but I think his conclusion is right. The pursuer's strongest point is the Ordnance Survey map of 1859, which shows the boundary of Blairgowrie parish as going along the east shore of Loch Fingask, and her witness, Mr Bennett, exhibited the "Boundary Remark Book," with the original sketches and notes from which the survey of this part of Perthshire was made. It contains a certificate by two inhabitants of the district, who had apparently been appointed by the Sheriff as "meersmen" to assist the surveyors, in terms of the Act 4 and 5 Vict. c. 30, and the certificate bears that "the boundary as described in this book from p. 49 to p. 62 between the parishes of Blairgowrie and Kinloch was pointed out by us this day and is strictly correct." This evidence is admissible, but it is not conclusive. One notices that the certificate applies generally to the whole line of the boundary between the parishes. It is not easy to conjecture how the "meersmen" can have known, or thought they knew, the parish boundary as regards this loch—a subject in itself of no importance for parochial purposes. But the Ordnance Survey map does not stand uncontradicted. Stobie's revised plan of 1805, which I gather from Mr Walker's evidence may be regarded as of considerable authority, is in the defender's favour, while each party claims to derive advantage from the production of a copy of the same author's earlier map of 1783. The Statistical Accounts of 1796 and 1845 (which are not, strictly, evidence at all) differ from one another. The pursuer founds strongly upon two plans—especially on No. 171 of process—produced by the defender under diligence, as showing that no part of Loch Fingask was considered by the defender's authors to be their property. But we know nothing about the plan No. 171, as to its date, its authorship, or the purpose for which it was made. I do not think it is of material weight in the case—(see Lord Neaves' observations in *Place*¹). Upon this point, therefore, I hold, with the Lord Ordinary, that the pursuer has failed to prove that Loch Fingask lies outwith the parish of Blairgowrie. In this view, it is unnecessary to consider or determine whether the defender is entitled to found upon the fact that his earliest title-deed—the Crown charter of 1674—contains no limitation by way of parochial boundary.

¹ 1 R. 1202.

On the whole matter, I am of opinion that we ought to recall the Lord Ordinary's interlocutor; find that the defender, in virtue of his titles, has a joint right of property along with the pursuer in Loch Fingask, and that the pursuer has failed to prove her alleged exclusive right to the same; and assoilzie the defender from the whole conclusions of the summons, with expenses.

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LORD MACKENZIE.—The question in this action is in regard to Fingask Loch, the size of which is stated to about 23 acres. The estate of Marlee belonging to the pursuer, and the estate of Ardblair belonging to the defender, both abut upon it. The pursuer claims the sole and exclusive right to the loch under her title, and also under her title and the possession which has followed upon it. The defender claims a joint right to the loch along with the pursuer as the only other riparian proprietor.

The earliest title with which the pursuer can connect herself is a Crown charter in 1764, which makes express mention of *tres lacus*. It is admitted that one of these lochs is identified as being Fingask Loch. The pursuer maintains that she has an express title to the loch. The earliest title which the defender can connect himself with is a Crown charter in 1674 of the lands of Ardblair, with parts and pertinents. An argument was founded on the fact that this charter contains a conveyance of lands called Shadouhalfe, with certain rights in the three lochs. Shadouhalfe, however, drops out of the progress, and no point arises in this case regarding it. The title of the defender is thus a conveyance of land with parts and pertinents earlier in date than the title granted to the pursuer. The lands in question abut on the loch, and I do not think there is room for the argument that it has not been shown they abutted at the date of the grant.

Before considering the law applicable to titles in such a position it is necessary to advert to a specialty in the case. In the defender's progress there is introduced for the first time, in a Crown charter of adjudication in 1721, as part of the description of the lands that they lie within the parish of Blairgowrie. Two questions arise upon this, (1) whether the defender can go back to the charter of 1674 which contains no boundary, and (2) if he cannot, whether the pursuer has succeeded in proving that the whole of Fingask Loch lies outside the boundary of the parish of Blairgowrie. If she has, then under the authority of *Gordon v. Grant*¹ the defender holds under a bounding charter which excludes Fingask Loch. I go straight to the second question, because if it is answered in the negative the first does not arise. But upon the first question I may say in passing that as the defender's charter of 1674 contains a novodamus there seems to me strong ground for saying that he may as competently go back to it as he might to an original charter;—I refer to what Lord Adam said upon this point in the case of *Durie's Trustees v. Earl of Elgin*.² I do not, however, think it necessary to decide this, because, in my opinion, the pursuer has failed to prove that the parish boundary runs along the eastern margin of Fingask Loch. I think the parish boundary is not distinctly defined as regards the loch. There is a difference

¹ 13 D. 1.

² 16 R. 1104, at p. 1117.

Dec. 17, 1912. between the two copies of Stobie's plan of 1783, which have been referred to. Stobie's revised plan of 1805, as Mr Meacher admits in his evidence, shows that the loch was divided between the parish of Blairgowrie and the parish of Kinloch. No doubt the Ordnance Survey map which was prepared in 1859 does show a dotted line intended to indicate the parish boundary running round the eastern margin of the loch, and the docquet of the meersmen on the plan was founded upon by the pursuer. This, however, would not be evidence sufficient to prove the fact, nor can the statements in the statistical accounts be regarded as evidence in the case. It was argued that the defender's estate plans, which do not indicate Fingask Loch as forming part of the estate of Ardblair were conclusive against him. But the point which the pursuer has to establish is that the dotted line on the Ordnance Survey was truly the parish boundary, and this I do not think the estate plans whether pursuer's or defender's enable him to do. It is not in my opinion proved that the defender is excluded from Fingask Loch by the line of the parish boundary.

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The next question is as to the law applicable to the case. As already stated, the pursuer maintained that she has an express title to the loch, and I take the case on that assumption. The defender holds an earlier title to lands abutting on the loch, with parts and pertinents. The law as decided in *Scott v. Napier*,¹ and *Stewart's Trustees v. Robertson* ² I take to be this, that in the case of a grant of lands abutting on an inland loch with parts and pertinents there is a presumption that the grantee has a joint right of property in the loch which will not be prejudiced by a subsequent express grant of the loch unless the latter is followed by exclusive possession. The joint right as is pointed out by Lord Selborne in the case of *Mackenzie v. Bankes*,³ carries with it the share of the *solum* pertaining to the lands *ex adverso* and a right in common with the other riparian proprietors over the whole of the water. It was argued that the possession which the holder of the express title requires to have in order to rebut the presumption in favour of the holder of a title to lands abutting with parts and pertinents was something less than the exclusive and adverse possession which is required to establish a right, and it was maintained that the opinion of Lord Watson in the case of the *Lord Advocate v. Wemyss* ⁴ supported this view. There it was pointed out that what was termed explicative possession might be sufficient. I am unable to take the view that this applies to the present case. That was a dispute between grantor and grantee, which this is not. Further, the quality and extent of the possession necessary in each case largely depends upon the nature of the subject possessed. Whatever application the observations made in the case of *Wemyss* ⁵ may have to the case of coal, they do not seem to me to apply to a case where both pursuer and defender have had possession of a loch, and the pursuer maintains that her possession is exclusive. The pursuer, therefore, requires to prove exclusive and adverse possession in the ordinary sense.

As regards possession, that of the marl is most important. If the pursuer could have shown that she or her predecessors had worked marl in

¹ 7 Macph. (H. L.) 35.

² 5 R. (H. L.) 192, at p. 202.

³ 1 R. 334.

⁴ 2 F. (H. L.) 1.

that portion of the *solum* of the loch which is *ex adverso* of Ardblair, this Dec. 17, 1912. would have been very material in instructing an exclusive right. But there is an entire absence of such evidence. Mr Meacher no doubt proves that there are holes from which marl has been evidently taken in the eastern portion of the *solum* of the loch, but there is no evidence as to when these were made or who worked them. The evidence in regard to the working of marl is not inconsistent with a joint right on the part of the defender. There are traces of a marl midden on Ardblair, although where the marl came from is not established. There is nothing in the lease between Farquharson of Invercauld, the pursuer's predecessor, and William Anderson in 1797, nor in the lease by the laird of Ardblair to James Baxter of Whiteloch Farm in 1756, as I read them, to exclude the idea that the proprietor of Ardblair could have worked marl in the loch had he wished to do so. The terms of the deed of entail by Farquharson of Invercauld in 1788, and the accounts and receipts for marl worked by Marlee proprietors from 1847 to 1856, do not instruct that the pursuer's predecessors had possession of the whole *solum* of the loch. The reference to marl in the statistical accounts does not, in my opinion, prove as a fact that Farquharson of Invercauld was the sole proprietor.

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Next, as to the watering of cattle by Ardblair tenants—the evidence of this is complete and seems to me destructive of the pursuer's position unless she is successful in relegating it to the exercise of a servitude right. The pursuer endeavoured to turn the defender's position by tendering a minute of amendment excepting from the conclusions of the summons the servitude of watering cattle or other bestial. If the watering of cattle had been the only competing act of possession on the part of the defender, it might have been possible to deal with it in this way. The pursuer, however, cannot, in my opinion, strike out the evidence upon this head when the whole evidence is being weighed. Acts of possession of this nature do tend to weaken the case for exclusive possession, and must be taken into account along with the other evidence in the case. Not only were the cattle watered, but fences were run down between the defender's fields into the *solum* of the loch, which, according to the pursuer's contention, was her exclusive property. There were no fences along the margin of Ardblair estate where it abutted on the loch.

The proprietor and tenants of Ardblair exercised the right of boating on the loch over a long period. The Scotts—grandfather, father, and son—tenants of Whiteloch Farm on the Ardblair estate had a connection with the place stretching back for fifty-six years. All had boats on Fingask Loch. Major Chalmers, whose recollection goes back to 1850, speaks of getting a boat on Fingask Loch from the farm of Whiteloch in that year. The evidence of any interruption is quite inconclusive. Daniel Scott speaks of Mr Anderson, who was factor both on Ardblair and Marlee, writing to ask him to take off his boat because he could not thole to see the boys amusing themselves. Scott says he took it off not in consequence of this letter, but because he was afraid the boys would drown themselves. In any case it cannot be said that Mr Anderson was asserting a right on the part of Marlee as against Ardblair. An attempt was made to prove that William Falconer, who was at one time tenant of Whiteloch sawmill, had

Dec. 17, 1912. been told to take his boat off Fingask Loch. Falconer denies this, and it is not proved. There is also evidence of other tenants on Ardblair having boats on the loch. In the same way Thomas Menzies, tenant of the farms of Newbigging and Leys on Marlee, gives evidence of his having a boat on Fingask Loch. He says that he never heard of any of the Ardblair people being interfered with at all. It cannot be said that the successive proprietors of Marlee had exclusive possession of the loch as regards boating.

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Still less can it be said that they had exclusive possession as regards fishing. It is sought to discount such evidence as that given by the Blairgowrie Sheriff-officer, who has fished the loch for thirty years, and has been in the habit of applying to Captain Blair-Oliphant for permission to fish and use his boat, by the fact that all and sundry seem to have come from Blairgowrie to fish when they pleased. No doubt the care and attention bestowed on a loch which holds only pike and perch is not such as is given to water which has been netted of these and stocked with trout. The fact, however, remains, and it tells against the exclusive possession of the pursuer, that not only did people fish who had no right, but the Ardblair proprietor, who could claim under his title that he was exercising a right, did so, and so did his tenants.

As regards shooting, the pursuer here relies upon the terms of the lease granted by her to Captain Blair-Oliphant and the plan annexed thereto, and the subleases granted by him. I do not consider it necessary to go into them in detail. The plan annexed to No. 22 shows the whole subject over which the pursuer was letting her sporting rights, whatever those rights might be. There is not, in my opinion, sufficient to establish acquiescence on the part of the defender in the position which the pursuer is now maintaining. The evidence as to taking sand and cutting reeds does not come to much. There is evidence that defender's tenants took sand from the loch. As regards reeds, the pursuer lays no stress on this as they were only cut on her own side.

Upon the whole matter I am of opinion that the pursuer has failed to discharge the onus there is upon her to prove exclusive possession. The possession by the defender and his predecessors is of the nature, quality, and extent which might be expected in the case of one who had a joint right. I am accordingly of opinion that the defender is entitled to a judgment that he has a joint right in the loch.

LORD KINNEAR.—I agree entirely with the opinions which have been delivered by Lord Dundas and by Lord Mackenzie. I do not think it necessary to repeat what has been said, or to go into any further detail, in expressing my own views, than is unavoidable in order that I should state the opinion I entertain upon the main points of the case.

I think, in the first place, with your Lordships, that if this question stood upon a competition of titles alone, the defender must certainly prevail; the defender has a title which, according to all the authorities, gives him a joint right in the loch with the other riparian proprietors or proprietor. I do not think it is now disputed that a title to lands surrounding a loch of this kind is a sufficient title to the loch itself, and in like manner when the adjacent lands belong to different proprietors, so that the loch cannot be

said to be surrounded by one estate, each has a common joint right with Dec. 17, 1912. the others in the loch, although it is not expressly mentioned in his titles, *Meacher v. Blair-Oliphant*, unless it can be shown that he is excluded by a prior express title, or by a later title which is in its terms exclusive and which has been followed by prescriptive possession. I understand that to be the law, and it is entirely Lord Kinnear. in accordance with what has been said by your Lordships.

The first question, therefore, as between the competing titles is whether the defender's is not preferable in respect of his prior infestment, and upon that point I think it right to make one observation in passing and with great respect to the Lord Ordinary, because I think his Lordship has fallen into an error which, although in the particular circumstances of this case it may not be of practical importance, is nevertheless so serious in point of law that it is necessary to take notice of it, lest the Court should be supposed to have sanctioned a line of argument which is altogether inconsistent with settled law. The parties are I think agreed—at all events it is quite clear to my mind upon the titles adduced—that the earliest title under which the pursuer holds her lands is a Crown charter of 1764. The earliest title upon which the defender holds his lands is a title of 1674, and, therefore, in the competition between these two titles there is no question at all that the defender's is the prior infestment. But the Lord Ordinary examines a great variety of title-deeds, which he describes as the pursuer's and the defender's titles respectively. He goes back in the case of the pursuer to 1541, and to a description contained in a Crown charter of that date, and then he refers specifically to subsequent titles prior to the title of 1764. But the pursuer is unable to trace her right or to connect herself in any way with any one of these titles. Now, I apprehend that is altogether incompetent. These earlier documents are not the pursuer's titles at all; nor are the earlier titles which the defender adduces the defender's titles. The question is what is the title under which the parties respectively hold their lands? They hold only upon titles with which they can connect themselves,—that is to say, titles which they have a right to found upon as creating their rights. The earlier titles are mere pieces of antiquarian history. It is out of the question to assume that because there was a grant in the sixteenth century, which contained a certain right, therefore the proprietor of lands called by the same general name, who begins with the establishment of his own right in the eighteenth century, is entitled to refer to earlier documents with which he has no connection. This is especially material in a question of prescription. I apprehend that nothing can be better settled than that you cannot go back at all, for any purpose, to inquire what was the condition of the right prior to the date of the charter, or of the series of sasines standing together, which forms the basis of the prescriptive possession. The point is put very clearly and forcibly by Lord Moncreiff in the case of the *Duke of Montrose v. Bontine*,¹ where he says, at p. 1197, that to go back to previous titles "to explain away, or alter, or qualify the investiture secured by prescription, is contrary to the very principle of the statute, which, as I have always understood it, was intended and was effectual to shut out all such enquiries." I do not refer to the decision as an

¹ (1840) 2 D. 1186.

Dec. 17, 1912. authority, for it is not in point. But I cite Lord Moncreiff's language as expressing the established rule of law better than I can put it in my own words.

Meacher v. Blair-Oliphant. Therefore we start with the titles of the two dates I have mentioned. Lord Kinnear. The defender's title gives him an express right in riparian lands, and that by construction of law, carries with it a joint right along with the other riparian proprietors in the loch. But this is the earlier infestment, and if the pursuer is to exclude him by a later express grant it is necessary for her to show that the express grant has been followed by exclusive possession for the prescriptive time.

But then it is necessary to consider a point with which your Lordships have already dealt, and on which the pursuer maintains that the defender cannot have the benefit of this doctrine, because it is said his estate is bounded by the boundaries of the parish—being described as an estate lying within the parish of Blairgowrie—and that the loch in dispute lies outside the parish. I agree with Lord Mackenzie that, if it were necessary to decide whether that was in law a good objection, having regard to the position of the title in which the limitation by the parish boundary first found its way into a grant to the defender's author, it would require some serious consideration, but I agree with him also that the question is altogether excluded because the fact upon which the plea is founded has not been proved. There is, to my mind, no evidence requiring serious consideration that the parish of Blairgowrie is bounded by the loch, and, indeed, I am not surprised that there should be none, because it is very difficult to understand how any such evidence could ever come into existence.

There are two kinds of evidence of parish boundaries. In many cases there are authentic documents, either before or after the Reformation, establishing by ecclesiastical authority what are the respective limits of adjoining parishes, or else defining such limitations by decrees of the Commission. But in other cases the only possible evidence depends upon immemorial usage. It must be remembered that until very recently the parish was a purely ecclesiastical area. It is only of comparatively recent date that other public interests came to be regulated by parish boundaries, and, therefore, in all the questions in which boundaries of parishes have had to be considered it has been found necessary to see what was the ecclesiastical division prior to the institution of any civil rights which might be regulated by a parish boundary. Now if there are any such authentic documents as I have figured, which might establish the boundaries of parishes, applicable to the case of Blairgowrie we do not know what they are; they are not produced. I think it is extremely probable that there are none, but at all events their existence is not to be assumed. The other kind of evidence is evidence of long-continued parochial uses which must be, from the nature of the case, ecclesiastical uses; because there was no other interest until recently in the division of parishes. Now it does not appear to me at all probable that, in the present case, there should ever have been any evidence of such uses worthy of consideration, for this simple reason that there is no parochial interest in such a piece of water as this loch. One cannot imagine any ground upon which a question between the ministers of two neighbouring parishes could possibly arise with reference

to such a subject. It is not teindable. It is not the residence of any Dec. 17, 1912.
 parishioner. There is no reason why persons interested in the limits of the parish
 parochial area should ever have considered whether the true parish boundary Blair-
 was an imaginary line drawn through the loch, or the verge of the loch Oliphant.
 itself. The probability, to my mind, is that it was absolutely disregarded Lord Kinneer.
 by both parishes, and that no one ever dreamed of raising such a question.
 It is, of course, good law to say that in Scotland there is no extra-parochial
 land, and I daresay if this loch had been drained and made available for
 some agricultural purpose a question might have arisen as to which parish was
 entitled to have the benefit of it. But that would involve an allocation of
 recovered land, and would depend upon different considerations, both legal
 and practical, from any that are before us now.

As to the evidence which has been actually produced I agree with what
 both your Lordships have said. I think the statistical accounts, besides
 being of very doubtful effect, are mere hearsay, and must be thrown aside
 altogether. As to the evidence of plans, I think the two cases of *Place v.*
*Earl of Breadalbane*¹ and *Gibson v. Bonnington Sugar Refinery*² are con-
 clusive. We do not know enough of the mode in which the plans were
 drawn, or the reasons for drawing them, to attach any importance to them.
 So far as regards the Ordnance Survey map, which is in a somewhat
 different position from the other plan, I think the case to which I have
 referred—*Gibson v. Bonnington Sugar Refinery*²—is quite conclusive. The
 question there had reference to a piece of ground which was described as
 running along the Water of Leith. The grant of the piece of ground con-
 tained a river boundary, and, accordingly, by a well-known rule of law,
 gave the proprietor one-half of the *alveus* of the stream *ex adverso* of his
 land; but it was maintained that in this particular instance he could not
 be the proprietor of any part of the *alveus* because the lands were described
 as lying in the parish of St Cuthbert, and the Ordnance Survey map showed
 that the boundaries of St Cuthbert's and North Leith lay upon his side of
 the river. That is exactly the question that has to be considered now.
 The Court held that the Ordnance Survey map must be disregarded
 altogether. The Lord Ordinary (Lord Mure) treats it as of no weight in
 itself irrespective of other evidence, and he found no such evidence. Lord
 Neaves, at p. 400, put it more strongly, no doubt with the concurrence
 of the other Judges: "I am glad," he says, "that no doubt has been
 expressed by any of your Lordships with regard to the question of the
 parish boundaries, for I think it would be highly dangerous if we held that
 a man could be deprived of his property on such evidence as an Ordnance
 Survey map." That is a perfectly reasonable view, because we know
 nothing of the evidence upon which the engineer officer laid down the
 parish boundaries. His object was not to decide legal questions of
 boundaries either between parishes or between estates, but to lay down a
 correct plan of the country: and the value of his note of the boundaries
 depends entirely upon the evidence upon which he laid them down. It is
 said that in the present case we are entitled to hold that he proceeded upon
 the statements of meersmen. I do not think that makes the matter any

¹ 1 R. 202.² (1869) 7 Macph. 394.

Dec. 17, 1912, better. It shows that the evidence of the map as to parish boundaries rests upon nothing but hearsay and inference, and we know nothing of the grounds upon which the meersmen went, if indeed they made any statement about the matter. I think, for the same reasons which were held sufficient in the *Bonnington Sugar Refining Company* case,¹ we should disregard this evidence altogether.

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Oliphant.

Lord Kinnear.

Therefore, in my view, we may take the title upon the ordinary construction which would be applied to its words as if there were no such limitation as the parish boundaries of Blairgowrie. In that view I think it is a perfectly good title to convey a joint right in the loch just as effectually as if that were expressed in words.

If that be so, then the only question is whether the pursuer has proved exclusive possession of the whole loch. There was some question raised in the case as to whether it was necessary that there should be proof of exclusive possession. I confess I do not see how that question can be raised with due regard to the conclusion in the pursuer's summons. What she seeks to have declared is that she has "the sole and exclusive right to Fingask Loch, including the *solum* thereof." That is the right she has got to prove. How she can prove that right without showing that she has had the sole and exclusive possession—if it depends on possession at all—for the prescriptive period I am unable to understand. It is necessary then that the pursuer's enjoyment of the right should be shown to be exclusive of any use and enjoyment by the defender or by anybody else. For this reason you have to consider the nature of the right which she possesses. It is very clearly stated in Lord Selborne's opinion in the case of *Mackenzie v. Bankes*.² I think it is of great importance to keep in view what the nature of the right really is. His Lordship, at p. 202, says this: "Under titles such as those by which both the competitors in the present case hold (and when nothing turns upon any evidence of exclusive possession) the entire lake if surrounded by the land of a single proprietor, belongs to that proprietor as a 'pertinent' of his land. If there are more riparian proprietors than one it belongs 'rateably' to them all." Then he comes to the point to which I am referring: "So far as relates to the *solum* or *fundus* of the lake it is considered to belong in severalty to the several riparian proprietors if more than one. . . . But for reasons which may be pronounced to be founded in part, if not wholly, on the irregularity of configuration, frequent in lakes, this *ex adverso* rule is not extended by the law of Scotland to these rights (such as boating, fishing, and fowling), which are exercised in or upon the surface of lake waters. These are to be enjoyed over the whole water's face by all the riparian proprietors in common, subject (if need be) to judicial regulation."

Now, that being the nature of the right, it appears to me that the pursuer proves nothing of the character of exclusive right by proving merely that she and her predecessors had exercised upon the surface of the waters those rights which are common to all the proprietors. The question is not whether she has a right to use the surface of the water of this loch for boating, fishing, and fowling—nobody disputes that—but the question is

¹ 7 Macph. 394.

² 5 R. 278; (H. L.) 192.

whether she has a right to the whole loch or the whole *solum*. There—Dec. 17, 1912.
fore she has not advanced a single step in her case by merely showing ^{Meacher v.}
that she has enjoyed those rights in the loch which belong to all Blair-
riparian proprietors. She cannot establish her right, therefore, without ^{Oliphant.}
showing one of two things, either that she has effectively excluded the Lord Kinnear.
defender and his authors from the common uses and enjoyments of the sur-
face of the water, and this on the ground that they belonged exclusively to
herself, or that she has encroached upon what would otherwise have been
the defender's separate property in the *solum*. If she had so encroached it
would be a very strong piece of evidence to show that her right extends
beyond her natural share of the loch. If she has not done that she can only
show that she has exercised an exclusive right in the whole loch and not a
joint right with others in the surface of the loch, by proving that she has
not only used the surface herself but has excluded everybody else. It is
for her to prove exclusion; her own use which excludes nobody proves
nothing.

Therefore I am unable to agree with the Lord Ordinary. The Lord
Ordinary says she has proved that she used the loch, that nobody else has
used the loch, and that, therefore, she is exclusive proprietor. That appears
to me to be altogether unsound. There is not a scintilla of evidence tend-
ing to establish exclusive right, because she did nothing which could not
be supported by the common right which was admittedly vested in her and
her neighbours. In all cases of prescription exclusive possession has only
been held to exist where the person alleging a prescriptive right has done
something which the person against whom prescription is supposed to be
running could have prevented if it were an infringement of his rights.
That is the test. The pursuer must say:—"I, in the exercise of my sole
right, encroached upon what you allege to be your joint right, and you did
not prevent me." I ask how could the defender in this case and his pre-
decessors have interfered to prevent the pursuer from doing any single one
of the things she alleges that she did? He was bound to submit to them,
not because she had a sole and exclusive right to the loch, but because she
had a joint right along with him, which would have been in itself sufficient
to maintain her possession. The only point in this view of the case is that
which is made by the pursuer where she claims to have worked marl on the
defender's side of the loch. If that were proved I should, with your Lord-
ships, have thought that to be a very material consideration. I do not say
that it would be conclusive. One cannot lay down any general rule with
reference to a hypothetical fact, which, if it were proved, must be taken
into account along with the whole other facts of the case. But I think it
is not proved. All that is proved is that there is a hole on the defender's
side of the loch, which might have been caused by people working marl;
but whether it was the defender or whether it was the pursuer who made
it there is no evidence. Therefore I think that point completely fails.

Then the question comes to be whether the pursuer has shown that she
has prevented the defender from making any such use of the loch as he
would be entitled to make if he had the ordinary right of a riparian pro-
prietor. If she had, that again would have been a very strong point in
favour of her claim to an exclusive right. There again I think she has

Dec. 17, 1912. completely failed. The defender and his predecessors have exercised exactly the same kind of right, although, no doubt, to a very inconsiderable extent; that is to say they have used the surface of the loch by their tenants for boating, fishing, and fowling. They have also made an exceptional use of the loch, which involves a direct encroachment upon the right of the pursuer to the entire *solum*, if she has such a right. They have for more than the prescriptive period watered their cattle, and, for the purpose of enabling them to water their cattle, have driven piles into the *solum*. Now, if they had no right in the loch, it was for the pursuer and her predecessors to interfere to prevent that encroachment if they were to maintain afterwards that they themselves had an exclusive right. It is said that use for watering cattle is to be referred to a right of servitude. I apprehend that is an altogether untenable position. There is nothing in the process to show any right of servitude. The only known right to which the defender's use and possession of the loch can be referred is the undoubted right of property which the defender holds by virtue of his titles. He has a perfectly good property title—and I think that is not disputed—which would support this use of the loch, in like manner as it would support his use of the loch in other ways. Why is his use of it not to be referred to that undoubted title rather than to an entirely imaginary or, to say the least, a purely hypothetical right of servitude? There is evidence of property: there is no evidence of servitude right apart from property. The vital importance of the point becomes evident when it is considered for what purpose this practice of watering cattle is employed by the defender. He does not require to show a use of the loch; he has a perfectly good title without possession at all. The value of his use of the loch is that he can show that he was not interfered with by the pursuer. That is the point to be explained. If the pursuer could have shown that she did not object to the defender's practice of watering cattle because he had established or alleged a servitude right there might have been something in the point; but otherwise, it appears to me untenable. Now there is nothing to suggest that the practice was ever challenged or that the defender ever maintained it on the ground of a servitude over the property which he admitted to be the pursuer's. If the right were allowed only because it was a servitude, the pursuer would, I think, be required to show that she and her predecessors knew of the servitude, and did not interfere because there was a servitude known to exist and upon no other ground. The whole theory of the pursuer is that she was excluding the defender; and, therefore, it lies upon her to establish that the encroachment upon her alleged exclusive possession can be accounted for by showing that she allowed it upon a ground in law consistent with the existence of her exclusive right. It appears to me, therefore, upon the whole case, without going into a further examination of the actual facts which have already been explained, that there is no evidence of such possession as would establish a prescriptive right.

The pursuer's counsel founded upon a passage in Lord Watson's opinion in the case of *Lord Advocate v. Wemyss*,¹ for the purpose of showing that

¹ 2 F. (H. L.) 1, at pp. 9 and 10.

she might succeed upon some more slender evidence of possession than is Dec. 17, 1912. ordinarily necessary to establish an adverse right. But Lord Watson ^{Meacher v.} makes it perfectly plain that this is exactly the kind of case to which his Blair-Oliphant. observation does not apply. What his Lordship says is that, in the case of a grant of a particular kind of right, the grantee's right as against the Lord Kinnear. grantor may be explained by a possession falling short of that which would be necessary to establish a prescriptive right against an adverse claim. The particular right which he was considering was a right of foreshore; and for a fuller exposition of what his Lordship means he refers to Lord Blackburn's judgment in the case of *Lord Advocates and Clyde Trustees v. Lord Blantyre*.¹ In that case what was found was that, if the holder of a property under a barony title had had such uses as the nature of the subject permitted in parts of the foreshore where his land adjoined the river, he might be held to have established as against the Crown a right to the entire foreshore. The only question was whether partial possession would do, and whether possession of such limited nature as possession of the foreshore must necessarily be would be effectual. I think all that Lord Watson means is that such partial possession is good as against the grantor, but his own statement clearly shows that he did not mean to say that it was of any avail for the purpose of establishing an adverse right against a stranger to the grant founding upon a competing title.

On the whole matter, therefore, I agree with your Lordships that the interlocutor of the Lord Ordinary must be recalled and the defender assolizied.

THE COURT recalled the interlocutor of the Lord Ordinary and found that the defender in virtue of his titles had a joint right of property along with the pursuer to the Fingask Loch, and that the pursuer had failed to prove the sole and exclusive right thereto, and assolizied the defender from the conclusions of the summons.

MACPHERSON & MACKAY, S.S.C.—LINDSAY, HOWE, & Co., W.S.—Agents.

IAN THEODORE NELSON, Pursuer (Respondent).—*Blackburn, K.C.*— No. 60.
Black.

WILLIAM CHALMERS & COMPANY, LIMITED, Defenders (Reclaimers).— Dec. 17, 1912.
Sandeman, K.C.—*Hon. W. Watson.*

Sale—Disconformity to contract—Rejection—Transference of property—Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), secs. 11 (2), 17, and 18, Rule 5 (1)—Contract for building yacht—Passing of property on payment of first instalment—Right to reject completed yacht as disconform to contract. ^{Nelson v. William Chalmers & Co., Limited.}

A firm of shipbuilders contracted to build a yacht to the satisfaction of the designer (who was to superintend the work), the builders undertaking to put right within the time stipulated for the vessel's completion anything considered by him to be unsatisfactory. A clause in the contract provided that "the right of property in the yacht will pass from the contractors to the owner on payment of the first instalment of the price."

The first instalment was paid; but repeatedly, during the progress of

¹ (1879) 6 R. (H. L.) 72, at p. 85.

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construction, complaints were made of defects in the workmanship. These the builders undertook to put right, but they failed to do so; and, when the yacht was completed, it was, on account of these defects, disconform to contract. The purchaser thereupon rejected the yacht and brought an action against the builders for repayment of the instalment paid and for damages. The builders maintained that as, by the terms of the contract and the provisions of the Sale of Goods Act, the property had passed on payment of the first instalment the purchaser was barred from rejecting the yacht.

Held, in the circumstances, that the purchaser had never accepted the yacht or any part of it as conform to contract, and, accordingly, was not barred from rejecting it.

Observed that the provisions of the Sale of Goods Act with regard to the passing of property in goods sold did not destroy in any way the existing right under Scots law of rejection for disconformity to contract, which was preserved unimpaired by sec. 11 (2).

Observed further that property might pass consistently with the existence of a right of rejection before final acceptance.

EXTRA
DIVISION.
Lord Dewar.

ON 25th April 1911 A. Mylne, naval architect, Glasgow, acting on behalf of Ian Theodore Nelson of Glenetive, entered into a contract with William Chalmers & Company, Limited, shipbuilders and engineers, Rutherglen, for the construction of a 42 feet screw motor yacht.

The material portions of the contract were as follows:—

"1. The contractors on the one hand agree to have built and equipped a motor yacht to the approximate dimensions given. The yacht to be built in first-class style to plans and specifications got out by the designer [Mr Mylne], a copy of the specification being appended and signed as relative hereto, and while in course of construction to be superintended by the said designer or his inspectors. The contractors agree to put right within the time stipulated for the construction of the yacht, any part of the work considered unsuitable either in material or workmanship by the said designer. . . .

"4. The contractors bind and oblige themselves to have the yacht completed in accordance with the specification, and to the satisfaction of the said designer, not later than twelve weeks from receipt of first building plans (unless prevented by strikes or other causes outside the control of the contractors, in which case they shall be allowed such extra time as may be considered reasonable). . . .

"5. The price to be paid by the designers to the contractors (exclusive of extras) shall be £525 (Five hundred and twenty-five pounds stg.), payable in instalments, as provided in the specification.

"6. The right of property in the yacht will pass from the contractors to the owner on payment of the first instalment of the price, subject to the contractors' lien for the balance of the price, and extras. . . .

"SPECIFICATION

"*General*.—To be built as per accompanying plan, scantlings as herein specified.

"*Material*.—All material used in the construction to be of the very best quality. Inferior quality of material will be cut out no matter at what stage the work is.

"*Workmanship*.—Workmanship to be of the highest class. Hull, sheer, &c., to be perfectly fair, all to designer's or owner's satisfaction, and all details not particularly specified, to be at least equal in quality to any other first-class yacht. . . .

"*Payments.*—Will be made in four instalments: One-fourth when in frame, one-fourth when plated, one-fourth when decks laid and caulked, and one-fourth when vessel is handed over complete according to plans and specification. . . .

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"*Finally.*—Notwithstanding any omissions in this specification and accompanying sketch plans, it is to be clearly understood the vessel is to be finished and ready for sea, with everything complete and as fitted in first-class motor yachts, and all to owner's satisfaction."

On 24th August 1911 Nelson rejected the yacht tendered by the builders as being disconform to contract, and on 7th November 1911 he brought an action against them for (1) payment of a sum of £131, 5s., being the amount of the first instalment of the price which he had paid on 27th June 1911; (2) delivery of an engine and other articles supplied by him for the yacht, or alternatively payment of a sum of £525, 6s. 9d. representing their value; (3) payment of a sum of £150 of damages.

The pursuer (besides averring that the defenders were in breach of their contract in respect that the yacht was not completed timeously) averred, *inter alia*;—(Cond. 6) "Further, the defenders were in breach of their contract in respect that the workmanship of the yacht was not in accordance with the terms of the contract and specification. In particular, the whole shell plating of the yacht was of very inferior workmanship, and was not fair. On the contrary, it was uneven, and was faired up with cement in a manner and to an extent which was quite inconsistent with good workmanship. It is believed and averred that the said plating would not have been watertight. These defects were repeatedly pointed out to the defenders by Mr Mylne, and by his assistant, Mr James. The defenders from time to time promised to have the said defects remedied, and induced Mr Mylne and Mr James to give them time to do so. Had it not been for the defenders' promises aforesaid, the pursuer's representatives would not have allowed the defenders to proceed with the work. They, however, failed to implement their said promises, with the result that on 24th August 1911, being satisfied after inspection of the yacht that the defenders had not fulfilled the promises which they had made, and that the said promises were then impossible of fulfilment, the pursuer was compelled to reject the yacht as disconform to contract. The pursuer at the same time informed the defenders that they were not to put the engine, &c., into the yacht. The said yacht was not built in first-class style; the workmanship was not of the highest class; nor was the yacht completed to the satisfaction of the designer or the owner, both of whom, on the contrary, were and are highly dissatisfied with the boat."

The defenders' case on record was, with regard to the alleged delay, that such delay as there had been was due to Mr Mylne's failure to furnish plans, and also to the dilatoriness of the makers of the engine, and a strike in their own yard; with regard to the alleged disconformity of the yacht to contract, that she was in fact conform to contract, but that, at any rate, no complaints had been made either by the pursuer or his designer during the progress of the work at a time when under the contract these complaints should have been made, and when the alleged defects could still have been remedied in terms of the contract. What, however, ultimately proved to be the main contention of the defenders did not appear on their record, and was only made at the hearing upon evidence. It was to the effect

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that the pursuer was barred from rejecting the yacht at any time after payment of the first instalment of the price, because she then became irrevocably his property, and no man could reject that which had become his own.

A proof was allowed and led. The import of the evidence will be found set forth in the opinion of the Lord Ordinary, *infra*.

On 1st April 1912 the Lord Ordinary (Dewar) pronounced the following interlocutor:—"Decerns against the defenders (1) to make payment to the pursuer of the sum of £131, 5s. sterling, with interest thereon as concluded for; (2) to deliver to the pursuer within the next thirty days the following articles, viz.:— . . . and failing their doing so decree will be pronounced for the value of the foresaid articles; and (3) to make payment to the pursuer of the sum of £75 sterling in full of the conclusion of the summons for damages."*

* "OPINION.—[After narrating the parties' averments and the terms of the contract]—Parties appear to have had two questions prominently before them, viz.:—(1) What was to be the quality of the work? and (2) within what period was the yacht to be delivered? And they came to a definite agreement on both points. I think the true meaning of the contract is shortly this:—The defenders agreed to build the yacht in first-class style with workmanship of the highest class, and to deliver it within twelve weeks; and they further agreed that the question whether the workmanship was satisfactory or not should be finally decided by the pursuer or the designer. And I think it follows that if the vessel was not delivered within the stipulated time, or if the pursuer or the designer were dissatisfied with the workmanship, the conditions of the contract have not been fulfilled; unless it can be shown that the delay in delivery was due to causes outside the control of the defenders, and that the decision as to the quality of the workmanship is corrupt.

"The portion of the workmanship to which the pursuer takes exception is the shell plating. The plates it appears in a yacht of this kind are very thin, and it is difficult and delicate work to rivet them in such a manner as to prevent bulging and irregularities. Parties evidently had this in view when they entered into the contract, for it is specially referred to in the specification—'Hull, sheer, &c., to be perfectly fair, all to designer's or owner's satisfaction.' The difficulty in getting this perfect fairness began to appear at an early stage of the construction. When some of the plates had been riveted, Mr Mylne on the 28th of June pointed out to the defenders that they were not fair, and he was informed by Mr Douglas Eadie that the irregularities would be faired out before the work was completed. Sometime afterwards Mr Mylne had occasion to leave Glasgow, and did not return until the middle of August. In his absence Mr James—his principal assistant—superintended the work, and he also complained on several occasions of the unfairness of the plates, and he got the same answer as Mr Mylne. And Mr Nelson, who occasionally visited the yard during the construction, also mentioned the unfairness, and was told that it would be put all right.

"When Mr Mylne returned to Glasgow in the middle of August he was informed by Mr James that the work was not in a satisfactory condition, so he telegraphed to the pursuer, and on the 16th of August they went to inspect the yacht. Mr Mylne states that he found the plating on the whole hull was so unfair that he was exceedingly doubtful whether the plating was watertight, and he at once advised the pursuer not to take delivery of the vessel. He states: 'I communicated to Mr Douglas Eadie my view as to the unfairness of the plating. I said it was a shocking job. He said he did not think it was so bad. I walked round with Mr Eadie and the pursuer, and said pretty well what I thought about it—that it was really

The defenders reclaimed, and the case was heard before the Extra Division (consisting of Lord Kinnear, Lord Dundas, and Lord Mac-
kenzie) on 6th, 7th, and 8th November 1912.

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Argued for the reclaimers;—The pursuer was not entitled to reject the yacht. If he had a grievance, he had mistaken his remedy, the only remedy open to him being an action of damages for a sum representing the difference in value between the yacht which he had ordered and the yacht which had been delivered to him. Doubtless under the law prior to the passing of the Sale of Goods Act, the pursuer could have rejected the yacht, seeing that under that law the right of property could not pass until delivery, and the yacht had not been delivered. But by sections 17 and 18 of the Sale

so very bad that we could not think of taking delivery of the boat.' Mr Nelson does not pretend to have expert knowledge, but he agrees that the plates were unfair; he states: 'I was very much disappointed with it; it was exceedingly bad. I don't think it was so good as it had been on the former occasion when I complained about it. In my view Mr Eadie had not implemented the promise he had made that it would be put all right.' Now the defenders specially agreed that this particular piece of work must satisfy the owner or designer, and both are very much dissatisfied. That appears to me to be conclusive. It is not suggested that they are actuated by any corrupt motive; it is admitted that both are honestly of opinion that the work is unsatisfactory, and it is further admitted that Mr Mylne is an experienced and competent naval architect. The defenders' case is that the designer's and pursuer's opinions are not well founded. I do not think that is a good defence in view of the terms of the contract, but in any case I am satisfied on the evidence that the plating was not in a satisfactory condition, and that the pursuer was justified in refusing to take delivery. [His Lordship then examined the expert evidence as to the condition of the plating.]

"But the defenders maintain that, even if the plating were not conform to contract on the 24th of August, the pursuer was not entitled to reject the yacht, because it was the duty of the designer to superintend the construction and point out defects as the work proceeded, and if the plating was not to Mr Mylne's satisfaction he ought to have insisted on its removal at an earlier stage. But, as I have said, I think it is proved that the defects were pointed out, and the defenders gave the assurance that they would be put right. I am aware that Mr Douglas Eadie denies this, but I was not favourably impressed with the manner in which he gave his evidence, and I regret that I cannot put any reliance upon what he says. If the vessel was disconform to contract on 24th August, and I am of opinion that it was, I do not think that the pursuer was bound to give the defenders further opportunity of putting it right; indeed, they never asked him to do so. They knew that it was required for the shooting season, and that time was an essential element in the contract. They admit that they received the contract because they agreed to deliver within twelve weeks. It is true that pursuer was prepared to accept delivery on 24th August if the workmanship had been satisfactory; but he was not bound to wait indefinitely. He had, I think, been very reasonable throughout—he gave them every opportunity, and they failed to give satisfaction, and I formed the impression that the real cause of their failure was that they had not sufficient experience for delicate work of this kind.

"The defenders further founded on clause 6 of the contract, which provides that 'the right of property in the yacht will pass from the contractors to the owner on payment of the first instalment of the price,' and argued that, as the first instalment had been paid, the yacht was now the property of the pursuer, and he was not entitled to refuse delivery and sue for repay-

Dec. 17, 1912. of Goods Act, 1893,* the right of property could pass at any time intended by the parties to the contract, and after that time the purchaser could not reject. The case accordingly turned upon the 6th section of the contract. Under that section the right of property in the yacht passed to the owner after he had paid the first instal-

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ment of the instalment. This appears to me to be an argument on relevancy, and if the defenders intended to insist on it, they ought to have taken it at an earlier stage. They gave no indication of it until the proof was closed and pursuer's counsel had been heard on the evidence. But in the view I take, of the contract the argument is unsound. The contract is for a completed yacht to be built in terms of a specification to the satisfaction of the pursuer. Clause 6 is intended merely as a security. Under such a contract I do not think that the pursuer is bound to accept delivery unless the vessel is completed conform to the contract. The defenders contracted to make and deliver a specified article within a definite time. They have not done so, and I see no reason why the pursuer should not be entitled to demand repayment of the instalment of the price he paid in advance for an article he has not received.

"If I am right in thinking that the workmanship was not conform to contract, I do not think that it is necessary to examine in detail the question as to the cause of the delay; but I think the defenders have failed on this part of the case also. On record (answer 5) they aver that the delay in delivery was due to three causes—(1) Mr Mylne's failure to furnish the plans; (2) the dilatoriness of the engineers; and (3) a strike of ironworkers in defenders' yard—[His Lordship examined the evidence on the question of delay]. I am satisfied on the evidence that they have failed to prove that it was due to any of the causes which they allege on record.

"On the question of damages the defenders did not, I think, dispute that if there was a breach of contract some damages were due. I have carefully considered the evidence, and I think the pursuer's loss may be fairly estimated at £75. On the whole matter I am of opinion that the defenders are in breach of their contract, and that the pursuer is entitled to decree in terms of the first and second conclusions, and to decree for £75 in terms of the third conclusion of the summons, with expenses."

* The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), enacts:—

Sec. 11. "(2) In Scotland failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."

Sec. 17. "(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

Sec. 18. "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

Rule 5. "(1) Where there is a contract for the sale of ascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made."

ment, and the yacht being thereafter his own, he could not reject his own property. Even, however, if payment of the first instalment did not involve the passing of property in the yacht as a whole it at any rate involved the passing of property in, and the acceptance of, that portion of the yacht which had been completed at its date, and work done on the yacht thereafter was work done on the owner's own property and became accessory to the principal.¹ His only remedy was to examine from time to time the new portions of the work as they were added to the old and reject them timeously, for the doing of which ample opportunity was given him by the contract, which allowed him the amplest powers of inspection. The object of section 6 of the contract was to protect the purchaser against the creditors of the builders, and he must be prepared to take the *incommodum* along with the *commodum* of his contract. The Mercantile Law Amendment Act, 1856,² had given security to the buyer against the seller's creditors without passing the property. The Sale of Goods Act, 1893,³ effected the same result by making it possible to pass the property without delivery of the goods. The flaw in the pursuer's argument was that he failed to recognise that the payment of the instalment was equivalent to acceptance of the yacht, at any rate so far as then in existence, and there was no case extant in which it had been held that a person was entitled afterwards to reject goods which he had already accepted. The cases cited for the pursuer were all distinguishable. In *Spencer & Company*⁴ the question was not as to the right of rejection, but as to whether the purchaser could keep the ship and claim damages. In *Aird & Coghill*,⁵ and in *Vigers Brothers*,⁶ there had been no acceptance of the goods. The proof clearly showed that the pursuer had deliberately allowed the defenders to proceed from stage to stage in the building operations, and therefore he was now barred from coming forward and saying he rejected the whole work *ab initio*. Accordingly the pursuer could not reject the vessel, and there were no materials in the present action for dealing with a claim of damages. As regarded machinery supplied by the pursuer, the bulk of it had been incorporated in the yacht, and the defenders had a right of lien over the yacht for the unpaid price; in so far as it had not been built into the yacht they were entitled to exercise a right of retention.⁷

Argued for the respondent;—The judgment of the Lord Ordinary was right and should be sustained. The contract was a perfectly simple one. It was a contract for a complete yacht, not for a part or portion of a yacht. The yacht was to be built to a certain specification, and to the satisfaction of the designer, and within a certain time. The completed yacht was not according to specification, did not satisfy the designer, and had not been completed in time. It was accord-

¹ *M'Bain v. Wallace & Co.*, (1881) 8 R. 360; *Seath & Co. v. Moore*, (1886) 13 R. (H. L.) 57; *Barclay, Curle, & Co., Limited, v. Sir James Laing & Sons, Limited*, 1908 S. C. 82, (H. L.) 1; *Bell's Com.* (7th ed.) vol. i. 189.

² 19 and 20 Vict. cap. 60.

³ 56 and 57 Vict. cap. 71, secs. 17, 18.

⁴ (1879) 7 R. 396.

⁵ (1904) 7 F. 258.

⁶ [1901] 1 K. B. 608.

⁷ *Moore's Carving Machine Co. v. Austin*, (1896) 33 S. L. R. 613; *Maikle v. Wilson & Pollard*, (1880) 8 R. 69; *Glendinning v. Hope & Co.*, 1911 S. C. (H. L.) 73, Lord Kinnear, at p. 78. *Bell's Com.* (7th ed.) vol. i., pp. 176, 181, and 275, was also referred to.

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ingly disconform to contract, and the purchaser was entitled, under the ordinary rules of the law of sale, to reject the yacht within a reasonable time.¹ The proof showed that the pursuer had in no way been to blame for the delay which had occurred, and also that he had timeously pointed out the defects for which he ultimately rejected the yacht, and that he had given the defenders ample opportunity of rectifying them as provided for by the contract. It was said, however, that he was deprived of the statutory right of rejection by clause 6 of the contract and by the new law as to the passing of property introduced by the Sale of Goods Act, 1893. It was argued that, the right of property having passed, the pursuer could no longer reject that which was his own, the idea of rejection being, it was said, only compatible with the property still remaining in the other party. That argument, however, was fallacious. There was nothing incongruous in the idea of property passing to the purchaser and thereafter repassing to the seller on rejection for nonconformity to contract. The purchaser might well be the owner, although his right of property was defeasible at his own option. The possibility of the rejection of an article, although the property in it had already passed, had been recognised in a number of cases.² Here, however, no property had passed, because, under the contract, property could only pass in a yacht conform to contract, and until her completion such portions of her as were built were "unascertained" goods in which, under section 16 of the Sale of Goods Act, 1893, no property passed. Even, however, if property had passed, there had been no final acceptance of the yacht, or any portion of her, as conform to contract, and until final acceptance had taken place, rejection was always open. The defenders were confusing two different kinds of contract, the contract of sale and the contract of *locatio operis*.³ This was an ordinary contract of sale for a completed yacht to be accepted or rejected on completion in the ordinary way, with a subordinate clause adjoined, temporarily regulating the ownership of the vessel in questions with third parties during the operation of the building.⁴

At advising on 17th December 1912,—

LORD KINNEAR.—I have some difficulty in construing the contract in this case, in which we have to consider the scope and operation of an unfamiliar legal conception, introduced into our system for the first time by the Sale of Goods Act, 1893. Nevertheless, I think the vital question between the parties is one of fact; and upon the facts, I not only agree with the Lord Ordinary, but, I may add, that inasmuch as the controversy turns upon a balance of conflicting testimony, I should be prepared to accept as final the decision of the Judge who saw the witnesses and heard their evidence.

The question is whether the pursuer is entitled to reject a motor yacht built for him by the defenders as disconform to contract; and to recover damages. The contract was made between A. Mylne, Glasgow, the designer

¹ Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), secs. 11 (2), 53 (5).

² *Spencer & Co. v. Dobie & Co.*, 7 R. 396; *Aird & Coghill v. Pullan & Adams*, 7 F. 258; *Vigers Brothers v. Sanderson Brothers*, [1901] 1 K. B. 608.

³ *Bell's Com.* (7th ed.) i. 485.

⁴ *Orr's Trustees v. Tullis*, (1870) 8 Macph. 936, was also referred to.

of the yacht, acting on behalf of the owner, and Chalmers & Company, Dec. 17, 1912. the defenders; and the material terms are that the defenders engage to build and equip for the pursuer a motor yacht of given dimensions, to be built in first-class style to plans and specifications got out by the designer, and while in course of construction to be superintended by the designer or his inspectors; that the contractors agree to put right within the time stipulated for the construction any part of the work considered unsuitable either in material or workmanship by the designer; that the price is to be paid by instalments; and that the right of property is to pass from the contractors to the owner on payment of the first instalment. It is further stipulated in the specification which is embodied in the contract that the workmanship is to be of the highest class. Hull, sheer, &c., to be perfectly fair, all to designer's or owner's satisfaction, and all details not particularly specified to be at least equal in quality to any other first-class yacht. The first instalment of the price was paid on the 27th of June when the boat was in frame, and the defenders say she was finished on the 16th of August 1911. On the last-mentioned day she was inspected by the pursuer and Mr Mylne, a naval architect who had designed the yacht and who is referred to in the contract as the designer. Mr Mylne advised the pursuer not to take delivery. The yacht was inspected again by Mr Mylne and a second naval architect on the 24th August and was then definitely rejected on the ground that the plating of the whole hull was defective. I agree with the Lord Ordinary that their objection was well founded in fact. It was stipulated that the workmanship should be of the highest class, "to the designer's or owner's satisfaction." They were both dissatisfied; and there is no good ground for suggesting that their dissatisfaction was capricious or unreasonable. If we accept the evidence for the pursuer as the Lord Ordinary does—and I see no reason to differ from him—the workmanship was so bad that no naval architect could have passed it. The boat as tendered was not the yacht for which the pursuer had bargained, and was indeed unfit for the purpose for which he had ordered it.

In these circumstances I do not think it doubtful that according to the former law the pursuer would have been entitled to reject the vessel, rescind the contract, and claim damages. But it is said that this right of rejection rested upon the rule that no right of property could pass without delivery, actual or constructive, and that a buyer can have no such remedy in a case where under the new law, the property is transferred by the contract itself. This was argued, in the first place, on the ground—although I do not think this first point was very confidently maintained—that for a purchaser to reject what has actually become his own is a legal impossibility, or contradiction in terms. I cannot say that the Lord Ordinary's answer seems to me satisfactory when he says that the clause as to the transference of the property was intended merely as a security. How far a right in security may be effectually created under colour of a sale it is unnecessary in this case to inquire. I do not think it doubtful that the transaction in question was a true sale intended to pass to the purchaser the absolute ownership of the yacht. But the alteration of the law as to the transference of property seems to me to make no difference in the buyer's right to reject goods that are not conform to contract. He is not bound to accept something different

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Dec. 17, 1912. from what he bargained for. The property of the yacht to be built in terms of the contract passes by force of the contract. But if the vessel tendered is not the yacht for which the pursuer bargained it is not the yacht of which the property is transferred. On that hypothesis there was no purchase or sale of the vessel tendered, and no property passed. The case is exactly in the same position as if under the former law the vessel had been delivered and then rejected without undue delay. The property would have been effectually transferred if she were conform to contract but not otherwise. Accordingly, the cases are numerous in which goods delivered in the alleged performance of a contract of purchase and sale have been rejected after delivery ; and the question considered in such cases has not been whether rejection is barred by delivery, but whether the goods have been accepted either expressly or by the failure of the purchaser to intimate his dissatisfaction in due time—and the right to reject in such circumstances is expressly confirmed by section 11, subsection 2, of the Act, and is further supported by the provisions of section 35.

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The law of Scotland, as the learned annotator of the Sale of Goods Act justly remarks, does not accept the English distinction between conditions and warranties, which forms the subject of the first part of the 11th section ; and accordingly the right of rejection has been much larger in Scotland than in England. It thus became necessary in passing the Act either to abrogate or maintain this distinction between the two laws ; and to this end, the statutory rules as to warranties are confined to England, and the Scottish right of rejection as it was before the Act is expressly preserved by the Act. I am therefore unable to doubt that unless the pursuer can be shown to have accepted the yacht as tendered, or to be barred from now insisting in his right to object, he is exactly in the position contemplated by the 11th section, and by reason of the seller's failure to perform a material part of the contract, he is entitled to reject the boat and to repudiate the contract.

But assuming that rejection may not be in general irreconcilable with a previous transference of the right of property by contract, the defenders' counsel presented a much more formidable argument on the particular terms of the contract in question. They maintained that the effect of the 6th clause is to pass the property in the frame at the time of payment of the first instalment of the price, and that the actual payment of that instalment imports acceptance of the work so far as then completed. Therefore the contract was completely executed so far as regards that part of the boat by transference of the property and payment of the price ; and it follows that all subsequent work was work done on a boat which was really the property of the purchaser and not of the shipbuilder, and so became part of that property by accession. I have some difficulty in taking that view of the contract, because what the pursuer bargained for was a complete yacht and not a part only ; and the property which the contract purports to pass is of the whole and not of successive parts. But the argument was very forcibly urged on the authority of Lord Watson's judgment in *Seath & Company v. Moore*.¹ The learned lord says that when it is the agreement of the parties to a contract for the construction of a ship that at a particular stage of its construction

¹ 13 R. (H. L.) 57. .

the vessel, so far as then finished, shall be appropriated to the contract of Dec. 17, 1912. sale, the property of the vessel, as soon as it has reached that stage of completion, will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, *accessione*, become his property. He adds that an agreement to this effect is to be inferred from a provision that an instalment of the price shall be paid at a particular stage coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage the execution of the work was regularly inspected by the purchaser. This makes it evident that an agreement to the effect described is perfectly possible in law, but it leaves the question in each case to depend on the true construction of the particular contract. I am not satisfied that the pursuer agreed to accept work already executed except as part of the completed subject which was to be delivered to him when the work was finished, and I do not see that he is prohibited from saying, when the completed ship is tendered to him, that as a whole it is disconform to contract, unless it can be said that he has already accepted it in each and all of its successive stages of completion. But the point which seems to me to create the most real difficulty is not so much dependent upon the particular moment at which the property passes as upon the special stipulations for inspection on behalf of the purchaser. If the yacht had been already accepted, the pursuer had lost his remedy at the time when he intimated his final rejection. It is said with undeniable force that the whole contract must be taken together. The stipulations as to the transfer of the property on the one hand and as to the inspection of the work on the other are interdependent. It is just because the property passes by the contract that it is of importance for the purchaser to stipulate that while in course of construction the vessel shall be superintended by the designer or his inspectors, and further that the contractors agree to put right any part of the work which the designer considers unsuitable either in material or workmanship. I do not doubt that these stipulations impose a duty upon the purchaser. According to all the authorities it is for the purchaser of goods to satisfy himself whether the contract has been fulfilled, and to reject the goods unreservedly if they are not conform to contract.

Now the pursuer not only had sufficient opportunity to satisfy himself that the contract was being fulfilled, but by an express stipulation he undertook to do so. If he had neglected this duty or if, on inspection, he was satisfied, or had concealed his dissatisfaction so as to allow the contractors to go on with the work on the understanding that so far as already seen it was sufficient, he would in my opinion have lost his right to object to the vessel on the ground of disconformity to contract. But this duty was in fact performed by his designer or his inspector; and the work which is now challenged as deficient was not passed by the designer. On the contrary, it is proved that Mr Mylne and his inspector complained in due time of the plating of the hull, and if they did not insist on the plates being replaced it was because the defenders undertook that the unfairness would be put right before the completion of the work. It follows that on the defenders' own argument they are in breach of contract, because the stipulation for inspection could serve no purpose if, notwithstanding their failure to do what they undertook to do in order to obviate the inspector's objection,

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Dec. 17, 1912. they are still entitled to say that the contract has been duly performed. I do not think they improve their position by alleging that their promise to put things right could not in fact be performed. It was nevertheless the condition on which they were allowed to complete the work; and if they failed to perform it, they cannot turn the pursuer's incautious belief in their promise, if so be that it was incautious, into an acceptance of bad workmanship which his designer had required them, and they had undertaken, to put right. The condition which Lord Watson considers is material to determine the acceptance of the work at subsequent stages has not been satisfied because none of the stipulated instalments except the first have been paid; and the pursuer declined to pay the balance in August on the ground that he had rescinded the contract and rejected the yacht.

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In this view of the case the question whether the yacht was completed in time does not arise. On the whole matter I agree with the Lord Ordinary and am for adhering to his interlocutor.

LORD DUNDAS.—I am of the same opinion.

The defenders found upon clause 6 of the contract, which provides that "the right of property in the yacht will pass from the contractors to the owner on payment of the first instalment of the price, subject to the contractors' lien for the balance of the price, and extras." One must consider at the outset the meaning and effect of this clause. Since the passing of the Sale of Goods Act, 1893, it appears to be, in the words of Lord Dunedin (*Barclay, Curle, & Company, Limited*¹), "quite clear that, by the law of Scotland, if people choose so to contract, they can pass the property of a thing which is being sold without delivery. . . . There is not the slightest difficulty in so framing a contract, if it is wished, . . . that the property in a gradually constructed ship shall be held to pass at certain stages." The Lord Ordinary observes that "clause 6 is intended merely as a security." This is an inaccurate mode of expression; but I do not consider that (as the defenders argued) it necessarily indicates any confusion of thought or erroneous view in law on the part of his Lordship. I should think he would agree in holding—as I should hold, and as I understood both parties to concede—that the object of clause 6 was to enable the pursuer, in the event of the defenders' sequestration, to vindicate his right to the yacht, though unfinished, in a question with their trustee. The clause is not happily framed, for the right of property in "the yacht," which *prima facie* should mean the completed vessel, could not, in the nature of things, pass at a time when *ex concessis* its construction was only at an early stage. But I rather think the defenders are so far right that the intention of clause 6 was to pass to the pursuer the property of the vessel as she stood when the first instalment was paid. The defenders' counsel urged that, if that be conceded, they must win the case. The pursuer cannot, they said, be entitled to the *commodum* of the clause and yet immune from its *incommodum*; and he is plainly debarred from rejecting the yacht at any time after payment of the first instalment of the price, because she then became irrevocably his property, all subsequent work upon her following by way of

¹ 1908 S. C. 82, at p. 89.

accessory to the thing as it stood at the date of that payment; and no man can reject his own property. I observe in passing that the Lord Ordinary points out that this view is not specifically raised upon the record—as it ought to have been, for it is truly a preliminary plea to the competency of the action as laid—but was only advanced in the speech of the defenders' counsel after the proof, and after his opponent had concluded his address. But the argument has been presented, and must be dealt with on its merits, whatever bearing the lateness of its appearance might have upon expenses.

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It is *prima facie* rather a formidable contention; but I have come to the conclusion that it is fallacious. I think it confuses passing of property with acceptance on delivery. Now, a buyer's right at common law to reject goods on the ground of disconformity to contract at any time before he has duly accepted delivery does not seem to have been altered or impaired by the provisions of the Sale of Goods Act (see sections 11 (2), 35, and 53 (5)). Section 11 (2) affirms in terms that "in Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer . . . within a reasonable time after delivery to reject the goods and treat the contract as repudiated. . . ." In this case there has been no delivery to the pursuer or "voluntary transfer of possession" (section 62 (1)) of the yacht or any part of it. Assuming, therefore, that the parties intended and agreed that the property of the yacht—"property" in the sense of section 62 (1) of the Act, *plenum dominium*—should pass to the pursuer as the defenders contend, and that it did so pass, it does not, in my judgment, follow that his right to reject the vessel at a subsequent stage, when she was tendered for delivery, was thereby cut off, if he had otherwise good grounds for rejection. There is nothing, I think, necessarily incongruous in the idea that property may pass consistently with the existence of a right of subsequent rejection before acceptance following on delivery. Such a position may, it seems to me, well arise where property in the, as yet, uncompleted subject of a contract of sale has passed to the buyer. He is the owner; but his right of property may be defeasible at his option. This seems to be assumed in the decision of *The Colonial Insurance Company of New Zealand*.¹ An instance by way of illustration has been suggested. If a purchaser should subscribe for a complete book to be published in separate parts to be paid for as delivered, the property in the parts delivered would pass to him, but it seems reasonably clear in principle that he might nevertheless, under given circumstances, be entitled to return them and recover their price, if the seller made default in completing the book, or if the book, when it professed to be completed, was materially disconform to the contract. I think the Lord Ordinary is substantially correct in saying that "the contract is for a completed yacht to be built in terms of a specification to the satisfaction of the pursuer. . . . Under such a contract, I do not think that the pursuer is bound to accept delivery unless the vessel is completed conform to the contract."

If the views I have expressed are sound, the matter is reduced to questions of fact—whether or not, upon the evidence, the work was so completed; and if not, whether the vessel was accepted by the pursuer as con-

¹ (1886) 12 App. Cas. 128, see p. 140.

Dec. 17, 1912. form to contract and to his satisfaction. On both these points the Lord Ordinary's decision is adverse to the defenders. . I do not propose to analyse or comment upon the evidence. The case, so far as dependent on fact, seems to me to be one peculiarly within the scope of many recent observations in the House of Lords (e.g., *Kinloch v. Young*¹) as to the exceptional value of the opinion of the Judge of first instance, who hears and observes the witnesses; and the less favourable position of appellate Judges, who have only printed evidence before them, in deciding matters of oral testimony, especially where (as here) credibility is involved. I am not, however, in the least inclined to differ from the Lord Ordinary's view of the facts. On the contrary, I agree with it; and I should have reached the conclusion he has arrived at upon my consideration of the printed proof. I am therefore of opinion that the interlocutor reclaimed against ought in substance to be adhered to.

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Lord Dundas.

LORD MACKENZIE.—[After narrating the circumstances]—The argument for the defenders is that when the first instalment was paid the property in the yacht, so far as the work had proceeded, then passed by force of the contract to the pursuer; that all the subsequent work was accessory to that property which had passed to and been accepted by the pursuer; and that accordingly, whatever his right might be to recover damages, he never could reject, because if he did, he would be rejecting his own property, which would be a contradiction in terms. According to the defenders' view of the contract, what the pursuer desired was to be protected against the builder's creditors by obtaining, upon payment being made of the first instalment, the full *dominium* over the yacht so far as constructed. This, they say, was made possible without delivery by the Sale of Goods Act, 1893. The Mercantile Law Amendment Act had given security to the buyer against the seller's creditors without passing the property. The Sale of Goods Act made it possible to pass the property without delivery, as is pointed out by the Lord President in *Barclay, Curle, & Company v. Laing*.² The defenders say the effect of article 6 of this contract was to pass not a "special property," as that term is used in the law of England, but the "general property" as defined in section 62 of the Sale of Goods Act. The defenders further point to article 1 as supplementary to article 6, and as giving the buyer complete protection. The yacht was to be built under the superintendence of the pursuer's designer, and, by the last clause, the builders undertook to put right, within the time stipulated for the construction of the yacht, any work considered unsuitable. It was admitted that not only must the property of the article sold have passed, but that the article must have been accepted, before it could be said that the buyer was barred from rejecting. The contention, however, was that it was not open to the pursuer to deny that he accepted the frame when he paid the first instalment due in respect of it.

The fallacy in this argument, as it appears to me, lies in the effect which is sought to be given to the terms of article 6. As I construe the contract, what the pursuer bought was a yacht completed according to contract. The

¹ 1911 S. C. (H. L.) 1.

² 1908 S. C. 82.

goods sold were not ascertained in the sense of section 16 of the Act when Dec. 17, 1912, the first instalment was paid. Until the buyer saw and inspected the finished whole he could not tell whether the yacht was according to contract or not, and accordingly could not either accept or reject her. As Lord Watson points out in *Seath & Company v. Moore*,¹ by the law of England (to which that of Scotland is now assimilated by the Sale of Goods Act) "in order to pass the property as sold there must always be facts proved or admitted sufficient to warrant the inference that the purchaser has agreed to accept the *corpus* so far as completed as in part implement of the contract of sale." The defenders' view of the meaning of the contract involves this, that after paying the first instalment the buyer was bound to take, and could not reject, the frame of the yacht, even though, owing to causes for which the builder was solely responsible, no further work was done to the yacht. This does not seem to me a reasonable construction to put upon article 6. No doubt it might be that during the course of construction the buyer or those representing him might act in such a manner as to bar him from rejecting the yacht. The contract provides that nothing is to be incorporated in the yacht that the designer does not consider good enough. If the designer or his subordinate had stood by and said nothing during the progress of the work, the buyer might have been barred from saying at the end of the day he was not satisfied. I am unable to regard the evidence as sufficient to make a case of that kind here. During the plating of the yacht there were complaints by the pursuer Mr Nelson, by his naval architect Mr Mylne, and by the latter's representative, Mr James. These were made to Mr Eadie, of the defenders' firm, and the point sought to be made against the pursuer is that Mr James, who saw the plating in progress, did not insist on plates which he, as an expert, must have known could never be straightened by hammering, being taken out and replaced by others. The defenders' counsel urged that there are certain plates that an expert should have known could never be put right, and others that could be faired out; and that it was the duty of Mr James to see that new plates were put in where necessary, as the defenders' undertaking only extended to fairing out. The answer to this, however, is that Mr Eadie continually promised, during the time the plates were being riveted, including a considerable period after 8th July, that the unevenness could and would be put right by hammering. The result of this was that it was only when the plating was completed in the middle of August that the badness of the work became fully apparent. To turn this point against Mr James now is to say that he should never have given the defenders the opportunity they asked to put their work right. Such a case as that cannot be made upon the evidence here. It was admitted that the defenders had not asked for an opportunity to put matters right after the yacht was rejected on 24th August.

Upon the question of law therefore I am against the contention of the defenders. None of the cases cited appear to me to lead necessarily to an opposite conclusion. If a buyer has accepted goods as his own in fulfilment of a contract he will be barred thereafter from rejecting them. The question

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¹ 13 R. (H. L.) 57, at p. 66.

Dec. 17, 1912. whether he has accepted them is a question of fact, and it is upon this question of fact that the defenders' contention fails.

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kenzie.

In this view of the case the question of who was to blame for the delay after 20th July does not arise. The record as regards the main cause of delay alleged, viz., that Mr Mylne did not furnish the defenders with the line of keelson and height of floors till 12th May, is quite at variance with the point sought to be made on the evidence, and the entry in the diary under date 29th May.

No objection was taken to the amount of damages, £75, allowed by the Lord Ordinary. I am of opinion that the interlocutor reclaimed against should be affirmed.

THE COURT pronounced the following interlocutor:—" . . .

Adhere to said interlocutor in so far as it (heads 1 and 3 thereof) decerns against the defenders for payment of the sums of £131, 5s. and £75 respectively, with interest thereon as concluded for in the summons, and to this extent refuse the reclaiming note, and decern; recall the second head of said interlocutor, and in place thereof ordain the defenders to deliver to the pursuer within thirty days from this date the articles specified in said second head, and decern; with certification that if the defenders fail to deliver said articles as aforesaid decree will be pronounced against them for the value thereof, with interest as concluded for in the summons."

W. & F. HALDANE, W.S.—CARMICHAEL & MILLER, W.S.—Agents.

No. 61.

ROBERT A. MUNRO & COMPANY, LIMITED, Petitioners.—

Hon. W. Watson.

Dec. 18, 1912.

Robert A.
Munro & Co.,
Limited.

Company—Reorganisation of share capital—Process—Petition—Advertisement—Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), sec. 45.

In a petition, under section 45 of the Companies (Consolidation) Act, 1908, for confirmation by the Court of a special resolution passed by a limited company for reorganisation of its share capital, the Court ordered intimation of the petition without advertisement.

2D DIVISION. ROBERT A. MUNRO & COMPANY, LIMITED, Glasgow, presented a petition to the Court for an order in terms of the Companies (Consolidation) Act, 1908,¹ section 45, confirming a special resolution of the Company to the effect that 10,000 preference shares in the Company should be converted into ordinary shares. In the prayer of the petition the petitioners craved the Court "to appoint intimation of this petition to be made on the walls and in the minute-book, and in such other manner, if any, as your Lordships shall think necessary."

When the case appeared in the Single Bills of the Second Division on 18th December 1912, counsel for the petitioners cited *In re Ashanti Development, Limited*,² and submitted that, the matter being merely a domestic one, intimation on the walls and in the minute-book was sufficient, and that advertisement of the petition was not required.

¹ 8 Edw. VII. cap. 69.

² 1911 W. N. 144.

THE COURT (consisting of the Lord Justice-Clerk, Lord Dundas, Dec. 18, 1912. Lord Salvesen, and Lord Guthrie), without delivering opinions, pronounced the following interlocutor:—"Appoint the petitioner to be intimated as craved, and answers, if any, to be lodged within eight days thereafter."

WEBSTER, WILL, & Co., W.S., Agents.

THOMAS PRYDE, Pursuer (Respondent).—*Moncrieff, K.C.—Dykes.*
A. G. MOORE & COMPANY, Defenders (Appellants).—*Horne, K.C.*
—*Lippe.*

No. 62.
Dec. 21, 1912.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Schedule Pryde v. Moore & Co.
(9)—*Recording of memorandum—Genuineness—Written agreement—Terms of memorandum differing from terms of agreement.*

A workman, who had been totally incapacitated by an accident, received weekly payments of 10s. from his employers, for which he granted receipts bearing that the payments were accepted "as the weekly compensation payable during the period of total incapacity for work as the result of the accident." He subsequently applied for warrant to record a memorandum which bore that the parties had agreed "that compensation be paid by" the employers to the workman "in terms of the Workmen's Compensation Act, at the rate of 10s. per week from" the date of the accident.

Held that the memorandum was not genuine, in respect of the omission of the qualification "during the period of total incapacity."

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule
(3)—*Amount of compensation—Partial recovery—Review of weekly payments—Arbitrator's discretion.*

When a workman, who has been totally incapacitated and has been receiving full compensation in terms of the Workmen's Compensation Act, partially recovers and is earning a wage, a *prima facie* case arises for reducing his compensation: but it is open to him to prove circumstances which will warrant the arbitrator, in the exercise of his discretion, in refusing to diminish the compensation. The circumstance that the compensation he has been receiving together with the wage he is earning does not equal his average weekly earnings before the accident does not by itself justify a refusal to diminish.

In an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Edinburgh, between Thomas Pryde, labourer, Dalkeith, and A. G. Moore & Company, coalmasters, Glasgow, the Sheriff-substitute (Guy) granted warrant to record a memorandum of agreement, refused to diminish a weekly payment of compensation, and, at the request of the employers, stated a case for appeal.

The case set forth:—"On or about 14th February 1912 the respondent lodged with the Sheriff-clerk of the county of Edinburgh, to be recorded in terms of the Workmen's Compensation Act, 1906, a memorandum of an agreement in the following terms:—

"The claimant claimed compensation from the respondents in respect of injury to his left haunch caused by accident in the employment of the respondents at Dalkeith Colliery, Smeaton, on the 26th day of September 1911.

"On or about the 10th day of October 1911 the parties agreed as follows, viz.: That compensation be paid by the respondents to the

2D DIVISION.
Sheriff of the
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Peebles.

Dec. 21, 1912. claimant in terms of the said Act at the rate of ten shillings per week from said 26th day of September 1911.

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“ It is requested that this memorandum be recorded in the Special Register of the Sheriff Court of Lothians and Peebles, at Edinburgh.

“ R. HANDYSIDE,

“ Law-agent, Dalkeith, for Claimant.

“ 14th February 1912.

“ To the Sheriff-clerk,

“ Court House, Edinburgh.’

“ Due intimation of this application having been given by the Sheriff-clerk to the appellants, and they having objected to the recording of the said memorandum of agreement, the Sheriff-clerk thereupon intimated to the respondent that the said memorandum had been objected to, and would not be recorded without a special warrant from the Sheriff. Accordingly, in terms of section 12 of the Act of Sederunt of 26th June 1907, the memorandum fell to be dealt with as if it were an application to the Sheriff for settlement by arbitration of the questions raised by the objections to the recording of the memorandum.

“ Thereafter the appellants having lodged a minute objecting to the recording of said memorandum on the ground that it was not genuine in respect (1) that the period during which compensation at said rate was to be paid was limited by agreement to the period of the respondent's total incapacity for work, and that this was a material term of the agreement entered into between the parties; and (2) that the agreement sought to be recorded had been superseded by another, whereby, on 30th December 1911, the respondent agreed to accept, and the appellants agreed to pay, partial compensation at the rate of 5s. 6d. per week. In said minute the appellants tendered payment of compensation at the said rate of 5s. 6d. per week; averred that the incapacity of the respondent for work in respect of which he had been paid compensation became greatly lessened on 25th December 1911, and that he was not entitled to full compensation as from that date, and craved the Court to diminish the claimant's compensation as at that date or at such subsequent date as the Court might think fit.

“ To the said minute answers were lodged by the respondent, in which he admitted that on or about 20th December 1911 he started light work at the picking tables at the appellants' Dalkeith Colliery, and averred that the appellants then offered the respondent compensation of 5s. 6d. per week, which he agreed to accept on the condition that the wage to be paid him for light work and the partial compensation of 5s. 6d. per week would be equal to his wage of 20s. per week before the accident, and that owing to the respondent's condition as the result of his injuries, his earning capacity did not warrant any reduction in his former compensation of 10s. per week as and from 25th December 1911.

“ Thereafter a proof was allowed and led before me on 29th April 1912, when the following facts were admitted or proved:—

“ (1) That the respondent sustained personal injury to his left haunch by accident while in the employment of the appellants at Dalkeith Colliery, Smeaton, on 26th September 1911, whereby he was totally incapacitated for work.

“ (2) That said accident arose out of and in the course of the respondent's said employment.

"(3) That the sum of 10s. per week was 50 per cent of the respondent's average weekly earnings prior to the accident. Dec. 21. 1912.

"(4) That on Saturday, 14th October 1911, the respondent asked his wife, Mrs Elizabeth Jackson or Pryde, to go to the appellants' office at Smeaton to get his compensation, as he was unable to go himself; that she had no authority or express instructions from her husband to enter into any special agreement with the appellants; that she went to the appellants' office and saw their cashier, Mr William Crooks, to whom she stated that she had come for her husband's compensation; that he told her that that was not the day for getting compensation, and that Monday was the day, but that he would give it as she had come; that the said William Crooks informed Mrs Pryde that the compensation would be 10s. a week; that at that rate the sum payable was 25s. for the two and a half weeks which had elapsed since the accident; that he read over to her as a condition of payment of the compensation of 10s. per week the following words printed on the receipt-sheet which was tendered by him to Mrs Pryde for her signature, viz. :—'The undernoted sums are accepted under the Workmen's Compensation Act, 1906, as the weekly compensation payable during the period of total incapacity for work as the result of the accident on the above date, my average weekly earnings having been 20s.'; that he asked her to sign the receipt-sheet, copy of which is appended hereto, and is held to form part of this case; that she stated to him that she could not write; that she, at his direction, signed the receipt-sheet by a cross; that he wrote her name before the cross and signed as a witness; that thereupon Mrs Pryde requested the cashier to make future payments to James Black, a neighbour who was working at the pit, which the cashier agreed to do; that for six weeks thereafter the sum of 10s. per week was paid on the receipt of the said James Black; that for the next three weeks the sum of 10s. per week was paid to the respondent himself, the last of these payments being made on 18th December 1911; that the words above quoted were not read over to the said James Black or to the respondent himself at any time.

"(5) That on 20th December 1911 the respondent had partially recovered capacity for work, and was employed by the appellants at light work, and paid wages at the rate of 1s. 6d. per shift, with eleven shifts in the fortnight, equivalent to 8s. 3d. per week.

"(6) That said sum of 8s. 3d. per week represented at that date and still represents the respondent's earning capacity, and said sum added to 10s. per week as compensation leaves the respondent with 1s. 9d. per week less than his average weekly earnings prior to the accident.

"(7) That the appellants from said 20th December 1911, in addition to paying the respondent wages at said rate, paid him for compensation as follows: On 25th December, for the week ending 22nd December, 9s. 6d., and for each of the three following weeks 5s. 6d. These payments were made to him along with the wages he was receiving for the light work that he was doing. The respondent accepted the payments under protest, and claimed that he was entitled, for his work and as compensation, to as much as his average weekly earnings before the accident had been.

"(8) That when on 30th December the respondent was for the first time paid compensation at the rate of 5s. 6d. per week, the cashier explained to him that that was all that he was authorised to pay him

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as compensation, but the respondent did not then or at any subsequent time agree to accept said sum as the compensation to which he was entitled. The appellants' said cashier had no authority to enter into any agreement with the respondent as to his compensation, or to bind the appellants thereanent in any way, and he did not do so. When taking receipts from the respondent for said sums of 5s. 6d. he took same on the original form bearing that they were sums accepted as the weekly compensation payable during the period of total incapacity for work. The method by which the appellants calculated the said sum of 5s. 6d. was by treating the respondent as capable of earnings of 1s. 6d. per shift or 9s. per week, and then taking 50 per cent of the difference between said sum of 9s. and 20s., his average weekly earnings prior to the accident.

"On these facts I found that the appellants had admitted liability to pay compensation to the respondent under the Workmen's Compensation Act, 1906, in respect of said accident and injury, and had agreed to pay him the sum of 10s. per week in name of compensation from said 26th September 1911, which the respondent agreed to accept; that the memorandum of agreement now sought to be recorded by the respondent is genuine; that the parties did not agree upon said sum of 5s. 6d. per week as the amount of compensation payable to the respondent, and entered into no agreement with one another modifying their first agreement before referred to; and that the appellants had failed to prove that the earning capacity of the respondent was sufficient to entitle them as a matter of right to have the respondent's compensation diminished, and I accordingly granted warrant to the Sheriff-clerk of the county of Edinburgh to record the foresaid memorandum of agreement sought to be recorded by the respondent in the Special Register kept by him for the purpose, and, in the circumstances of the case, refused to diminish the compensation payable to the respondent, and found the appellants liable to the respondent in expenses."

The questions of law for the opinion of the Court were:—"(1) Upon the facts stated, is the memorandum of agreement lodged for the respondent genuine within the meaning of the Workmen's Compensation Act, 1906? (2) In the event of the first question being answered in the affirmative, was I on the facts stated bound to hold that said memorandum of agreement had been superseded by an agreement to diminish the weekly compensation payable to the respondent from 10s. to 5s. 6d.? (3) Upon the facts set forth above, was I entitled to grant warrant to record the memorandum of agreement lodged by the respondent? (4) On the facts stated (a) were the appellants entitled, as a matter of right, to have the respondent's compensation diminished; or (b) was I entitled in the circumstances of the case to refuse to diminish the respondent's compensation?"

An answer to the second question of law was not asked for on appeal.

The case was heard before the Second Division (consisting of the Lord Justice-Clerk, Lord Guthrie, and Lord Hunter) on 9th and 16th November 1912.

Argued for the appellants;—(1) The memorandum was not genuine, because no agreement had ever been concluded in the terms there set forth.¹ The conditions of the actual agreement between the parties

¹ Phillips v. Vickers, Sons, & Maxim, [1912] 1 K. B. 16; Hartshorne v. Coppice Colliery Co., (1912) 5 Butterworth's W. C. C. 358.

were contained in the receipts granted by the workman, and included a condition limiting the agreement to the period of total incapacity, which was omitted from the memorandum proposed by the respondent. When an agreement was in writing the Sheriff was bound to refuse warrant to record any memorandum which was not in the precise terms of the agreement.¹ (2) When total incapacity changed to partial incapacity a *prima facie* case arose for reducing compensation.² In special circumstances—such as were present in *Geary v. William Dixon, Limited*,³ and *Parker v. William Dixon, Limited*,⁴—a workman might continue to get full compensation even though he had partially recovered. But no such circumstances had been proved—or at anyrate stated—in the present case. It was not enough that the compensation in respect of total incapacity, together with the wages the workman was now earning, was not equal to his average weekly earnings before the accident. There was no general rule, and the arbitrator in each case must exercise his discretion.⁵ This was even more emphatically provided under the Act of 1906⁶ than under the Act of 1897.⁷ There was no indication in the case that the arbitrator had applied his mind to this question, and the matter should therefore be remitted to him for reconsideration.

Argued for the respondent;—(1) There was no doubt that an agreement had been come to between the parties, whereas in *Hartshorne*⁸ the question was whether there was an agreement at all. The memorandum correctly expressed that agreement. The omission of the reference to the period of total incapacity was immaterial, for that qualification expressed no more than the statute implied. Even if the agreement fell to be ascertained from the terms of the receipt, it was clear that the agreement was not—as maintained by the appellants—limited to the period of total incapacity, for after that period was over the appellants continued to make payments of reduced compensation and to take receipts in precisely the same terms. The appellants could suffer no hardship, for they had met the application to record with a simultaneous application for review.⁹ (2) The arbitrator had refused to diminish the compensation, and no reason had been shown for interfering with his determination. The circumstances were the same as those in other cases where the arbitrator's award had been allowed to stand.¹⁰ That he had applied his mind and exercised his discretion was clear from the statement that he refused to diminish “in the circumstances of the case.” It was an unheard-of thing that any Judge should be obliged to give reasons for an

¹ *McLean v. Allan Line Steamship Co., Limited*, 1912 S. C. 256.

² *Carlin v. Stephen & Sons, Limited*, 1911 S. C. 901, *per* Lord Salvesen, at p. 908.

³ (1902) 4 F. 1143.

⁴ (1902) 4 F. 1147.

⁵ *Webster v. Sharp & Co., Limited* [1904] 1 K. B. 218, *aff.* [1905] A. C. 284; *Bevan v. Energlyn Colliery Co.*, [1912] 1 K. B. 63.

⁶ Workmen's Compensation Act, 1906, First Schedule, (3), quoted by Lord Guthrie, *infra*, at p. 463.

⁷ Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), First Schedule (2), quoted by Lord Guthrie, *infra*, at p. 464.

⁸ 5 Butterworth's W. C. C. 358.

⁹ *McEwan v. Baird & Co.*, 1910 S. C. 436.

¹⁰ *Bryson v. Dunn & Stephen, Limited*, (1905) 8 F. 226; *Geary v. William Dixon, Limited*, 4 F. 1143; *Parker v. William Dixon, Limited*, 4 F. 1147.

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The questions of law for the opinion of the Court were:—"(1) Upon the facts stated, is the memorandum of agreement lodged for the respondent genuine within the meaning of the Workmen's Compensation Act, 1906? (2) In the event of the first question being answered in the affirmative, was I on the facts stated bound to hold that said memorandum of agreement had been superseded by an agreement to diminish the weekly compensation payable to the respondent from 10s. to 5s. 6d.? (3) Upon the facts set forth above, was I entitled to grant warrant to record the memorandum of agreement lodged by the respondent? (4) On the facts stated (a) were the appellants entitled, as a matter of right, to have the respondent's compensation diminished; or (b) was I entitled in the circumstances of the case to refuse to diminish the respondent's compensation?"

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were contained in the receipts granted by the workman, and included a condition limiting the agreement to the period of total incapacity, which was omitted from the memorandum proposed by the respondent. When an agreement was in writing the Sheriff was bound to refuse warrant to record any memorandum which was not in the precise terms of the agreement.¹ (2) When total incapacity changed to partial incapacity a *prima facie* case arose for reducing compensation.² In special circumstances—such as were present in *Geary v. William Dixon, Limited*,³ and *Parker v. William Dixon, Limited*,⁴—a workman might continue to get full compensation even though he had partially recovered. But no such circumstances had been proved—or at anyrate stated—in the present case. It was not enough that the compensation in respect of total incapacity, together with the wages the workman was now earning, was not equal to his average weekly earnings before the accident. There was no general rule, and the arbitrator in each case must exercise his discretion.⁵ This was even more emphatically provided under the Act of 1906⁶ than under the Act of 1897.⁷ There was no indication in the case that the arbitrator had applied his mind to this question, and the matter should therefore be remitted to him for reconsideration.

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Dec. 21, 1912. exercise of discretionary power. The award did not exceed the amount permitted by the statute, and it was not suggested that the arbitrator had failed to consider any relevant facts, or had considered any facts which were irrelevant.

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Moore & Co.

At advising on 21st December 1912,—

LORD GUTHRIE.—In this stated case the appellants maintain, first, that the arbitrator was wrong in holding the memorandum of agreement (relating to the compensation payable by them to the respondent, Thomas Pryde, in respect of an injury to his left haunch caused by accident in the appellants' employment at Dalkeith Colliery, Smeaton, on 26th September 1911) genuine within the meaning of the Workmen's Compensation Act, 1906; and second, that he was wrong in refusing their crave to have the compensation, paid to him at the rate of 10s. from 26th September 1911, reduced as at and from 25th December 1911. The first of these questions is raised in the first and third questions of law, and the second in the fourth question of law, subsection (b.) The appellants did not insist on the point to which the second question of law relates.

1. Was the memorandum genuine, and therefore capable of being recorded? It was suggested by the respondent that the agreement was verbal, and was either arrived at antecedent to Saturday, 14th October 1911, the date founded on by the appellants, or that on that date there was a verbal agreement for a weekly payment of a sum of money, namely, 10s., which must be taken as the agreement of parties, irrespective of any conditions which might be annexed in the written receipt to the payment of that sum. I cannot agree with either view. The case does not suggest any communings between the parties prior to 14th October, and the facts stated make it clear that the agreement, if there was any agreement, embodied in the receipt of that date printed in the appendix to the stated case, must be taken as a whole.

The receipt bore these words:—"The undernoted sums are accepted under the Workmen's Compensation Act, 1906, as the weekly compensation payable during the period of total incapacity for work as the result of the accident on the above date (26th September 1911), my average weekly earnings having been 20 shillings." On a receipt in these terms, signed for the first payment by the respondent's wife (by mark) and for subsequent payments by James Black, a friend of the respondent, and then latterly by the respondent himself, payments were regularly made at the rate of 10s. down to the week ending 15th December 1911. If the respondent had been willing to record a memorandum of an agreement in the terms of the receipt, including the words "during the period of total incapacity for work," there would have been no question between the parties. But the respondent insisted on a memorandum of agreement in the following terms:—"That compensation be paid by the respondents to the claimant in terms of the said Act at the rate of 10s. per week from said 26th day of September 1911." The employers insisted on the insertion of the words "during the period of total incapacity for work." Hence the present dispute.

A preliminary question was mooted, rather than argued, namely, whether,

in view of the fact stated in the case that the respondent's wife, with whom Dec. 21, 1912. the appellants allege an agreement, had no authority to enter into any Pryde v. special agreement with the appellants, there was an agreement at all which Moore & Co. could be recorded. But this question is not raised by any of the questions, Lord Guthrie. and it must therefore be assumed that, if otherwise unobjectionable, the agreement contained in the receipt might have been recorded.

The question is, Could the agreement embodied in the memorandum of agreement, not containing the words "during the period of total incapacity for work," be recorded as genuine? A similar question was considered in Scotland in the case of *M'Lean*¹ and in England in the case of *Phillips*.² These cases decided that, if there be a variation, not trivial, between the memorandum of agreement proposed to be recorded and the agreement actually entered into, it is not for the arbitrator to decide whether the difference is so substantial as to prevent the agreement in the memorandum being considered genuine. It is sufficient that there is a difference, on the face of it not trivial, which is objected to on the ground that it is material. In this case the appellants maintain that the insertion of the words founded on by them would put them in a more advantageous position in relation to the duration and termination of the payments to an injured workman than if the words were omitted. If the views expressed in the cases above cited be well founded, it is not for the arbitrator to decide whether the appellants would or would not obtain any such advantage. It is significant that, although the respondent maintained that the words in question, even if introduced, would in no way alter the rights of parties, he has always refused, and still refuses, to record a memorandum which includes these words.

I therefore think that the first question should be answered in the negative, and if it be necessary to answer the third question, that it also should be answered in the negative.

2. Ought the arbitrator to have refused to diminish the respondent's compensation? There is no question that the original sum of compensation, 10s. a week, being 50 per cent of the respondent's average weekly earnings prior to the accident, was properly fixed for the period of total incapacity. But it appears from the case that, on and after 20th December 1911, he had partially recovered capacity for work, and was employed by the appellants at light work, and was paid by them 8s. 3d. a week. This sum added to the respondent's compensation amounted to 18s. 3d., being 1s. 9d. per week less than his average weekly earnings prior to the accident. The question turns on the interpretation of the First Schedule (3) to the 1906 Act, which runs as follows:—“(3) In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of

¹ 1912 S. C. 256.

² [1912] 1 K. R. 16.

Dec. 21, 1912. that difference as under the circumstances of the case may appear proper."

Pryde v.

Moore & Co.

Lord Guthrie.

This section may be compared with the corresponding section of the Act of 1897: "(2) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity."

The cases of *Geary*,¹ *Parker*,² and *Bryson*³ arose under the previous Act of 1897, and the case of *Carlin*⁴ was decided under the existing Act of 1906. The result of these cases is that circumstances like the present raise a *prima facie* case for reduction, but that it is open to the workman to prove circumstances which will warrant the arbitrator (he being the judge of their sufficiency) to refuse to diminish the compensation. Both in *Parker's* case² and in *Geary's* case¹ there were permanent injuries; in the first case the workman's hands were burned so as to produce permanent injury, and in the other case the man had lost an eye. In both cases his value in the labour market was permanently lessened. Now, the stated case does not disclose any special circumstances relevant to displace the *prima facie* case made by the employers. The only circumstance stated by the arbitrator is that the compensation money plus the respondent's earnings did not equal his average weekly earnings before the accident. So far as the case shows, this was the only ground on which the respondent claimed that his compensation should not be reduced. Holding as I do that this circumstance by itself cannot justify a refusal to diminish, I am of opinion that if it had been necessary to determine this question now, the proper course would have been to answer the fourth question in its second branch in the negative. But in view of the way in which the case is stated, it might not be fair, without a remit, to assume the absence of the relevant circumstances. If we answer the first and third questions in the negative, it seems unnecessary to answer the other questions.

LORD HUNTER.—The first question raised in this stated case is whether on the facts stated a memorandum of agreement lodged for the respondent was genuine within the meaning of the Workmen's Compensation Act, 1906. The memorandum of agreement bears, *inter alia*, an unqualified statement that compensation was agreed to be paid by the appellants to the respondent at the rate of 10s. per week from 26th September 1911.

From the facts stated by the Sheriff-substitute it appears that the respondent's wife, on 14th October 1911, received 25s., being compensation for two and a half weeks, and granted a receipt which bore, as was explained to her, that the undernoted sums were accepted under the Workmen's Compensation Act, 1906, as the weekly compensation payable "during the period of total incapacity for work, as the result of the accident." Subsequent payments were made to a friend of the respondent and to the respondent himself on receipts which were similarly qualified. It is said that these

¹ 4 F. 1143.

² 4 F. 1147.

³ 8 F. 226.

⁴ 1911 S. C. 901.

receipts were not read over or explained either to the respondent's friend or Dec. 21, 1912. to himself. I do not think this is of any importance, as there was no evidence, except in terms of the receipt, of the appellants having agreed to any payment. Pryde v.
Moore & Co.
Lord Hunter.

On 12th February 1912 the respondent, who had partially recovered, and had for three or four weeks received less than the full compensation from the appellants, lodged a memorandum of an agreement with the Sheriff-clerk to the genuineness of which the appellants objected, and the question came to be dealt with by the Sheriff as if it were an application for settlement by arbitration of the questions raised by the objections to the recording of the memorandum. The principal objection was that the memorandum was not genuine, as it did not contain any qualification to the effect that compensation at the agreed-on rate was limited by agreement to the period of the respondent's total incapacity for work. The Sheriff-substitute repelled the objection, and we are asked to sustain his view, upon the ground that the memorandum of agreement was in statutory terms, and that the qualifying words "during total incapacity," which it was proposed to insert, were an implied statutory qualification of payment of the maximum weekly compensation under the Act. It appears to me, however, to be quite clearly decided by the cases to which we were referred, *Phillips*,¹ *M'Lean*,² and *Hartshorne*,³ that the Sheriff-substitute took a wrong course. In *M'Lean*'s case² the Lord President, speaking of an agreement which was evidenced by a receipt signed by the workman, said (at p. 260) "that where an agreement which has been come to between the parties is admittedly in writing, the Sheriff must record that agreement as it stands and nothing else." Lord Kinnear added in the same case (at p. 260): "Either party is quite entitled to say that, in so far as it departs from the express terms of this document, the agreement proposed is not what he has consented to." The recent case of *Hartshorne*³ raised exactly the same point as is raised in the present case, because there, as here, what the employers sought was to prevent a memorandum of agreement being recorded that did not contain the same qualifying words as the appellants maintained should be introduced in this case.

Another question was argued to us. It arises from the following circumstances. At the time when the respondent presented his application to the Sheriff-clerk to have the memorandum of agreement recorded, he was earning 8s. 3d. a week, and the Sheriff finds that that figure represents his present earning capacity. The 8s. 3d. added to 10s. as compensation leaves the respondent with 1s. 9d. less than his average weekly earnings prior to the accident. The appellants maintained that the respondent was only entitled to 5s. 6d. The Sheriff-substitute found that "the appellants had failed to prove that the earning capacity of the respondent was sufficient to entitle them as a matter of right to have the respondent's compensation diminished." I do not think that is a correct way of considering the question which arises upon an application to reduce compensation where there has been partial recovery of earning capacity by a disabled workman. The provision under the Act of 1906 is somewhat different from the provision under the

¹ [1912] 1 K. B. 16.

² 1912 S. C. 256.

³ 5 Butterworth's W. C. C. 358.

Dec. 21, 1912. *Act of 1897*, which was considered by the Court of Session in the three cases of *Geary*,¹ *Parker*,² and *Bryson*.³ It is now provided⁴: "In fixing Pryde v. the amount of the weekly payment . . . in the case of partial incapacity the weekly payment shall in no case exceed the difference between the Moore & Co. amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such Lord Hunter. relation to the amount of that difference as under the circumstances of the case may appear proper."

The last words quoted were not used in the Act of 1897. They appear to me to make it clear that the Sheriff-substitute must not proceed upon any hard and fast rule that compensation is not to be altered unless the amount added to his present earnings is equal to or exceeds the former earnings of the workman. I do not say, although his findings rather suggest it, that the Sheriff-substitute took this view; but there is nothing to show that he exercised his discretion with reference to the facts of the case, which I think he was bound to do. The fourth question is not, however, so framed that either branch of it could be answered either in the affirmative or the negative without a remit being made to the Sheriff-substitute. But if the first and third questions are answered in the negative, I do not think that it is necessary to answer the other questions put.

Lord Guthrie intimated that the LORD JUSTICE-CLERK, who was absent at the advising, had considered the opinions which had been delivered and concurred in them.

LORD DUNDAS and LORD SALVESEN were present at the advising.

THE COURT pronounced this interlocutor:—"Answer the first and third questions of law in the negative: Find it unnecessary to answer the other questions: Find and declare accordingly: Therefore recall the determination of the arbitrator, and remit to him to proceed as accords."

GRAY & HANDYSIDE, S.S.C.—W. & J. BURNES, W.S.—Agents.

¹ 4 F. 1143.

² 4 F. 1147.

³ 8 F. 226.

⁴ 6 Edw. VII. cap. 58, First Schedule (3).

ALEXANDER W. SCOTT AND OTHERS (James Scott's Trustees), First Parties.—*Chree, K.C.—Hon. W. Watson.*

No. 63.

MRS B. S. DAWSON OR SCOTT, Second Party.—*Clyde, K.C.—D. P. Fleming.*

Dec. 21, 1912.

JAMES E. D. SCOTT, Third Party.—*Morison, K.C.—R. C. Henderson.*

Scott v.
Graham.

JAMES ALEXANDER GRAHAM AND OTHERS, Fourth Parties.—*Chree, K.C.—Hon. W. Watson.*

Succession—Bequest in lieu of conventional provision—Marriage-contract provision to children—Bequest to children with conditional institution of their issue—Deduction of marriage-contract provision from share falling to issue.

A testator by his settlement bequeathed the residue of his estate to his children equally, "the issue of any of them predeceasing taking the parent's place and share," vesting being postponed till the occurrence of a particular event. This bequest was declared to be in satisfaction of a provision to the children already made in the testator's marriage-contract.

A son of the testator survived him, and thus became entitled to claim a share of the marriage-contract provision, but died before the term of vesting of the residuary bequest, leaving issue. On his death his share of the marriage-contract provision was claimed by his executor; his share of the residuary bequest, on the other hand, passed to his issue.

Held that the amount of the marriage-contract provision payable to the son's executor fell to be charged exclusively against the share of the residue falling to his issue, and not against the whole residuary estate.

JAMES SCOTT, manufacturer, Dundee, died on 26th January 1908, ^{2D DIVISION.} leaving a trust-disposition and settlement. He was twice married. There was no marriage-contract with reference to the first marriage, but on the occasion of his second marriage a marriage-contract was entered into between him and his spouse.

By this marriage-contract he bound himself to provide one-tenth part of his free personal estate as at the day of his death to the children of the marriage, and this provision was declared to be in full satisfaction of their legal claims.

By his trust-disposition and settlement Mr Scott conveyed to trustees the whole estate belonging to him at the date of his death, and after directing his trustees in the first place to pay his debts, provided as follows:—"On my youngest child attaining the age of twenty-one years, I direct and appoint my trustees, with all convenient speed, and as and when they are in a position to do so, to divide the rest, remainder, and residue of my means and estates, both heritable and moveable, into three equal shares, which my trustees shall dispose of as follows:—They shall pay and convey one of said shares to and among the children of my first marriage and the survivors and survivor of them equally between and among them, the lawful issue of any of them predeceasing taking the parent's place and share; and with regard to the other two shares, I direct my trustees to pay and convey the same to and among the children of my second marriage and the survivors and survivor of them equally between and among them, the lawful issue of any of them predeceasing taking the parent's place and share." It was also declared in the

Dec. 21, 1912. trust-disposition and settlement that "the provisions hereinbefore conceived in favour of my children are, and shall be accepted of by them respectively, in full satisfaction to them of all legitim, and bairns' part of gear, and also of all conventional provisions whatsoever made by me in and under any marriage-contract or otherwise, and of every other claim or provision whatever competent to them in any manner of way by or through or in the event of my death."

Scott v.
Graham.

Of the testator's first marriage five children were born, of whom one daughter predeceased him, leaving a child, and the other four survived him. There were ten children of the second marriage, who all survived the testator. The eldest of these ten children, Alfred T. Scott, died on 16th February 1908, while the youngest child (who attained majority on 30th November 1911) was still in minority. Alfred T. Scott was survived by his wife and by an only child, James E. D. Scott, and left a settlement by which he appointed his wife as his sole executrix and made over to her his whole estate as her absolute property.

A question having arisen in regard to the share of the residue of the testator's estate to which Alfred T. Scott would have been entitled had he survived the date when the youngest of the testator's children attained majority, a special case was presented to which the testator's testamentary trustees were the *first parties*; Alfred T. Scott's widow the *second party*; his child the *third party*; and the testator's surviving thirteen children and the child of the daughter who predeceased him the *fourth parties*.

In this case the Court found, in answer to the first two questions therein submitted, that the vesting of the residuary bequest to the testator's children in his trust-disposition and settlement was suspended till his youngest child attained majority; that Alfred T. Scott therefore did not acquire a vested right in any portion thereof; that his child, the third party, was entitled to the share which he would have taken had he survived; and that his widow, the second party, was entitled, as his executrix, to his one-tenth share of the provision made by the testator in his marriage-contract to the children of his second marriage.

The third question of law in the case (with which alone this report deals) was:—"Does the said Alfred Thomas Scott's tenth share of the marriage provision in question fall to be paid exclusively from the share of residue to which the third party is entitled; or, is the same payable from the general estate of the said James Scott?"

The case was heard before the Second Division on 12th December 1912.

Argued for the third party;—The amount of the share of the marriage-contract provision payable to the second party fell to be charged against the whole of the residue and not against the share to which the third party was entitled. This was the result on a sound construction of the trust-disposition and settlement, for the trustees were directed to pay the testator's debts in the first place. The marriage-contract provision was a debt and was included in this direction. What was bequeathed to the children was the remainder of the estate after meeting all these debts; and two-thirds of the estate so remaining fell to be paid in equal shares to the surviving children of the second marriage and the third party. It was admitted that if the third party's father had acquired a vested right in a share of the residue, he could not have claimed that share and also a share

of the marriage-contract provision. But this was so only because the principle of approbate and reprobate would then have applied. That principle was, however, not applicable to the present circumstances, for the condition of its application was that two or more rights or claims were vested in one person so that he had power to choose which he would enforce.¹ Here neither the second nor the third party could make more than one claim and they could exercise no option. The second party claimed as representing her husband. The third party on the other hand was a conditional institute. His right was quite independent of his father's right under the trust-disposition and settlement, and there was no ground in law or equity for holding that conditions annexed to the bequest to the father were by implication attached to the bequest to the third party.² The case of *Fisher v. Dixon*³ was discussed in McLaren on Wills and Succession (3rd ed.), vol. i., p. 258.

Argued for the fourth parties;—The case fell to be decided on the terms of the trust-disposition and settlement and involved no question of election. By the trust-disposition and settlement it was provided that the issue of a predeceasing child of the testator should take "the parent's place and share." These words meant that the conditions imposed on the parent were also imposed on his or her issue, and one of these conditions was that the share of residue was given in lieu of the marriage-contract provision. If, therefore, the second party's father had acquired a vested interest in a share of the residue and had also claimed his portion of the marriage-contract provision, he would have been compelled to contribute from his share of the residue the sum necessary to compensate the other residuary legatees who suffered from his claiming under the marriage-contract,⁴ and the second party was placed under the same obligation by the terms of the trust-disposition and settlement. The case of *Rose*⁵ was distinguishable, for the question there arose in regard to a debt. Nor was *Fisher v. Dixon*³ in point, for there (1) the words "parent's place and share" did not occur in the settlement, and (2) separate estates were given to the parent and his issue, the former being given only the life interest while the issue were entitled to the fee; while here the same estate, a fee, was given to both parent and issue.⁶

At advising on 21st December 1912,—

LORD DUNDAS.—[After dealing with the first and second questions]—The third question is whether Alfred Scott's share of the marriage-contract fund, of which his executrix stands in right, falls to be paid exclusively from the share of residue to which his child is entitled, or from the

¹ *Hewitt's Trustees v. Lawson*, (1891) 18 R. 793, at pp. 798 and 804; *Douglas's Trustees v. Douglas*, (1862) 24 D. 1191, at pp. 1205 and 1207; *Story's Equity Jurisprudence* (2nd ed.), sec. 1075.

² *Rose v. Rogers*, (1870) 39 L. J. (Ch.) 791; *Hewitt v. Jardine*, (1872) L. R. 14 Eq. 58.

³ (1833) 6 W. & S. 431.

⁴ *Gray's Trustees v. Gray*, 1907 S. C. 54.

⁵ 39 L. J. (Ch.) 791.

⁶ Reference was also made to *Jack v. Marshall*, (1879) 6 R. 543; *Snody's Trustees v. Gibson's Trustees*, (1883) 10 R. 599; *Sinclair's Trustees v. Borison*, (1852) 15 D. 212, at p. 216.

Dec. 21, 1912. general estate of Mr James Scott. A point is thus raised which requires more careful consideration. I am not aware of any decision bearing directly upon it, but my opinion is that the view presented in the first alternative branch of the question is the correct one. Alfred Scott, having survived his father, might have claimed his share of the marriage-contract funds; but he could not, if he had survived the period of vesting, have claimed, in addition to that, the full amount of his conventional provisions under the settlement. I think we must hold, as matter of construction, that Mr Scott did not intend or contemplate that the share of the marriage-contract fund effeiring to any one of his children should be paid, and that the issue of such child should, over and above, receive the full share of residue destined to his father under this settlement. The issue of a child predeceasing the period of vesting is to take "the parent's place and share." It was argued that the "debts" which form a first charge upon the trustor's estate before "residue" can be ascertained must be taken to include any share of the marriage-contract fund which was claimed and had to be paid; and therefore any share paid to Alfred Scott, or to anyone in his right, must be deducted from the general estate before shares of residue are struck. I do not think this argument can avail the grandchild. Alfred Scott's share of the marriage-contract fund cannot form a proper debt of the trustor's estate, consistently with a claim by him (or by his child, as taking his place) to his full share in the residue. The only condition on which the child can claim this share of residue is that his father's share of the marriage-contract provision should be paid from some other source than the trustor's general estate—that is, it must be paid out of the child's own share of residue. The child has no separate and independent right apart from his own father, but merely a right of representation to take his "parent's place and share." I am therefore for answering the first branch of question three in the affirmative, and the second in the negative.

LORD SALVESSEN.—[After dealing with the first and second questions]—The third question raises a more difficult and to some extent a novel point, namely, whether the share of the testator's estate which is payable to the executrix of Alfred Thomas Scott falls to be met out of the general estate or from the share of residue to which the third party is entitled. The argument for the third party was that this was a debt which fell to be deducted from the general estate before the residue was ascertained, with the result that the executrix and child of Alfred Thomas Scott would together receive a larger share of the testator's estate than any of the other children of the second marriage.

It may be conceded that the testator did not contemplate such a result, but this by itself is not conclusive. In the case of *Fisher v. Dixon*,¹ where a father had bequeathed a provision to his daughter in life and to her children in fee, declaring that the provision should be in full of all that his daughter could claim from the estate, it was decided that the right of the children to the fee was not affected by the daughter repudiating the

¹ 6 W. & S. 431.

provision and betaking herself to her legal claims. The ground of the Dec. 21, 1912. decision as expressed by Lord Fullerton was that the deed created two distinct and independent rights, and that the fee in favour of the children could not be affected by the act of their mother the liferenter. In the present case there is only one right conferred by the settlement on the testator's children, to wit, a right to share in the residue of his estate contingently on the child surviving the period of distribution. Each child had, however, a vested right under the marriage-contract in a smaller share of the testator's estate; but this right would have merged in the larger provision which each child would take who survived the period of distribution. If, therefore, Alfred Thomas Scott had deliberately elected to take the marriage-contract provision, he could only have claimed the benefit conferred upon him by the testator if he survived the period of vesting, on the footing of equitably compensating the estate for the loss it had thereby suffered—*Gray's Trustees*.¹ In my opinion the other residuary legatees cannot be put in a worse position by Alfred Thomas Scott's executrix claiming the provision which had vested in him than they would be if the same provision had actually been paid to himself. This, I think, sufficiently appears from the language of the settlement. In the first place, I reject the argument that the claims of children under the marriage-contract are to be included in the "just and lawful debts," &c., which fall to be deducted before the residue is ascertained. The children of the second marriage are under the contract no doubt, as it has often been expressed, "creditors amongst heirs," but they are not creditors in the ordinary sense; and I think it may safely be inferred that a testator who gave his children by his settlement much larger provisions than they were entitled to under the marriage-contract did not contemplate that their possible claims under the marriage-contract were to be provided for under the first purpose of his settlement. But, further, the residue clause expressly provides that the lawful issue of a child who predeceases is to take his parent's place and share. Now, the third party here would be getting more than his parent's share if his contention were well founded, because the parent himself could not claim his full share of the residue in addition to his share of the marriage-contract provision. On these grounds I am for answering the first alternative of the third question in the affirmative and the second in the negative.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

THE COURT answered the first alternative of the third question in the affirmative and the second alternative in the negative.

MORTON, SMART, MACDONALD, & PROSSER, W.S.—M. J. BROWN, SON, & Co., S.S.C.—
DAVIDSON & SYME, W.S.—Agents.

¹ 1907 S. C. 54.

No. 64. **MRS ANNIE CORNER TAIT OR CUMMING, Complainer (Reclaiming).—**
J. R. Christie.

Jan. 7, 1913.

JOHN MITCHELL HENDRY AND ANOTHER, Respondents
(Respondents).—Lippe.

Cumming v.
Hendry.

Process—Reclaiming note—Competency—Note of suspension—Offer of caution—Note passed on caution—Appeal on contention that note should be passed without caution—Personal bar.

The complainer in a note of suspension pleaded that the note should be passed without caution or consignment, but subsequently amended the note by adding an offer to find caution "if your Lordships shall so appoint." The Lord Ordinary then passed the note "on caution as offered." *Held* that the complainer was not barred by the offer of caution from reclaiming for the purpose of maintaining that the note should have been passed without caution.

Bill-Chamber. **MRS ANNIE CORNER TAIT OR CUMMING** brought a note of suspension
 2d Division. against **John Mitchell Hendry and Andrew Hendry junior**, for the
 Lord Hunter. suspension of a charge upon an extract registered bond and disposition in security.

In the note it was stated, *inter alia*;—"That the complainer considers that in the whole circumstances of the case she is entitled to have this note passed without caution or consignment."

At the hearing in the Bill Chamber the complainer asked leave to amend this part of the note by adding the words printed in italics, so that it should read:—"That the complainer *is prepared, if your Lordships shall so appoint, to find caution, but she* considers that in the whole circumstances of the case she is entitled to have this note passed without caution or consignment."

On 18th December 1912 the Lord Ordinary on the Bills (Hunter) pronounced this interlocutor:—"Allows the note to be amended to the effect of offering caution; and this having been done, on caution as offered, passes the note."

The complainer reclaimed against this interlocutor in so far as it ordained her to find caution. On the case appearing in the Single Bills of the Second Division on 7th January 1913, the respondents objected to the competency of the reclaiming note.

Argued for the respondents;—The complainer had withdrawn her original objection to finding caution by amending the note so as to offer caution. The note had been passed on her motion in respect of that offer, and she was not entitled to reopen the question by means of a reclaiming note.

Argued for the complainer;—By the amendment the complainer had not abandoned the contention that the note should be passed without caution, and she was entitled to maintain that contention on a reclaiming note.¹

LORD JUSTICE-CLERK.—I think that this reclaiming note cannot be held incompetent. Although the complainer amended her note of suspension to the effect of offering caution, she did not give up her contention that the note should be passed without caution, so as to preclude her from bringing that question before this Court by a reclaiming note.

¹ Mackay's Manual of Practice, p. 429.

LORD DUNDAS.—I concur.

Jan. 7, 1913.

LORD SALVESSEN.—I am of the same opinion. The complainer's offer of caution was a conditional one. She maintained before the Lord Ordinary on the Bills that she was entitled to have the note passed without caution, and nothing took place in the course of the proceedings in the Bill Chamber, so far as was explained to us at the bar, to prevent her from now insisting in that contention before this Court.

LORD GUTHRIE.—I am of the same opinion.

THE COURT appointed the cause to be put to the Summar Roll.

GALBRAITH STEWART & REID, S.S.C.—COWAN & STEWART, W.S.—Agents.

ROBERT MITCHELL SCORGIE BARCLAY, Pursuer (Appellant).—
A. M. Stuart.

No. 65.

T. S. SMITH & COMPANY AND OTHERS, Defenders (Respondents).—
R. S. Brown.

Jan. 11, 1913.

Barclay v.
Smith & Co.

Process—Removal to Court of Session for jury trial—Remit to Sheriff—Trifling nature of cause—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 30.

The pursuer, in a Sheriff Court action of damages at common law for £100 for personal injury, required the case, under section 30 of the Sheriff Courts Act, 1907, to be remitted to the Court of Session for trial by jury. The Court *refused* the application and, under the powers conferred on them by that section, remitted the case back to the Sheriff, *holding* that it was unsuitable for jury trial in respect of the trifling nature of the injuries averred.

In October 1912 Robert Mitchell Scorgie Barclay, electrical engineer's apprentice, aged seventeen years, brought an action in the Sheriff Court at Aberdeen against T. S. Smith & Company, motor car proprietors, and the individual partners of the firm, concluding for £100, in name of damages for personal injuries sustained through the fault of the defenders.

The pursuer averred that on 23rd September 1912, while bicycling, he was knocked down by a motor car which was being driven in a reckless manner by a servant of the defenders. (Cond. 4) "The pursuer was severely injured. He sustained numerous and severe bruises on the body, arms, and legs. The cycle, worth seven guineas, was completely destroyed, and his clothing was also destroyed. The cycle was hired from a hirer to whom the pursuer is liable for the value of said cycle, and who is insisting on his claim. He was for several weeks completely incapacitated from work, and has not yet fully recovered. The pursuer from the combined effect of his direct physical injuries, and of his being suddenly struck down in the dark by a car, the approach of which he did not hear, has sustained severe nervous shock. It is necessary for his efficiency as an engineer, and for his working at said trade with safety to himself and to his fellow-workmen, that his nervous system should be in good condition. The accident will probably have permanent effect on his nervous system and may result in his earning capacity being permanently diminished. In the course of his work as an engineer it is necessary, in order to allow him to get home for meals, to use a

2D DIVISION.
Sheriff of
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Jan. 11, 1913. cycle and ride through congested traffic in Aberdeen. Owing to the said shock he will be unable to ride a cycle where there is traffic, and he will be handicapped in carrying on his said work."

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The defenders on record admitted fault and tendered £8 as compensation for the injuries, and £2, 2s. of expenses, and undertook to relieve the pursuer of any claim for damage to the bicycle.

On 11th December 1912 the Sheriff-substitute (Laing) allowed a proof.

On 13th December 1912 the pursuer required the case to be remitted to the Court of Session for trial by jury.*

The case appeared in the Single Bills of the Second Division (without Lord Salvesen) on 11th January 1913, when the defenders moved that the case be remitted to the Sheriff; and argued;—The only point at issue was the amount of damages. Upon the pursuer's own averments, his injuries were very slight, and it was quite unsuitable that the case should be tried before a jury merely for the purpose of assessing the trifling compensation to which he was entitled. In *M'Nab v. Pyfe*,¹ the averments of injury were stronger, and yet the appeal for jury trial was refused. It was further to be noted that at the date of that case the discretionary power of the Court to remit to the Sheriff, under section 40 of the Judicature Act, 1825,² and section 73 of the Court of Session Act, 1868,³ was less explicit than it was under the present law.⁴

Argued for the pursuer;—The application for a jury trial should be granted as it was in the case of *Duffy v. Young*.⁵ The power of the Court was neither diminished nor increased by section 30 of the Sheriff Courts Act, 1907, which was merely declaratory of the prior law. The only change was that the standard of value was raised from £40 to £50. Otherwise the principles enunciated in *Sharples v. Yuill & Company*⁶ still held good. On an application of these principles the pursuer was entitled to trial by jury, for it was impossible to say that a jury could not reasonably award him £50 in name of damages.

LORD JUSTICE-CLERK.—Since 1907 the law has been that when a cause is removed from the Sheriff Court to the Court of Session for jury trial, "the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the Sheriff, or to remit it to a Lord Ordinary, or to send it for proof before a Judge of the Division before whom the cause depends."⁴ I think the purpose is very plain, namely, to save

* The Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), enacts:—Sec. 30. "In causes originating in the Sheriff Court . . . where the claim is in amount or value above fifty pounds, and an order has been pronounced allowing proof . . . it shall, within six days thereafter, be competent to either of the parties, who may conceive that the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried: Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the Sheriff, or to remit it to a Lord Ordinary, or to send it for proof before a Judge of the Division before whom the cause depends."

¹ (1904) 6 F. 925.

² 6 Geo. IV. cap. 120.

³ 31 and 32 Vict. cap. 100.

⁴ Sheriff Courts (Scotland) Act, 1907, sec. 30.

⁵ (1904) 7 F. 30.

⁶ (1905) 7 F. 657.

the enormous expense incurred in the trial by jury of very small cases, Jan. 11, 1913. especially where witnesses have to be brought from a long distance. But ^{Barclay v. Smith & Co.} whatever was the intention of the Legislature, the statute gives us an absolute discretion in the matter. Even under the law as it stood prior to Lord Justice-1907, the Court was of opinion that it had such a discretion, but the Act of Olerk. 1907 has made this quite clear.

In the present case I think we should exercise our discretion by remitting the case back to the Sheriff. The circumstances in the case of *M'Nab v. Fyfe*,¹ where jury trial was refused, were very similar. In that case, as in this, the pursuer complained of severe bruises and of nervous shock. The Court, having only the power conferred on it by the law prior to 1907, refused the appeal, the Lord President saying,—“On the face of the record this is a small case, and more suitable for proof in the Sheriff Court than for jury trial in the Court of Session. Proceeding upon that view we have remitted other similar cases to the Sheriff Court for proof. I am of opinion that this would be the proper course to follow in the present case.” I do not think there is any substantial difference between that case and the one we are dealing with now. I think this is a typical case for remitting to the Sheriff, and I would have thought this apart from the case of *M'Nab*,¹ though that decision confirms me in my opinion. I have acted as counsel in and have tried hundreds of jury cases, and I have seen many cases where the expenses have been piled up and where the pursuer was a person of no substance, so that even though the defender was successful in obtaining a verdict, he was in the end an absolute loser. This leads to many defenders paying a substantial sum where there is no true case against them, rather than run the risk of being subjected to heavy loss, even if successful. I hold that in this case we should exercise our discretion under the Act of 1907, and remit it to the Sheriff for proof.

LORD DUNDAS.—I quite agree. The question to which the Court has to address itself is whether it thinks this case unsuitable for jury trial; and, looking to its general aspect as disclosed on the pursuer's record, I am of opinion that it is unsuitable. I understand that there has been no case decided under section 30 of the Act of 1907; but if authority were needed, I agree that the case of *M'Nab*,¹ decided at a time when the statutory power of the Court was less explicit than it is now, is *a fortiori* of the present.

LORD GUTHRIE.—I agree. In this case there are four points which weigh with me. (1) There is no averment of any serious physical injury. (2) There is no averment of any permanent injury other than the very guarded statement in Cond. 4 that the accident will “probably” have a permanent effect on the pursuer's nervous system, and “may” result in his earning capacity being permanently diminished. (3) There is no averment that medical attendance was made necessary by the accident. (4) The witnesses are all in Aberdeen, and much additional expense would be incurred by bringing them here if the case were tried before a jury. I agree that the views expressed in *M'Nab*¹ are applicable in this case, and,

Jan. 11, 1913. indeed, in that case the averments of injury were even stronger than they are here.
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THE COURT pronounced this interlocutor:—"The Lords having heard counsel for the parties on the pursuer's application for a remit, dated 13th December 1912, refuse the application, and remit to the Sheriff to proceed in the cause."

BALFOUR & MANSON, S.S.C.—ALEX. MORISON & Co., W.S.—Agents.

No. 66.

DAVID MACBETH MOIR MILLIGAN AND OTHERS (John Hannay's Trustees), First Parties.—*R. S. Brown.*

Jan. 15, 1913.

PETER HANNAY, Second Party.—*R. S. Brown.*

Hannay's
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 Graham.

MISS JEMIMA GRAHAM (Elizabeth Hannay's Executrix), Third Party.
 —*C. H. Brown.*

Succession — Destination to testator's "heirs in mobilibus" — Period at which heirs ascertained — Object of gift.

A testator by his testamentary settlement directed his trustees to hold a portion of the residue of his estate in equal shares for his son and daughter in liferent, and for their issue respectively in fee, vesting in the issue being suspended till their parent's death. It was declared that, if either child died without leaving issue, the share liferented by him or her should fall to the testator's "heirs in mobilibus," and that neither of the testator's children should "have any vested right in the capital." Both of the testator's children survived him, and thereafter the daughter died without issue, but leaving a will.

Held (diss. Lord Salvesen) that the testator's heirs in mobilibus fell to be ascertained at his death and not at the death of the daughter, and accordingly that the share liferented by the daughter fell to be divided equally between the son and the daughter's executor.

Muirhead's Trustees v. Torrie, supra, p. 85, distinguished.

2D DIVISION. JOHN HANNAY, sometime factor to the Earl of Fife, died in 1901 leaving a trust-disposition and settlement. He was survived by his wife, who died in 1904; by a daughter, Elizabeth H. C. Hannay, who died unmarried in 1911, leaving a settlement in favour of Miss Jemima Graham as sole executrix; and by a son, Peter Hannay.

By his trust-disposition and settlement the testator conveyed his whole estate to trustees, and, as to the residue thereof, directed them to pay over one-half to his wife for her absolute use, and to hold the other half and pay her during her life the income to be derived from it. With reference to the latter half of the residue the testator (after giving certain directions as to his estate of Cairnhill and as to a sum of money specially destined) provided as to the "balance" as follows:—"My trustees, on the death of my wife, shall hold and invest in their own names one half of said balance and pay the revenue thereof to my son during his lifetime, and shall hold and invest the other half of said balance and pay the revenue thereof to my daughter during her lifetime: And neither of my children shall have any vested right in the capital of said balance." The half liferented by the son was to fall to his children on his death, vesting being postponed till that event, and if there were no issue alive at the period of vesting, the share was to fall to the testator's heirs in mobilibus. As to the half

liferented by the daughter the testator directed as follows:—"And Jan. 15, 1913. the capital of said half of balance of residue to be liferented by my daughter shall on her death vest in, and be payable to, her issue in the same manner and subject to the same conditions as are provided with regard to the fee of Cairnhill, and if she die without issue, or if all her issue predecease the term of vesting, the fee of said one-half share of the balance of residue shall fall to my heirs *in mobilibus*." The directions as to Cairnhill were that the trustees, on the death of the testator's wife, were to hold it for his daughter in liferent, and that on her death, leaving issue, the fee was to "fall to her children equally among them, but in that event vesting shall not take place in such children unless and until they shall at or subsequent to their mother's death have attained the age of twenty-five years, or if females have attained that age or been married," with a destination-over to the issue of predeceasers, whom failing to the survivors. Hannay's Trustees v. Graham.

A question having arisen on the daughter's death, without issue, as to the disposal of the share of residue liferented by her, a special case was presented, to which the testator's testamentary trustees were the *first parties*; his son, Peter Hannay, the *second party*; and Miss Graham (Elizabeth Hannay's executrix), the *third party*.

The questions of law were, *inter alia*:—" (2) Do the testator's heirs in *in mobilibus* fall to be ascertained as at his own death? or (3) Do they fall to be ascertained as at the death of Miss Hannay?"

The case was heard before the Second Division on 6th and 10th December 1912.

At the hearing counsel for the second party maintained that the testator's heirs were to be ascertained at the death of Elizabeth Hannay, and cited *Young v. Robertson*.¹ For the third party it was argued that these heirs were to be ascertained at the testator's death,² and that Elizabeth Hannay had a vested right as one of these heirs, subject only to defeasance in the event (which had not occurred) of her leaving issue who acquired a vested interest under the provision in their favour.³

At advising on 15th January 1913,—

LOD DUNDAS.—[After dealing with the first question]—The second and third questions relate to the disposal of the balance of the fee of the one-half share of the half of Mr Hannay's residue which was liferented by his daughter. The succession to it opened upon her death to the testator's heirs in *in mobilibus*. We have to decide whether these heirs are to be ascertained as at his own death, or as at that of his daughter.

This question is attended with considerable difficulty, and (though the sum here at stake seems to be a very small one) was, I think, worthy of a fuller and more careful argument than that to which we listened; but I have come to the conclusion that the former of the alternative views suggested is the correct one. The phrase "*heirs in mobilibus*," which in our

¹ (1862) 4 Macq. 314.

² *Gregory's Trustees v. Alison*, (1889) 16 R. (H. L.) 10, *per* Lord Watson, at p. 14.

³ *Steel's Trustees v. Steel*, (1888) 16 R. 204, *per* Lord President Inglis, at p. 208; *Coulson's Trustees v. Coulson's Trustees*, 1911 S. C. 881; *Johnston's Trustees v. Dewar*, 1911 S. C. 722.

Jan. 15, 1918. older law was equivalent to next of kin, has acquired a specific and different meaning since the passing of the Intestate Moveable Succession (Scotland) Act, 1855¹ (see *Young's Trustees v. James*²; *Gregory's Trustees v. Alison*³). It means the class of heirs who would be entitled under that Act to succeed to the moveable estate of one who died intestate. Now, in *Mortimore v. Mortimore*⁴ the House of Lords, following *Bullock v. Downes*,⁵ decided that where a will destined money to be paid on failure of certain issue to "such person or persons as will then be entitled to receive the same as my next of kin under the statute for the distribution of intestates' estates," the class of "next of kin" described the persons who filled that character at the time of the death of the testator. The Lord Chancellor (Cairns) said, in allusion to the words above quoted: "That is a class which, according to the statute, must be ascertained at the death of the testator; and, as I took the liberty to mention during the argument, it is not an artificial class of next of kin to be created. The only other words are 'that the same be paid to such person or persons as will then be entitled to receive the same.' Now, I am quite willing to look at the word 'then' as if it meant at the expiration of the preceding limitation, but then what does this amount to? Why, this. At the expiration of the preceding limitation you are to find out the hands into which you are to pay the money, but you must do that by first ascertaining who were his next of kin at the time of his death." In *Johnston's Trustees v. Dewar*⁶ the Court had to consider the period at which a testator's "nearest in kin" should be ascertained, and decided upon a construction of the will that his "nearest in kin" should be ascertained, not at his death, but at a later period. Lord Kinneir, in whose opinion Lord Mackenzie and I concurred, expressed the view that "There can be no presumption founded upon what is supposed to be the primary meaning of these words; because the words are descriptive of a class; they apply equally to the class of persons who answer the description of 'nearest in kin' at one time, and to those who answer that description at another time. The body of a man's nearest relations must necessarily vary from time to time with the birth of new relations and the death of old ones; and the mere words 'nearest of kin' to my mind convey no significance whatever except that of propinquity of blood at whatever time it is necessary to look for the persons who answer the description." But his Lordship went on to point out the distinction between the case before him and such cases as *Mortimore*,⁴ and said: "Now, if the words next of kin in our law implied any reference to a right of succession at all, I think the case of *Mortimore v. Mortimore*⁴ would be applicable; because, although the words are not qualified by an express reference to the statute, if the testator means that the people who are to take benefit by his will are the people who take under the law of intestate succession, they, according to the law, must be fixed at the date of his death when his right passed by inheritance to them. But the words 'nearest in kin' have no such significance at all; on the

¹ 18 Vict. cap. 23.

² 16 R. (H. L.) 10, per Lord Watson, at p. 13.

³ (1879) 4 App. Cas. 448, affg. 7 Ch. D. 322.

⁴ (1860) 9 H. L. C. 1.

⁵ (1880) 8 R. 242.

⁶ 1911 S. C. 722.

contrary, they are specially distinguished by the statute which regulates moveable succession in Scotland from heirs *in mobilibus*." It seems to me that the present question is precisely covered by the words just quoted. I think the heirs *in mobilibus* must be found as at the testator's own death, and not at any later period.

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The presumption to that effect is a very strong one. It may, of course, like other presumptions, be redargued, if a contrary intention is expressed or can be held upon sufficient grounds to be implied. If a testator appointed his heirs *in mobilibus* to be his ultimate destinees, and added words indicating that he meant those persons who would answer that description if his death had happened at the time when the ultimate destination should come into operation, the legal presumption would be overcome by the plain language of the instrument. And, short of such express declaration, a contrary intention might well be inferred, as matter of implication, from the tenor of the deed as a whole. A very recent example of this may be found in *Muirhead's Trustees v. Torrie*¹ where the First Division reversed the decision of the Lord Ordinary (Skerrington); but the case, in every way an extremely narrow and special one, is not, I think, likely to form a precedent in the future, and seems to me to have no application here. It is said that, in the present case, a contrary intention is sufficiently evidenced by the clause, already quoted, that "neither of my children shall have any vested right in the capital of said balance" of residue. I do not think this is so. I read these words of exclusion as importing no more than that the original gift by the testator to his children of the capital of the balance of this share of his residue was one of life interest merely, and not of fee, to the donees; and I cannot see how this should prevent the latter from coming to share as members of the class, or constituting the class—heirs *in mobilibus*—to whom the fee is destined on the failure of the prior purposes (see *Bullock v. Downes*,² per Lord Campbell, L. C., at p. 13, and Lord Cranworth, at p. 18). The anomaly, if anomaly there be, in the result I arrive at, would not be removed, if the contrary view were affirmed; for the testator's son, Peter Hannay, would, in that event, as I read the settlement, receive the whole of the share of residue in question. I can find in Mr Hannay's trust-disposition nothing to rebut the ordinary legal presumption as inferring a contrary intention. I do not proceed upon the theory suggested at the discussion that the fee in question vested *a morte testatoris* in his children, as his heirs *in mobilibus* at his death, subject to defeasance, further than to this extent that, as everyone knows, a man's heirs-at-law, in heritage or in moveables, must take by inheritance so far as they are not ousted or defeated by his testamentary provisions. I read Mr Hannay's settlement as meaning that, having made every provision he thought it necessary to make, he said, in effect, "If and when these fail, let the law distribute the property." It seems to me that he intended, if the expressed purposes of his settlement proved ineffectual, to leave the balance of residue to be dealt with as if he had made no further disposal of it. His children, though in form they take the balance under the provisions of the deed, take it truly in their capacity of heirs in intestacy.

¹ *Supra*, p. 85.

² 9 H. L. C. 1.

Jan. 15, 1913. I am therefore for answering the second question in the affirmative, and the third in the negative.

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LORD SALVESSEN.—[After dealing with the first question]—The second question, while it is stated in general terms, has special reference to a one-half share of half the residue of John Hannay's estate. His trustees were directed to hold and invest this share, and to pay the revenue thereof to his daughter, Elizabeth Hannay, during her lifetime. In the event of her dying without issue the fee was to fall to the testator's heirs *in mobilibus*. At what point of time are these heirs to be ascertained? For the third party it was said that the residue must be ascertained as at the death of the testator, and that, as Miss Hannay was herself one of the heirs *in mobilibus* at that time, her estate falls to be enriched by one-half of the capital of the half share liferented by her. The other view maintained by the second party is that the heirs *in mobilibus* fall to be ascertained as at the death of Miss Hannay. I am of opinion that this latter view is the sound one. The testator expressly declared that neither of his children should have any vested right in the capital of the balance of his estate. Are we to find, notwithstanding this direction, that the fee vested in these children to the extent of one-half of the provision destined to each? I am unable to assent to this view. The leading case of *Young v. Robertson*¹ makes it clear that the presumption in favour of vesting *a morte* may be overcome by evidence of a contrary intention. I find such evidence here in the express declaration as to vesting already referred to. In the case of *Johnston's Trustees v. Dewar*² the Court decided in favour of the date of distribution as being the date of vesting although there was no declaration, as in the present case, that vesting should not take place in the person of the liferenter. No doubt the ultimate beneficiaries in that case were the testator's "nearest in kin" and not his heirs *in mobilibus*, but it is just as easy to ascertain the testator's heirs *in mobilibus* at some time subsequent to his death as it is to ascertain his nearest in kin.

The facts of the present case appear to me to be stronger than those which came under the consideration of the First Division in *Muirhead's Trustees v. Torrie*.³ In that case there was no express declaration that the fund was not to vest until the expiry of the liferent, although on other grounds it was held not to do so. In other respects the circumstances were not unlike the present, except that the ultimate destination was to the heirs and executors whomsoever of Mrs Muirhead, and that it occurred in a marriage-contract and not in a testamentary settlement. Both these differences appear to me to be immaterial. "Heirs and executors whomsoever" is just an equivalent expression for heirs *in mobilibus* when the estate happens to be wholly moveable. Lord Kinnear, who gave the leading opinion, held that the question was one of intention, and that the grantor did not intend in the event which happened, namely, that she had a child who predeceased the liferenter, that her money should go to the child's heirs because the child was her heir and executor at the time when she died, but that she intended it to go to her own heirs in the event of failure of children. It is plain

¹ 4 Macq. 314.

² 1911 S. C. 722.

³ *Supra*, p. 85.

that the testator here contemplated that the two children, to each of whom Jan. 15, 1913. he gave a half of the residue of his estate in liferent, would survive him, Hannay's and of course he must be taken to have known that at his death they would Trustees v. Graham. be his heirs *in mobilibus*. Suppose he had only one child and had given the whole residue in liferent to that one, and had directed that on the child's Lord Salvesen. death without issue the funds should go to his own heirs *in mobilibus*, and at the same time had excluded the child from taking any vested interest in the fund,—is it possible to hold that his intention was that the child nevertheless should take such an interest (subject only to defeasance in the event of his having issue) and might divert it to strangers by a *mortis causa* deed? I confess that I cannot understand such a view. There is here no question of intestacy, in which case it sometimes happens that the fund goes to a testator's heirs through the operation of law, although he had plainly indicated that he did not desire it to do so. That result only happens where the testator has failed to dispose of the fund. Here he has not failed to do so, but has provided for the very circumstance which has occurred. If then, as is shown by the cases of *Johnston*¹ and *Muirhead*,² words descriptive of a class usually ascertained at a testator's death may, in virtue of the presumed intention of the testator, be held to refer to a later period when the gift actually takes effect, I do not think that, apart from express declaration, any case is likely to occur where the intention could be more clearly inferred than in the present. I am accordingly of opinion that the second question falls to be answered in the negative and the third in the affirmative.

LORD GUTHRIE.—I concur in the result arrived at by Lord Dundas. On the second point involved in the second and third questions my opinion has varied. I still feel that there is great force in the views expressed by Lord Salvesen founded on the clause "Neither of my said children shall have any vested right in the capital of said balance," but on the whole, although with hesitation, I am not prepared to differ from the result arrived at by Lord Dundas, in which I understand your Lordship in the chair concurs.

The LORD JUSTICE-CLERK concurred with Lord Dundas.

THE COURT answered the second question in the affirmative and the third in the negative.

MARTIN, MILLIGAN, & MACDONALD, W.S.—MACKINTOSH & BOYD, W.S.—Agents.

¹ 1911 S. C. 722.

² *Supra*, p. 85.

No. 67.

DAVID MACBETH MOIR MILLIGAN AND ANOTHER (Mrs Hannay's Trustees), First Parties.—*R. S. Brown.*

Jan. 15, 1913.

MRS LAURA ESTHER PARKER OR KEITH AND OTHERS, Second Parties.—*A. M. Mackay.*Hannay's
Trustees v.
Keith.MISS JEMIMA GRAHAM (Miss Hannay's Executrix), Third Party.—*C. H. Brown.*PETER HANNAY, Fourth Party.—*A. R. Brown.*JOHN HENRY FITZPATRICK HANNAY AND OTHERS, Fifth Parties.—*R. S. Brown.**Succession—Testament—Re-execution of prior will—Effect on validity of intervening codicil.**Succession—Testament—Clause of revocation—Prior testamentary writing—Proof—Competency of extrinsic evidence to negative revocation of prior writing.*

A testatrix by her will, dated 13th January 1904, *inter alia* directed her trustees to pay the income of £5000 to her daughter, and on her daughter's death to pay £500 thereof to a granddaughter, "to pay a further sum of £1500 thereof in the manner to be afterwards directed by me in any writing or writings to be hereafter executed by me," and to pay the remainder, £3000, to certain grandchildren. The will contained a clause revoking "all previous testamentary writings." The testatrix left no writing dated after 13th January 1904 dealing with the sum of £1500, but there was found in her repositories after her death a holograph document dated 21st December 1903, by which she bequeathed the £1500 to certain beneficiaries. The will of 13th January 1904 was in its main provisions the same as a previous will executed by her on 16th December 1903, but contained certain alterations, one of them being the provision with regard to the sum of £1500 which was not contained in the previous will.

Circumstances in which held (1) that the will of 13th January was not a mere re-execution of the will of 16th December, (2) that extrinsic evidence (consisting chiefly of correspondence between the testatrix and her law-agents) was not competent for the purpose of establishing that she intended, notwithstanding the clause of revocation in the will of later date, that the document of 21st December should form part of her testamentary writings, and accordingly (3) that the document of 21st December, having been revoked by the will of 13th January, was inoperative as a testamentary writing.

Dalglisch's Trustees v. Crum, (1891) 19 R. 170, and *Tait's Trustees v. Chiene*, 1911 S. C. 743, distinguished.

2D DIVISION. MRS ELIZA FARQUHARSON MILNE OR HANNAY, who resided at Southville, Dollar, died on 26th October 1904, and on 23rd January 1912 a special case was presented to the Court to determine questions arising out of her testamentary writings.

Mrs Hannay left a trust-disposition and settlement of her whole estate, dated 13th January 1904. The fourth purpose thereof provided:—"I direct my trustees, as soon as convenient after my death, to set aside and invest in their own names the sum of Five thousand pounds sterling, and to pay to my daughter, the said Elizabeth Harriet Caroline Hannay, during her lifetime, the free annual income thereof for her alimentary support, declaring however that my daughter shall have no vested right in the fee of said Five thousand pounds, and in the event . . . of my daughter dying unmarried, . . . then I direct my trustees on my daughter's death, and out

of said sum of Five thousand pounds, to pay a sum of Five hundred pounds thereof, as representing the amount of a legacy which I received from my great-grandfather, the Reverend Robert Farquharson of Allargue, to my granddaughter, Millicent Isabel Bruce Hannay, absolutely, and to pay a further sum of One thousand five hundred pounds thereof, in the manner to be afterwards directed by me in any writing or writings to be hereafter executed by me, and that, too, however informal said writings may be, so long as they are admittedly under my hand; and the remainder of said sum of £5000, *videlicet*, Three thousand pounds, I direct my trustees to pay to the children of my son Peter equally among them” The will also contained this clause:—“And I revoke all previous testamentary writings.”

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Mrs Hannay was survived by her only son, Peter Hannay, and by her only daughter, Miss Elizabeth Harriet Caroline Hannay, who died unmarried in 1911. Mrs Hannay did not leave any writing dated after 13th January 1904 dealing with the sum of £1500 mentioned in the fourth purpose of her will, but in her repositories a holograph pencil document was found after her death in these terms:—“In the event of my daughter's leaving no descendant, £1500, Fifteen hundred pounds *stg.* I bequeath to the family of the late William Keith of Ceylon, £200 of which would be for his widow Mrs Laura Keith.

E. F. HANNAY,

“Southville, Dollar, Scotland,

“December 21st, 1903.”

After setting forth the foregoing facts, the special case further stated:—

“7. A draft of Mrs Hannay's trust-disposition and settlement was prepared by her law-agents in July 1903, and was then sent to her for consideration and approval. After correspondence as to its terms, an engrossment of the draft as then adjusted was executed by Mrs Hannay on 16th December 1903. In returning the signed engrossment to her agents on 16th December 1903 Mrs Hannay expressed her desire to make certain alterations on the settlement, and requested her agents to prepare a codicil for the purpose of giving effect to these. One of the alterations desired by her was a reservation of right to her to bequeath £1500 out of the sum of £5000 mentioned in the fourth purpose otherwise than to her son or his family. Mrs Hannay's agents advised her that it would be preferable that the settlement should be altered to give effect to her wishes and be re-executed by her. Said advice was given prior to 21st December 1903, but final instructions to the agents for a new settlement embodying said alterations were not given till 29th December 1903, and the settlement as so altered was executed by her on 13th January 1904. The trust-disposition and settlement as executed by Mrs Hannay on 16th December 1903 is not now available for production, having been either destroyed or mislaid, but the agents who prepared it are able to state that it contained a clause of revocation in the same terms as that quoted [from the will of 13th January].* There are printed in

* From the correspondence it appeared that the earlier settlement differed from the later in at least the following respects:—(1) The reservation of £1500 was omitted from the earlier settlement, £4500 being destined to Peter Hannay and his children instead of £3000; (2) the fee of a share of residue given by the earlier settlement to the issue of the present marriage of Peter Hannay was given by the later to his lawful children; and (3) the

Jan. 15, 1913. the appendix hereto certain letters passing between Mrs Hannay and her agents between the dates 4th December 1903 and 14th January 1904, which print is accepted by all the parties hereto as correct, and as giving a true and sufficient purview of the purport of the correspondence so far as bearing on the questions at issue, and is held to form part of this case.*

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"8. After Mrs Hannay's decease there was also discovered in her said repositories a document, holograph of Mrs Hannay, in the form of a letter purporting to be addressed to her law-agent, and signed by her. The terms of the said document are set out in the appendix hereto, and held to form part of this case.† The facts stated in this and the two immediately preceding articles, and the letters printed in appendix referred to in the immediately preceding article, are admitted by the parties under reservation of all questions as to their relevancy and the competency of referring to them in determining the questions submitted in the case.

"10. The question has now arisen whether the said holograph writing by Mrs Hannay, dated 21st December 1903, and quoted above, is operative and effectual to dispose of the sum of £1500 mentioned in it as therein specified." The case then proceeded to deal with other questions with which this report is not concerned.

The *first parties* to the case were the trustees acting under Mrs Hannay's trust-disposition and settlement. The *second parties* were Mrs Laura Esther Parker or Keith and the children of her husband, the deceased William Keith, and were the whole of those who were designated in and would benefit under the holograph writing of 21st December 1903 if the same were operative and effectual. The *third party* was the executrix acting under the settlement of Miss Elizabeth

later settlement attached two conditions to two annuities given by the earlier settlement, viz., that the annuitants should be unmarried, and should not have other sufficient means.

* A summary of this correspondence is contained in the opinion of Lord Dundas, *infra*, p. 491.

† The document was in these terms:—

"Southville, Dollar,
December 5th, 1903.

"D. M. M. Milligan, Esquire,
&c., &c., &c., of Aberdeen.

"Dear Sir,—I am much obliged for your and Mr Nicolson's kind letters with which I am favoured to-day, and I once more beg to return many thanks for the kind consent of both to act as trustees.

"It is late this Saturday, and I do not expect to dispatch this until Monday, but it has come irresistibly on my mind that, in event of my daughter's remaining unmarried, or married, leaving no family, I would leave £1500—fifteen hundred pounds—to Mrs Laura Keith's family, Ceylon, i.e., herself, for benefit of her family.

"You will kindly observe from which part of the funds I am entitled to make this bequest. . . . E. F. HANNAY.

"Not sent. I intend adding as a private codicil, to be read after my death. E. F. H."

There was also found in Mrs Hannay's repositories a document, printed in the appendix, in these terms:—

"28. 5. 1904.—Of funds absolutely mine, I leave the sum of Fifty pounds Stg., £50 to Eliza Keith, Ceylon, whom failing to her mother, Mrs Laura Keith, widow of Mr William Keith—as also £250—the sum of Two hundred and fifty pounds to said Mrs Laura Keith. E. F. HANNAY."

Harriet Caroline Hannay, Mrs Hannay's daughter. The *fourth party* Jan. 15, 1913. was Peter Hannay, Mrs Hannay's son; and the *fifth parties* were his children. Hannay's
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With reference to the question with which this report is concerned, the first, third, fourth, and fifth parties contended (1) that the holograph writing by Mrs Hannay, dated 21st December 1903, was revoked by her trust-disposition and settlement; and (2) that it did not constitute an operative direction as to the disposal of the sum of £1500 in the sense of the fourth purpose thereof. The second parties contended that the holograph writing, dated 21st December 1903, was not, in the circumstances, revoked by Mrs Hannay's trust-disposition and settlement, and that it was operative and effectual as a testamentary writing of Mrs Hannay, and that it constituted a direction to pay the sum of £1500 in the manner expressed in the holograph writing, and that in the sense of the fourth purpose of the trust-disposition and settlement.

The following question of law was, *inter alia*, submitted for the opinion and judgment of the Court:—" (1) Is the holograph writing of the testatrix, dated 21st December 1903, operative and effectual as a part of her final testamentary writings?"

The case was heard before the Second Division on 4th, 5th, and 6th December 1912.

Argued for the second parties;—The argument in favour of the validity of the holograph writing of 21st December could be presented in two ways. (1) The will of 13th January was a mere re-attestation or republication of the will of 16th December, and in consequence it left unaffected the writing of 21st December which was a codicil to, and part of, the will of 16th December.¹ The doctrine of republication was an English doctrine, but it had been adopted into Scots law.² That the testatrix in signing the will of 13th January intended merely to re-execute the will of 16th December appeared clearly from the correspondence and the surrounding circumstances. Her own suggestion was that she should add a codicil to the will of 16th December embodying the small alterations which she desired to make, and it was her law-agents who persuaded her that the will should be rewritten. (2) Alternatively, there was extrinsic evidence to show that the testatrix, notwithstanding the terms of the January will and the clause of revocation, intended the writing of 21st December to remain part of her testamentary writings and to receive effect as such. In particular, this appeared from the letter dated 5th December, which was found in her repositories, and in which she referred to her intention to make the very codicil in question. Proof was always competent for the purpose of ascertaining what were the testamentary papers of the deceased,³ and

¹ Williams on Executors, (10th ed.) pp. 140, 147; Wade v. Nazer, (1848) 1 Rob. E. 627; Green v. Tribe, (1878) 9 Ch. D. 231; *In bonis* Rawlins, (1879) 48 L. J., P. & D. 64; Uphill v. Marshall, (1843) 3 Curt. 636.

² Dalglish's Trustees v. Crum, (1891) 19 R. 170; Tait's Trustees v. Chiene, 1911 S. C. 743, *per* Lord Johnston, at p. 761.

³ Whyte v. Hamilton, (1881) 8 R. 949, *aff.* (1882), 9 R. (H. L.) 53; Forsyth's Trustees v. Forsyth, (1872) 10 Macph. 616; Sprot's Trustees v. Sprot, 1909 S. C. 272; Tait's Trustees v. Chiene, 1911 S. C. 743; Lowson v. Ford, (1866) 4 Macph. 631, *per* Lord Cowan, at p. 636; Greenough v. Martin, (1824) 2 Add. E. R. 239.

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generally the circumstances under which his testamentary arrangements were made.¹ The present case raised a question of probate, as distinguished from one of construction, although in Scotland both questions were dealt with by the same Court, a circumstance which was apt to lead to their confusion.² It was evident from the facts that what happened between 16th December, when the first settlement was made, and 13th January, when the last deed was executed, was all "one act of testamentary disposition,"³ and that accordingly the deed of 21st December should receive effect, even though, on a strictly literal reading of the January will, it would be inoperative.

Argued for the first, third, fourth, and fifth parties;—The writing of 21st December was inoperative. It was not "the kind of writing to which the deceased has taken his trustees expressly bound to give effect,"⁴ since it was not a writing "to be hereafter executed," but was executed before the January will was signed. Moreover it was in terms struck at by the express clause of revocation. The terms of the January will were perfectly clear and unambiguous in favour of these parties, and the argument by which the second parties sought to evade the effect of the will was fallacious in both its aspects. (1) The January will was not a republication of the December will. It was a new will, differing in several material respects, and the second parties could not point to any case, either in English or Scots law, where the republished will was not identical with the original. Republication was an English doctrine and had only been applied in Scotland in one case—*Dalglisch's Trustees*.⁵ In that case, besides the fact that the two wills were identical, there was the further distinction that the later will did not, as here, contain an express clause of revocation. This was a material consideration.⁶ Even in English law there was no more than a presumption that a republished will confirmed a prior codicil,⁷ and this presumption was rebutted in the present case by the revocation clause. (2) If republication were negatived, there was no room for the admission of extrinsic evidence to set up the writing of 21st December. The circumstances did not raise a question of probate, but one of construction. Probate merely determined whether the writing was testamentary in nature and form, and as to that there was no doubt in the present case.⁸ What the second parties were attempting to do was to modify by extrinsic evidence the clear and unambiguous terms of the January will, and this was contrary to

¹ *Forlong v. Taylor's Executors*, (1838) 3 Shaw & M'L. 177, per Lord Chancellor Cottenham, at p. 210; *Dickson on Evidence*, sec. 1067.

² *Scott v. Seales*, (1864) 2 Macph. 613, per Lord Justice-Clerk Inglis, at p. 619; *Pattison's Trustees v. University of Edinburgh*, (1888) 16 R. 73, per Lord M'Laren (Lord Ordinary), at p. 75.

³ *Tait's Trustees v. Chiene*, 1911 S. C. 743, per Lord Johnston, at p. 761.

⁴ *Lowson v. Ford*, 4 Macph. 631, per Lord Cowan, at p. 637.

⁵ 19 R. 170.

⁶ *Turnbull's Trustees v. Robertson*, 1911 S. C. 1288; *Allan v. Glasgow*, (1846) 5 Bell's App. 379.

⁷ *In bonis Rawlins*, 48 L. J., P. & D. 64, per Sir James Hannen, at p. 65.

⁸ *Pattison's Trustees v. University of Edinburgh*, 16 R. 73, per Lord M'Laren, at p. 75; *Maitland's Trustees v. Maitland*, (1871) 10 Macph. 79, per Lord President Inglis, at p. 88.

the cardinal rules of construction.¹ *Tait's Trustees v. Chiene*² was Jan. 15, 1913. very special, and in that case evidence was admitted only to determine to which of two possible deeds the phrase "my last will of even date" applied. Further, in that case the whole of the deeds were executed within forty-eight hours, and it was possible to regard them as *idem negotium*. The same principle could not be extended to a transaction where a month had elapsed between the execution of the first deed and the last. Even assuming the competency of the evidence, it was not conclusive in favour of the second parties, for the letter of 29th December, in which the testatrix referred to the £1500 as still undisposed of, was inconsistent with the view that she considered the codicil in favour of the second parties, which she had executed eight days previously, as still remaining in force. It was also an argument against the claim for the second parties that the testatrix had made a bequest in their favour by the codicil of 28th May 1904, for it was not to be presumed that she intended them to take a double benefit.

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At advising on 15th January 1913,—

LORD DUNDAS.—[After narrating the facts]—The principal question in this case is whether or not this document (the deed of 21st December 1903) is operative and effectual as a part of Mrs Hannay's testamentary writings. It is admittedly holograph and, though in pencil, is *ex facie* a valid testamentary writing. But if its operative force and effect are to be judged of purely by the terms of Mrs Hannay's settlement, it is clear that, being prior in date, it must be held to be ineffectual, for it is not a writing thereafter executed; and even if otherwise effectual it would be cut down by the express clause of revocation in the settlement. But certain facts are stated in the case, under reservation of all questions as to their competency and relevancy, which the second parties (the Keith family) maintain are sufficient, if effect can legally be given to them, to warrant the Court in sustaining the writing of 21st December 1903. It appears that in July 1903, Mrs Hannay's law-agents prepared on her instructions a draft settlement of her affairs, which on 3rd December she returned to them as finally approved of, and on 16th December the engrossment was formally executed by her. In returning the document, Mrs Hannay expressed her desire to make certain alterations on her settlement, one of these being a reservation of right to herself to bequeath £1500 out of the sum of £5000, mentioned in the fourth purpose, otherwise than to her son Peter and his children; and she requested the agents to prepare a codicil giving effect to the alterations. The agents advised her that it would be preferable that the settlement should be altered to give effect to her wishes, and be then re-engrossed and re-executed by her. This was done, and the settlement was executed, as already stated, on 13th January 1904.

A question of considerable interest and importance is thus raised as to the extent to which extrinsic evidence is competent to set up as effectual a testamentary document which (like the writing of 21st December) must

¹ Jarman on Wills, (6th ed.) p. 2209, rule 8; Dickson on Evidence, secs. 1052, 1055.

² 1911 S. C. 743.

Jan. 15, 1918. otherwise, being prior in date to the settlement, admittedly be held to be ineffectual. Mr Mackay for the second parties maintained two points with ability and vigour—(1) that the settlement of 13th January 1904 was in fact and effect a mere re-attestation of that of 16th December 1903, and the intermediate writing of 21st December therefore remained good and effectual; (2) that the extrinsic evidence was competent and sufficient to establish Mrs Hannay's intention that the writing of 21st December should receive effect, notwithstanding its actual date prior to the settlement of January 1904.

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Lord Dundas.

The first of these points was based largely upon the case of *Dalglish's Trustees v. Crum*,¹ decided by this Division. The rubric bears that "a lady left (1) a trust-disposition and settlement, partly signed by her and also executed notarially of date 8th March; (2) a codicil executed notarially on 14th March; and (3) a trust-disposition and settlement executed on 9th April in the ordinary way, all in the year 1890. (1) and (3) were both universal settlements, and were practically identical. There was no express revocation of prior settlements in (3). The codicil bequeathed a legacy to a person to whom a legacy was bequeathed in the first trust-disposition, and again in identical terms in the second trust-disposition, the codicil bearing that its provision was 'in addition to the provisions in my trust-disposition and settlement in favour of the' legatee. In a special case brought to determine whether the codicil was or was not recalled by the second trust-disposition, it was stated that the first trust-disposition of the 8th of March was executed notarially because from bodily weakness the testator had not been able to complete the execution of it in her own hand; that her man of business had explained to her that, if she recovered strength, 'it might be better to have the deed re-executed and signed by herself'; that accordingly, she having recovered, it was so 're-extended and re-executed,' this deed being the trust-disposition of 9th April; and that the notary who prepared and executed the codicil was not the same person who prepared the two trust-dispositions and took charge of their execution. Held that the codicil was not recalled, the trust-disposition of 9th April being merely a re-attestation of the will of 8th March." The Lord Justice-Clerk said the "question would be a very difficult one but for the authorities that have been cited to us"; these were English cases (*Wade v. Nazer*,² *Green v. Tribe*,³ and *Rawlins*⁴); and on the strength of these decisions, his Lordship stated that, the settlement of 9th April "being a mere re-execution or re-attestation, we are, I think, in a position to hold that it did not cancel the codicils. The expression of the will of Miss Dalglish on the 8th March was repeated on the 9th April, and as a mere repetition it had no effect as a cancellation of the codicils. They are not affected by it." Lord Young, the only other Judge who delivered an opinion, observed that the difficulty lay in reaching the fact that the deed of 9th April was only a re-attestation or re-execution of the deed of 8th March. Having overcome that difficulty, his Lordship said he had "no hesitation in acting on the principle of the case of *Wade*."² That principle

¹ 19 R. 170.

² 1 Rob. E. 627.

³ 9 Ch. D. 231.

⁴ 48 L. J., P. & D. 64.

was very distinctly expressed by Lord Hannen, in a subsequent case, when Jan. 15, 1913. he was President of the Probate Court. The principle is that a mere re-attestation of a deed, though that re-attestation be subsequent to a codicil, will have no effect in recalling that codicil. Indeed, it is an inaccurate use of language to speak of a re-attested will as a new will. The will remains the same, though evidenced by writing on a new piece of paper. The will of 9th April is the very will of 8th March." Lord Rutherford Clark and Lord Trayner concurred. *Dalglisch's case*¹ is, I think, the only Scots decision in which the "principle" of re-attestation is affirmed, for I do not consider that the judgment in *Tait's Trustees*² truly proceeded upon that ground. But, accepting *Dalglisch's Trustees*¹ as a sound decision, I do not think we could apply it to the present case without materially enlarging the scope and effect of the "principle" it affirms, which I am not disposed to do. The case before us does not comply with the postulates of Lord Young's opinion. Mrs Hannay's will of 13th January cannot be said to be "the very will" of 16th December. The two settlements were not identical (see M'Laren on Wills and Succession, 3rd ed., p. 413, note 2). We have not before us the settlement of 16th December; but we were informed that by its terms £4500 out of the sum of £5000 was destined to Peter Hannay and his children. By the settlement of 13th January only £3000 is so destined, the other £1500 being reserved for future disposal of the testatrix, as the deed bears. Other material alterations were intentionally and deliberately made by Mrs Hannay on the former settlement when she executed the later one. I am therefore of opinion that the principle of re-attestation affirmed in *Dalglisch's Trustees*¹ does not govern the present case. The first branch of Mr Mackay's argument, accordingly, in my judgment fails.

The other branch must also, I think, be rejected. It is important to bear in mind in a question of this sort that the Court of Session in Scotland has to perform two separate and distinct functions which, in some other countries, are entrusted to separate branches of the Court (see Lord Justice-Clerk Inglis in *Scott v. Sceales*³). We have, in the first place, to ascertain and determine what are the testamentary writings of the deceased of which, in English phrase, probate should be granted as constituting his will. For this purpose, extrinsic evidence may be necessary; and in this case the few facts necessary to establish the testamentary character of the writing of 21st December are admitted. The next function of the Court is to determine, as matter of construction, the true meaning and effect of the testamentary writings of the deceased. Here again extrinsic evidence may be necessary; but the limits within which it can competently be resorted to are somewhat jealously guarded. The testator's intention must, of course, always be gathered from the language he has used, and no extrinsic proof is admissible to contradict or modify the plain meaning of that language. But the Court is entitled, in construing a testamentary (like any other) instrument, to have information as to the circumstances which surrounded the testator when he subscribed it. And extrinsic evidence may be resorted to; e.g., to explain words or phrases occurring in a will which are technical,

¹ 19 R. 170.² 1911 S. C. 743.³ 2 Macph. 613, at p. 619.

Jan. 15, 1913. scientific, or otherwise outside the range of common parlance; or when it is necessary for the identification of a particular legatee, or the subject of a legacy, or the like; or even where ambiguity arises from a reference in the instrument under construction to some fact beyond the scope of its immediate expression. Counsel for the second parties strenuously maintained that extrinsic evidence is here admissible (and available) to prove that the words in Mrs Hannay's will, "afterwards directed by me in any writing or writings to be hereafter executed by me," were intended by her to refer to and include the testamentary writing of 21st December, prior in date to the will, notwithstanding the clear and unambiguous import of the words themselves, and the express clause of revocation of "all previous testamentary writings." I cannot accept the contention. It was urged that the recent case of *Tait's Trustees*¹ is a direct authority in favour of the second parties upon the point. I do not think it is so. *Tait's case*¹ was, as appears from the opinions delivered, one of exceptional difficulty and of great specialty. A proof was then led "to enable the Court" (as Lord Dunedin put it, at p. 753), "as is proper, to be, so far as it could be, in possession of the circumstances of the moment, with regard to what was done." The question was as to the validity or the reverse of Mr Tait's holograph list of legacies, which was dated 28th October 1909 and signed by him "in terms of my last will of even date." The evidence satisfied the Court that this document was a testamentary writing of the testator. But the difficulty of the case arose from the words quoted; for, as Lord Johnston expressed it (at p. 758), "there was no will of 'even date,' if 'even date' meant 28th October 1909. There was a possible will of 27th, and an undoubted will of 29th. There was a possible will of yesterday, an actual will of to-morrow, but, literally at least, none of to-day. Yet to one or other of these two documents the docquet must refer. If it referred to the former, then, as the will of 27th October, so far as it can be regarded as a will, was revoked by that of 29th October, No. 8 of process went with it; if to the latter, it may be sustained. Literally and expressly it referred to neither." The learned Judges pointed out that, if the date 28th October were to be regarded alone and by itself, the list of legacies must necessarily be held to be invalid, seeing that Mr Tait's final settlement was only executed on the 29th. But they sustained its validity; and the Lord President expressed his ground of judgment (p. 755) to be that Mr Tait did not look on the two documents of 27th and 29th October as different things. "He looked on them as *idem negotium*, and I think, therefore, when he says, 'in terms of my last will of even date,' he really has in contemplation not the one document of the 27th, but both documents." I think Lord Johnston proceeded on precisely the same ground. He uses the word "republishing" more than once in the course of his opinion; but the basis of his decision (p. 761) was that "what Mr Tait did between the evening of 27th and the afternoon of 29th October 1909 was truly one act of testamentary disposition." In these circumstances the case of *Tait's Trustees*¹ does not appear to me to afford a sufficient basis for the contention of the second parties. It would, I think, be a strong thing to extend the doctrine

¹ 1911 S. C. 743.

of *idem negotium*, applied in *Tait's case*¹ with difficulty to a period of Jan. 15, 1913. hours rather than of days, to a period of weeks as we are here asked to do. It is not easy to see what such an extension might lead to; it might be prayed in aid to cover a period of months or of years, the continuity and identity of the "*negotium*" or "act of testamentary disposition" being sought to be established by correspondence or other extraneous evidence during the period. I am not prepared to strain a theory which was held to suit the facts in *Tait's case*¹ so as to make it cover the quite different and much less favourable state of circumstances now before us. In my judgment we ought not to admit the correspondence in evidence. It is not, I consider, competent to contradict by extrinsic proof the express and unambiguous terms of Mrs Hannay's final settlement; and that, I think, is in effect what we are here asked to do. The writing of 21st December is therefore, in my judgment, inoperative and ineffectual; and I am for answering the first question put to us in the negative.

I should like, however, to add that the conclusion I have reached as matter of law does not, in my opinion, result in any miscarriage of justice; for if the extrinsic evidence could competently be regarded, it would not, in my opinion, be relevant or sufficient to show an intention on Mrs Hannay's part other than that to which effect will be given, if your Lordships agree with my conclusion. The draft of Mrs Hannay's settlement was sent to her on 4th December. Next day she wrote a letter addressed to her agents, which shows that she had it in her mind to leave the £1500 to the Keith family if her daughter died unmarried. But this letter was never sent; it was docketed and retained by Mrs Hannay. She executed her settlement on 16th December; it contained no such provision as she had contemplated for the Keith family, but in returning it to her agents she says she would like added to the will a codicil to the effect that, if her daughter died childless, she left the £1500 otherwise than to her son and his heirs; and on 17th December she refers to the "probability under certain contingencies of bequeathing £1500 to others than my son's family." The agents on 17th and 19th December advised that instead of a codicil or codicils the settlement should be rewritten. On 21st December Mrs Hannay put on paper the writing in question, reverting apparently to her idea of a codicil. But on the 29th, eight days later, she writes to her agents: "In the event of my daughter's leaving no direct heirs, I might not leave the whole of the £5000 five thousand pounds to go to my son or family. I reserve the right of bequest, otherwise, for a portion, and without meantime specifying amount or direction." It is exceedingly difficult to reconcile this passage with the view that Mrs Hannay believed and intended when she wrote it that she had already validly bequeathed the £1500 to the Keiths. When the new settlement was sent to her, containing the colourless clause already quoted, she executed it without comment on 13th January. In these circumstances I confess I see no reason to suppose that Mrs Hannay regarded the writing of 21st December as a valid and subsisting provision; and the contrary view is further supported by the fact that on 28th May 1912 she made a bequest to the Keith family,

¹ 1911 S. C. 743.

Jan. 15, 1913. as to the validity of which no doubt is suggested. [His Lordship then proceeded to deal with questions in the case with which this report is not concerned.]
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LORD SALVESEN.—I have had an opportunity of reading Lord Dundas's opinion, and I entirely concur with the result at which he has arrived.

LORD GUTHRIE.—I am of the same opinion.

LORD JUSTICE-CLERK.—That is my opinion also.

THE COURT answered the first question of law in the negative.

MARTIN, MILLIGAN, & MACDONALD, W.S.—GRAHAM, JOHNSTON, & FLEMING, W.S.—
 MACKINTOSH & BOYD, W.S.—COWAN & DALMAHOY, W.S.—Agents.

No. 68.

MISS ELIZABETH BIRNIE COUPER, Pursuer (Respondent).—

Cooper, K.C.—Wilton.

Jan. 15, 1913.

RIGHT HONOURABLE ALEXANDER HUGH BRUCE, BARON BALFOUR OF
 BURLEIGH, Defender (Reclaimer).—*Clyde, K.C.—J. H. Millar.*

Couper v.
 Lord Balfour
 of Burleigh.

*Reparation—Slander—Privilege—Sufficiency of averments of malice—
 Complaint by ratepayer to Local Authority—Refusal to withdraw statement.*

The matron of a hospital belonging to certain local authorities brought an action of damages against a ratepayer within the hospital district for defamatory statements contained in two letters. The first of these letters was sent by him to the clerk of one of the local authorities, reporting certain information received by him as to the pursuer's conduct as matron (which he stated, if true, pointed, in his opinion, to criminal conduct), and demanding an inquiry. An inquiry was accordingly held by the hospital authorities, and thereafter, on the instigation of the defender, a second inquiry was held by the Local Government Board. In both of these inquiries the pursuer was absolved of blame. The second letter was then sent by the defender to the Local Government Board, in which he expressed dissatisfaction with the result of these inquiries, and made another charge, based on fresh information, against the pursuer, and craved a further inquiry. A third inquiry was held in which the pursuer was again absolved. The defender, however, refused to apologise or withdraw the charges.

The defender's letters were admittedly privileged, but the pursuer maintained that malice sufficiently appeared from (1) the violent terms in which the statements in the letters were couched; (2) the fact that they were made without prior inquiry; (3) the reiteration of them; and (4) the defender's adherence to them and refusal to apologise.

Held (rev. judgment of Lord Dewar) that these facts and circumstances were not sufficient to infer malice; and action *dismissed* as irrelevant.

Observed that the defender as a ratepayer was entitled to lay the facts reported to him before the proper authorities for investigation, and was under no duty to inquire into them before doing so; and that, although the facts were disproved, he was not bound to apologise or to withdraw the statements made to the authorities, although a duty of future reticence might be imposed on him.

2D DIVISION. ON 26th July 1912 Miss Elizabeth Birnie Couper, matron of the
 Lord Dewar. Clackmannan Combination Infectious Diseases Hospital, Alloa, brought an action of damages for defamation against Lord Balfour of Burleigh, residing at Kennet, Alloa.

The pursuer averred :—(Cond. 2) "On 15th July 1911 two children, Jan. 15, 1913.
Rose and Carlos Forbes, aged respectively six and three years, were admitted to the hospital, being notified by Dr Robertson, Clackmannan, Couper v.
their family medical attendant, as suffering from scarlet fever, and Lord Balfour
were placed in the scarlet fever ward. On 31st July a Mrs Comrie of Burleigh.
was admitted to the hospital suffering from scarlet fever, and died next day in the hospital. Carlos Forbes died in the hospital on 21st August 1911." (Cond. 3) "On or about 1st September 1911 the defender addressed the following letter to James Whitehead Moir, solicitor, Alloa, clerk to the County Council of Clackmannanshire, namely :—

" ' Kennet, Alloa, Sept. 1, 1911.

"Dear Mr Moir,—I desire to lay before you the following statement of facts, and beg the favour that a stringent inquiry will be made into the whole circumstances, which seem to me to reflect very seriously on the management of the County Fever Hospital.

"On Saturday, July 15th, two children of my overseer, Mr R. Forbes (Rose and Carlos being the Christian names), were taken to the hospital. They were both suffering from scarlet fever of a very mild type. Both were out of bed and progressing to a favourable recovery when seen by their parents on August 5. On August 11th Rose was sent home said to be cured, but on the following day or on the 13th she developed serious fever, and had to be again taken to the hospital. This time the fever was most severe. I understand it was of the type known as "Septic." The little boy also developed the severe type of fever about the same *or an earlier date*.

"The serious part of the case is this, that on or about July 30th, a woman from Sauchie with the most malignant type of fever was put into a bed in close proximity to the children, almost the next bed to one of them. This woman died within a few hours. The dates would seem to show that both children were infected from this poor woman with the malignant fever: and as I have said the little boy died. I am told that a lad Norval from Clackmannan who entered the hospital about May 22nd suffering from the same mild form of fever as these two children also got the serious type of fever in the hospital, but recovered. So far the facts are not, I think, susceptible of contradiction. I am told, but this is hearsay, that the matron was responsible for putting the Sauchie woman into the close proximity to the two Forbes children, and that she did it in spite of remonstrances from at least one other member of the staff. If this is the case it points, in my opinion, to criminal conduct.

"In any case the whole circumstances should, in my opinion, be made the subject for a most rigid and circumstantial inquiry. I am confident you will agree with me, and that the County Council will see that such an inquiry is made.

"I add that I reserve my right to carry the matter further by appeal to the Local Government Board, or otherwise as may seem right.—I am, faithfully yours,

BALFOUR OF BURLEIGH.

"J. W. Moir, Esq."

(Cond. 4) "The statements in the said letter, namely :—[The portion of the letter from 'the serious part' to 'criminal conduct' was here quoted]—are of and concerning the pursuer, and are false, calumnious, and malicious. These statements were intended to represent and convey, and did represent and convey, the meaning that the pursuer was responsible for the death of Carlos Forbes mentioned in the letter

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by reason of her criminal conduct as matron in putting a patient suffering from the most malignant type of fever, in spite of remonstrances from at least one other member of the hospital staff, into close proximity to the said Carlos Forbes. There was absolutely no foundation for any such imputation upon the pursuer." (Cond. 5) "The defender had no right or duty to make the said statements complained of. The said James Whitehead Moir was not an official of the hospital, nor concerned in its management. The defender made the statements complained of recklessly, without any cause and without having any grounds therefor, and without making the slightest inquiry into the truth thereof. Had he made the slightest effort to test the truth thereof, he would have at once discovered that the charges made by him against the pursuer were false, and that the charge made by him in particular against her in respect of mere hearsay was completely devoid of any foundation." (Cond. 6) "The said letter of 1st September 1911 was transmitted by the said James Whitehead Moir to the committee of management of the hospital, and after inquiry the said committee found that the allegations of the defender against the management of the hospital were not supported by any evidence, and in particular with regard to the said statements complained of by the pursuer as affecting her the said committee found that they were groundless. The said committee further recorded their opinion that the defender should either substantiate his said complaint in regard to her by evidence or withdraw it. The members of the nursing staff on duty at the time in question repudiated the statement to the effect that any remonstrance had been made by them, and of this repudiation the defender was formally made aware. The clerk to the hospital, by letter dated 5th October 1911, intimated to the said James Whitehead Moir the decision of the said committee of management, and reference is made to this letter for its terms." (Cond. 7) "On 12th October 1911 the decision of the said committee of management was communicated to the defender. Copies of signed statements from the medical superintendent, the pursuer, and the nurses of the hospital, together with a copy of the said letter of 5th October 1911, were also transmitted to the defender. Although invited by the committee of management to withdraw his said charges against the pursuer, he declined to do so. On the contrary, the defender openly expressed his dissatisfaction with the conclusions of the said committee, and in spite of his knowledge that there were no grounds in fact for imputing criminal conduct to the pursuer, he declined to withdraw this charge, and determined to press for further inquiry. The defender intimated this resolution upon his part by letter dated 17th October 1911 to the said James Whitehead Moir." (Cond. 8) "On or about 18th October 1911, notwithstanding that the said committee of management had exonerated the pursuer from the said charge of criminal conduct, and that the defender had been made aware of their decision as aforesaid, the defender addressed a letter to the Local Government Board for Scotland, or to the Secretary thereof, in which he demanded that the Board should cause an inquiry to be made with reference to the whole allegations made by him in the said letter of 1st September 1911. In his said letter of the 18th October 1911 the defender again re-asserted and repeated the said charges he had made in his said letter of 1st September 1911." (Cond. 9) "The Local Government Board appointed their medical inspector, Dr Frederick Dittmar, to

inquire into the allegations made by the defender, and after making his investigations he reported to the said Board that in his opinion it was impossible to say from whom the said Carlos Forbes obtained his infection after admission to the hospital, but that it was not likely that he was infected by the said woman patient. In connection with the discharge of her duties by the pursuer, no blame was in any way attached to the pursuer by Dr Dittmar." (Cond. 10) "On or about 27th December 1911 the said Local Government Board communicated to the defender the report of Dr Dittmar. The defender was displeased with the result of this inquiry, and attributed such result to the partisanship of the said medical inspector. He refused to accept the inquiry held by Dr Dittmar as final." (Cond. 11) "On or about 11th January 1912 the defender addressed a letter to the Secretary of the Local Government Board, containing a passage in the following terms :—' All along I have been afraid that a much worse state of things existed than has been revealed. I understand now that events have occurred since I left home some days ago which throw a lurid light on the whole matter under discussion. I understand from a source on which I think I can rely, that two or three of the hospital nurses have resigned their places, and that the matron has also gone, and that they realise the grave responsibility of their position and some of the things that have occurred. A further inquiry would throw a good deal more light upon the actual state of matters, and upon what happened. I understand these nurses went to a medical man in Alloa and informed him that the original charts and registers in the case of the Forbes boy had been wilfully destroyed, either with the knowledge or under the direction of the matron, and that those submitted to Dr Dittmar were fabricated for the purpose.* In this letter the defender ascribed the conclusions of Dr Dittmar to partisanship without the slightest ground for any such imputation." (Cond. 12) "The statements quoted from the said letter of 11th January 1912 are in part of and concerning the pursuer, and are false, calumnious, and malicious. They were made recklessly and without any cause and without making any inquiry, and in gross disregard for the interests of the pursuer. The slightest inquiry by the defender into these statements would have disclosed the entire want of any justification for them." (Cond. 13) "The said statements complained of in the said letter of 11th January 1912 were intended to represent and convey, and did represent and convey, that the pursuer had wilfully destroyed, or caused to be destroyed, original charts and registers in the case of the said Carlos Forbes, had fabricated, or caused to be fabricated, other charts and registers in their place, had uttered and submitted these fabricated charts and registers to the said Dr Frederick Dittmar as true and genuine documents and to defeat the ends of justice, and further, they represented that the pursuer, realising her guilt, had deserted her said post as matron, and that the pursuer was not fit to be matron of the said hospital, or of any hospital." (Cond. 14) "The purpose of the defender in writing the said letter to the said Local Government Board of 11th January 1912 was to force a fresh inquiry because of

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* With this letter was enclosed a letter to the defender from Dr Robertson, dated 9th January 1912, in which the latter reported a statement, which he alleged had been made to him by a nurse on that date, as to the fabrication of the charts.

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his displeasure and disappointment with the result of the said two previous inquiries. Moved by the defender's said groundless allegations, the said Local Government Board appointed James A. Fleming, K.C., Sheriff of Dumfries and Galloway, as their commissioner to hold another inquiry on their behalf." (Cond. 15) "The result of the inquiry held on three days in February 1912 by the said commissioner was that he reported to the said Local Government Board that the charges made against the pursuer of fabricating evidence in view of Dr Dittmar's inquiry and of deliberately concealing relevant facts from him were without foundation, and he found no fault proved against the pursuer. The said commissioner stated regarding her:— 'On the other hand, the matron impressed me very favourably. I think she is a woman anxious to do her work, truthful in her whole account of what she has done, even of the faults she had committed, and full of zeal and desire to have the hospital work done as smoothly as possible.' The said commissioner found that the statements reflecting on the pursuer and the said hospital were made by the defender to the said Local Government Board on the authority of Dr Robertson; that these statements were based on 'mere spiteful tittle-tattle'; that his informant (Dr Robertson) had 'carefully noted the charges of grave misconduct against the hospital staff (meaning thereby, *inter alios*, the pursuer) by a dismissed probationer and her tool'; that the said Dr Robertson had 'deliberately refrained from testing' the accuracy of the said statements by any questions or by any communications with the hospital committee or anyone else." (Cond. 16) "On or about 29th June 1912 the said Local Government, by its Secretary, formally informed the clerk to the said committee of management that they concurred in the findings of the said commissioner. A copy of the report of the said commissioner was sent to the defender, and he was apprised by the said Local Government Board of their said concurrence therein." (Cond. 17) "The statements complained of by the pursuer in the said letters of the defender of 1st September 1911, 17th and 18th October 1911, and 11th January 1912 reflected upon the pursuer both in her professional capacity and in her personal character, and they were to her serious loss, injury, and damage. She was deeply wounded in her feelings by the unjust and cruel aspersions made by the defender upon her as a professional nurse and as the matron of an important hospital, and by the imputations cast by him upon her private character, and her health was also seriously affected thereby. Further, these statements put her to considerable expense in employing legal assistance for the purpose of protecting herself and her interests in the inquiries into her alleged misconduct ordered by the said Local Government Board. The loss, injury, and damage which the pursuer has sustained and may sustain by reason of the defender's actings cannot be stated at less than £2000, being the sum sued for." (Cond. 18) "On or about 13th May 1912 the pursuer by her agents requested the defender to withdraw the said charges and insinuations which he had made against her in the said letters complained of, and to make such reparation to her as he might consider right and proper in the circumstances. Again, on 22nd May 1912, failing to obtain a satisfactory reply from the defender, the pursuer's agents urged the defender to accept the findings of Sheriff Fleming and to grant the pursuer the fitting reparation of a full apology. The pursuer would then have been satisfied with such an apology, and offered by her

agents in their letter to the defender of 22nd May 1912 that the whole matter, in so far as regards herself, might be honourably closed by the compliance of the defender with her request for such retraction. So far from acquiescing in this reasonable proposal, the defender has intimated by letter from his agents that he declines to withdraw any of his allegations against the pursuer or to give any apology to the pursuer, and that he considers his actings have been meritorious in that they have given the pursuer, by means of the successive inquiries instigated by him as aforesaid, an opportunity of clearing herself from the stigma thrown upon her conduct as matron. In these circumstances the pursuer is under the necessity of raising this action in order that she may vindicate herself from the said charges and accusations."

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The defender pleaded, *inter alia*;—(1) The pursuer's averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (3) In respect that the letters of the defender libelled and the statements therein contained and complained of by the pursuer were privileged, the action should be dismissed.

On 27th November 1912 the Lord Ordinary (Dewar) approved of two issues, the first being based on the letter quoted in cond. 3, the second on the passage quoted in cond. 11.*

* "OPINION.— . . . The defender objects to both issues on the grounds (1) that the words complained of are not defamatory, and (2) assuming that they are defamatory, they were used on a privileged occasion, and the pursuer, he maintains, has not set forth on record facts and circumstances from which malice can reasonably be inferred.

"Counsel for defender did not offer much argument on the first point, and I do not think that it can be seriously disputed that to accuse the matron of a hospital of criminal conduct in the discharge of her duties, and of having fabricated documents to deceive a commissioner appointed to inquire into her conduct, is calculated to injure her in her character and reputation. If she had been found guilty of these offences she would have been unfit to hold the post of matron in this or any other hospital. I am, therefore, of opinion that the statements complained of are actionable. But I think that the occasions on which both letters were written were privileged. It is clear from the pursuer's record, and from the correspondence to which both parties referred me, that the defender in writing to the authorities was acting in what he believed to be the discharge of a public duty. The child who had died was the son of his overseer. It is not disputed that information had been placed before the defender that there had been mismanagement in the hospital. But it is said that he had no right or duty to communicate this information. I cannot agree with that. If the defender had reasonable cause to believe that the information he received was true, and that the mismanagement was calculated to spread infection and endanger the public health, I think he was privileged in communicating such information to the proper authority. Although the first letter should, perhaps, have been addressed to the clerk of the Combination Hospital and not to the clerk to the County Council, still the County Council, as the public health authority for the county of Clackmannan, are at least partly responsible for the management of the hospital, and I do not think that there is anything in the point that the communication was not addressed to the proper authority. Indeed the pursuer did not appear to press this point. Her case, as I understand it, is—not that the defender fell into a technical error—but that he persistently, recklessly, and maliciously accused her of offences which she had not committed, and persists

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The defender reclaimed, and the case was heard before the Second Division on 18th December 1912.

Argued for the reclamer;—The pursuer's averments were irrelevant. There was admittedly privilege, and there were no facts averred sufficient to infer malice. The Lord Ordinary had proceeded on four grounds—(a) the strength of the reclamer's language; (b) the absence of inquiry by the reclamer; (c) his repetition of the statements; and (d) his refusal to retract. As to (a), whether language was too violent depended on the occasion and circumstances to which it was applied,¹ and if the reclamer "stated no more than what he believed and what he might reasonably believe," he would not be liable.¹ Here the reclamer did believe in what he stated, and his language was not disproportionate to the incident to which it was directed, viz., the death of a child through supposed careless management of the hospital. As to (b), the case on which the Lord

in accusing her, or at all events refuses to withdraw the accusation, although she has, after three official inquiries, been found to be innocent.

"If I am right in thinking that the occasion was privileged, the next question is whether there is a sufficient averment of malice on record. A bare averment that the defender acted maliciously is not enough. If the occasion was privileged, the statements complained of, although untrue in fact, nevertheless must be presumed to have been communicated in good faith, in the exercise of a right, or the performance of a duty—unless there is on record some averment which will displace that presumption. And the pursuer will not be entitled to an issue unless she has set forth on record facts and circumstances from which, if proved, a jury might reasonably infer malice. But I think she has done so, and that she is entitled to have her case submitted to a jury. Although, as I have said, the defender was privileged in placing facts as to mismanagement before the hospital authorities, he appears to have gone beyond what was necessary for that purpose in suggesting that the pursuer was guilty of 'criminal conduct' and of 'fabricating' documents. In the case of *Gall v. Slessor*, 1907 S. C. 708, it was held that 'to charge the pursuer deliberately, after ample time for consideration, with having obtained money on false pretences, and to threaten him that unless the money was refunded and an apology made the matter would be put into the hands of the police, was . . . so extravagant and indicated such recklessness on the defender's part as to infer malice.' Following that authority I think it possible that the jury might, if they thought proper, reasonably reach the conclusion that the statements made in the present case were so extravagant and reckless as to be inconsistent with the *bona fide* discharge of a public duty and to infer malice. Then the pursuer makes the averment that the statements were made without any grounds therefor, and without the slightest inquiry, and that after the first official inquiry had been held and the defender was invited by the committee to withdraw the charges he not only declined to do so, but repeated them 'in spite of his knowledge that there were no grounds in fact for imputing criminal conduct to the pursuer.' These averments may not, of course, be true, but at present I must assume that they can be proved, and on that assumption I think they require explanation. If it be true for example, that the defender knew after the first inquiry that there were no grounds in fact for imputing criminal conduct to the pursuer, it is difficult to see what legitimate purpose could be served in repeating the charge and continuing to press it against her. And it has been decided that to accuse a person of a crime without having made any inquiry is a circumstance from which a jury would be entitled to infer malice—(*Dinnie v. Hengler*, 1910

¹ *Spill v. Maule*, (1869) L. R., 4 Ex. 232, *per* Cockburn, C.-J., at p. 237.

Ordinary relied¹ was not in point. In that case it was the relation-ship of master and servant between the parties that gave a sinister aspect to the absence of inquiry. Here the reclamer had taken the proper method of securing inquiry, viz., by laying the matter before the responsible authorities, and he was under no obligation to conduct a private inquiry. (c) There was no repetition of the slander, in the true sense of that term; the statements were based on different information and were made to different bodies. *Douglas v. Main*² was an instance of repetition such as to infer malice. (d) There was no ground for requiring an apology. It was the reclamer's duty to report what he had learned to the body controlling the hospital, and in doing so he was bound to express his opinion of the matter, and if after investigation the information or opinion was found to be erroneous, he was not bound to retract, for he had committed no wrong. In any case, while prior malice might be inferred from malice existing after the utterance of the slander, this was possible only where the circumstances made that inference irresistible.³ Here the inference had very slender support, if any.

Argued for the respondent;—Malice sufficiently appeared from the averments made. The statements complained of were made without inquiry,¹ and without any regard for the respondent's position,⁴ and were couched in the most extravagant terms.⁵ The subsequent actings of the reclamer, which might be founded on as proving the existence of a malicious motive prompting the slander,⁶ his repetition of the slander, and his refusal to retract,⁷ all sufficiently inferred malice. The undernoted authorities were also referred to.⁸

At advising on 15th January 1913,—

LORD DUNDAS.—This is an action of damages for slander. The statements complained of are contained in two letters written by the defender

S. C. 4). And the fact that a defendant refused to withdraw a plea of justification yet did not attempt to prove it, has been held evidence of malice in England—(*Simpson v. Robinson*, 12 Q. B. (Ad. & Ell.) 511). Of course the defender may have quite a good explanation to offer, and the pursuer may be entirely wrong in thinking that he was actuated by any malicious motive. I express no opinion on that. All I decide is that she is, in the circumstances, entitled to have her case laid before a jury. I accordingly approve both issues, with the addition of the word 'malicious' inserted in each.

"The defender argued that the words 'without probable cause' should also be put in the issues. But these words do not appear to be appropriate to a case of this kind—(See the Lord President's opinion in *Webster v. Paterson & Sons*, 1910 S. C. 459)."

¹ *Dinnie v. Hengler*, 1910 S. C. 4.

² (1893) 20 R. 793.

³ *Reid v. Coyle*, (1892) 30 S. L. R. 335, per Lord Trayner, at p. 338.

⁴ *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q. B. 431; *Smith v. Green*, (1853) 15 D. 549, per Lord Fullerton, at p. 552.

⁵ *Gall v. Slessor*, 1907 S. C. 708.

⁶ *Pearson v. Lemaitre*, (1843) 5 Man. & G. 700.

⁷ *Simpson v. Robinson*, (1848) 12 Q. B. (Ad. & Ell.) 511; *Folkard on Slander and Libel*, (7th ed.) 212.

⁸ *Ingram v. Russell*, (1893) 20 R. 771; *Currie v. Weir*, (1900) 2 F. 522; *Cassidy v. Connachie*, 1907 S. C. 1112; *Craig v. Jex-Blake*, (1871)

9 Macph. 973; *Jenouire v. Delmege*, [1891] A. C. 73; *Odgers on Libel and Slander*, (5th ed.) 144; *Cooper on Defamation*, (1st ed.) 30, 200.

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Jan. 15, 1913. on 1st September 1911 and 11th January 1912 respectively. It is admitted on the one hand that the statements are *prima facie* libellous, and on the other that the occasions were privileged. The sole question is whether or not the pursuer has relevantly averred malice. The Lord Ordinary decided in the affirmative, and allowed issues. His carefully expressed opinion proceeds upon the cumulative effect of four elements, viz., (1) undue strength of the language used; (2) that the statements were tenaciously adhered to and repeated; (3) that the defender made no inquiry into the truth or otherwise of the statements; and (4) that he declined, and declines, to withdraw them or to apologise. I have come to the conclusion that the pursuer's averments are irrelevant, because they do not disclose any issuable matter on the head of malice. It seems to me that the synthesis of the Lord Ordinary's reasoning is destroyed if a fair amount of analysis is applied to it. The pursuer's record must be reasonably construed along with the letters themselves and such other letters as are imported into her condescendence, but no others. It is important, having regard to some portions of the arguments of the pursuer's counsel, to emphasise at the outset that the statements complained of were made by the defender to public authorities in the alleged discharge of a public duty, and that the presumption is that they were so made *in bona fide*, and not from any oblique motive. In *Jenoure v. Delmege*¹—a case bearing considerable resemblance to the present in several respects—Lord Macnaghten, who delivered the opinion of the Privy Council, said: "There is no reason why any greater protection should be given to a communication made in answer to an inquiry with reference to a servant's character than to any other communication made from a sense of duty, legal, moral, or social. The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case *bona fides* is always to be presumed."

By the first letter, that of 1st September 1911, the defender laid before the county clerk a statement of facts, and begged that a strict inquiry should be made into the whole circumstances which seemed to him to reflect very seriously on the management of the County Fever Hospital. He reserved his right to carry the matter further by an appeal to the Local Government Board, or otherwise as might seem right. The paragraph chiefly complained of is that in which he said: "I am told, but this is hearsay, that the matron was responsible for putting the Sauchie woman into the close proximity to the two Forbes children, and that she did it in spite of remonstrances from at least one other member of the staff. If this is the case, it points in my opinion to criminal conduct." I should be disposed to read this as meaning that if the reported hearsay should prove to be true in fact the matron would, in the defender's opinion, be criminally responsible for the child's death; but the word "criminal" may have been used, as it sometimes is, only in the sense of "highly reprehensible." Even upon the former of these constructions, I do not think it could be legitimately inferred from the language used that the defender went beyond what was

¹ [1891] A. C. 73.

proper for his purpose, and was inspired by malice. The pursuer avers Jan. 15, 1913. (Cond. 5) that "the defender had no right or duty to make the said statements complained of." I think that he had the right and duty of any citizen who *bona fide* believes that wrong has been done to lay the alleged facts before the proper authority for investigation; and that in doing so he was entitled to formulate his own view of what ought to follow if the facts reported on hearsay should be established as true. The pursuer goes on to aver that the defender made the statements recklessly, "and without making the slightest inquiry into the truth thereof." Her counsel could not suggest, and I cannot imagine, what form of independent inquiry it was the defender's duty at that stage to undertake. He asked that the proper authority should inquire. The case of *Dinnie v. Hengler*,¹ referred to by the Lord Ordinary, has no application. There, a master, without making any inquiry at all, charged his servant with dishonesty in presence of other persons, and an oblique motive was alleged pointing to actual malice. It seems to me, therefore, that from the letter of 1st September 1911 and its surrounding circumstances as disclosed by the pursuer's record, no legitimate inference of malice could possibly be drawn.

A domestic inquiry having been conducted by the hospital authorities, its result was on 5th October 1911 communicated by their clerk to the county clerk, and afterwards to the defender. The pursuer avers (Cond. 7) that "although invited by the committee of management to withdraw his said charges against the pursuer, he declined to do so. On the contrary the defender openly expressed his dissatisfaction with the conclusions of the said committee, and in spite of his knowledge that there were no grounds in fact for imputing criminal conduct to the pursuer, he declined to withdraw this charge, and determined to press for further inquiry"; and (Cond. 8) that he demanded that the Local Government Board should cause such inquiry to be made. I think the defender was quite entitled to ask (as he had originally stated his intention to ask) for this further and independent investigation, and that no inference of malice could be reasonably drawn from his so doing. If, under analogous circumstances, a procurator-fiscal to whose notice a citizen had brought certain alleged facts, should decline to act, or, after making some inquiry, should express the view that the facts did not disclose any ground for proceedings, I apprehend that the citizen might, without any room for a suggestion that he was actuated by malice in doing so, approach the Crown Office with a request for further investigation. Nor do I think that the defender was bound to act upon the "invitation" of the hospital committee that "the statement should either be substantiated by his Lordship or withdrawn by him." It was not, in my judgment, for the defender either to substantiate or to withdraw; it was for the Local Government Board, if they thought fit, to inquire into the facts, as he desired them to do.

The Local Government Board did think fit to order an inquiry, which was accordingly conducted by Dr Dittmar; and his report was communicated to the defender about 27th December 1911. On 11th January 1912 the defender wrote to the Local Government Board the letter, part of which

¹ 1910 S. C. 4.

Jan. 15, 1913. is scheduled to the second issue, and the whole of which is printed in Appendix B. Enclosed with it was a letter, dated 9th January, which he had received from Dr Robertson. The pursuer (Conds. 12, 13, 14) alleges that the statements in the defender's letter were malicious, made recklessly and without any inquiry, and in gross disregard of the interests of the pursuer; and that his purpose was "to force a fresh inquiry because of his displeasure and disappointment with the result of the said two previous inquiries." Now it is clear from the letter itself (and its enclosure), and from the pursuer's averments, that since the date of Dr Dittmar's investigation new information, involving fresh matter for inquiry, had been brought to the defender's notice by Dr Robertson. The demand for renewed investigation was not a mere iteration of what had gone before. I cannot understand why the defender should not have been entitled to ask for further inquiry, or how malice could be inferred from his having done so; nor, so far as I see, is there anything violent, or possibly suggestive of malice, in the language of this letter, any more than in that of the letter of 1st September 1911. There is not here, in my opinion, any ground for applying the doctrine laid down, *e.g.*, in *Gall v. Slessor*,¹ to which the Lord Ordinary alludes.

An inquiry was in fact held by Sheriff Fleming; and the pursuer avers (Cond. 15) that his report bore that "the charges made against the pursuer of fabricating evidence in view of Dr Dittmar's inquiry, and of deliberately concealing relevant facts from him, were without foundation, and he found no fault proved against the pursuer." Thereafter, the pursuer's law-agents wrote certain letters to the defender, and a correspondence was continued between his law-agents and them. The pursuer (Cond. 18) summarises this correspondence, which must be looked at in considering the relevancy of this part of the pursuer's record. Her agents requested the defender to withdraw the false and libellous charges, allegations, and insinuations which they maintained he had made against her, or to apologise for them. The defender (through his solicitors) declined to do either. His attitude is expressed in their last letter to be that "while, as the result of these inquiries, he is now satisfied that the matron was not so much to blame as she seemed at first sight to be, he does not see anything in his action which calls for either apology or compensation." I do not think that a member of the public who has, in the *bona fide* discharge of a duty, submitted matters to a public authority for their investigation is legally bound, if the result of such investigation is to absolve some person from injurious implication in the subject-matter inquired into, to apologise to that person, or to withdraw any statement he may have made about him or her in his *bona fide* disclosure to the authority. A duty of future reticence may be imposed upon him; but I do not think he is legally bound even to recant his original belief; it might be impossible for him conscientiously to do so. But the pursuer's counsel urged that, whether or not the defender is bound in law to apologise or to withdraw, his persistent refusal to do either is a ground from which a jury might legitimately infer that he was actuated by a malicious intent when he wrote the first (or, at all events, the second) of

¹ 1907 S. C. 708.

the letters complained of. I am not aware of any authority for this view, Jan. 15, 1913. and I think it is unsound. The English case of *Simpson*,¹ referred to by the Lord Ordinary, is a long way off the point attempted to be made. The Court there declined to say that a Judge had misdirected the jury when he told them that, with reference to the question of malice, they might consider the whole of the defendant's conduct, one feature of which was that while his record pleaded, *inter alia*, the truth of the alleged verbal slander, he gave no evidence at the trial in support of that plea, and refused to admit that the words were false, though the plaintiff offered, on his doing so, to accept an apology and nominal damages. It may be that the present defender could, in the circumstances, without any sacrifice of principle or of dignity, have expressed some measure of regret that statements made by him in the *bona fide* discharge of a duty, upon information which had turned out to be in part, at least, erroneous, should have cast unmerited reflection upon the pursuer's character and caused her pain and inconvenience. It may be that such an expression would have been a kind and a handsome act on his part. But I think these considerations are matters outside the proper province and contemplation of a Court of law. I know of no authority, and none was cited to us, for holding that the mere obstinate retention of a personal belief or view is by itself a ground upon which malice may be inferred; and that is, I think, what the pursuer's argument upon this head of the case must amount to.

On the whole matter, we ought, in my judgment, to recall the Lord Ordinary's interlocutor, sustain the defender's first plea in law, and dismiss the action. The case, in my opinion, ought not, according to our established law and practice, to go to a jury, because the pursuer's record does not contain any issuable matter on the essential element of malice.

LORD SALVESSEN.—The only point in controversy in this case is whether the pursuer has sufficiently averred facts and circumstances from which malice can be inferred. The Lord Ordinary's reasoning is plausible and at first impressed me, but after further consideration I have come to be of opinion with your Lordships that his judgment cannot be supported. Malice in the sense of animosity or ill-will is here out of the question. It is not alleged that the defender had any acquaintance with the pursuer or had even come in contact with her; nor is it suggested that he had any object to serve by her dismissal or by her conduct being made the subject of censure. His relation to the pursuer was merely that of the recipient of complaints regarding her from the father and medical attendant of two children, one of whom had died in the hospital from an infectious disease contracted there. It is not averred that he added to or embellished the information that had been conveyed to him by the interested parties in the communications which he made to the hospital authorities or to the Local Government Board. There is therefore nothing to detract from the *prima facie* view that the defender in making these communications was actuated solely by a sense of public duty. It is no doubt true, as the Lord Ordinary has pointed out, that the character of the statements made and the mode of

¹ 12 Q. B. (Ad. & Ell.) 511.

Jan. 15, 1918. making them may sometimes be such as to justify a tribunal in inferring malice or, in other words, drawing the conclusion that the person making Couper v. them, while professing to act in the discharge of a public duty, was not Lord Balfour of Burleigh. really doing so but was actuated by motives of hostility towards the subject Lord Salvesen. of the complaint. Such hostility may even be engendered at the very time that the accusations are made, and may be consistent with there being no previous acquaintance between the parties ; but it must be carefully distinguished from the indignation which a public-spirited person may well feel when facts are brought to his notice which suggest to his mind that there has been culpable mismanagement of a public institution resulting in the sacrifice of life.

Is there anything, then, in the pursuer's averments from which malice on the part of the defender can legally be inferred ? Let me examine them in detail as summarised by the Lord Ordinary. First it is said that the defender acted recklessly and without inquiry. That he did not make inquiry is true, but so far from this being evidence of recklessness in the circumstances here disclosed I think it is proof of discretion. Had the defender constituted himself a private detective he could scarcely have failed to reveal the suspicions which he harboured and might easily have exposed himself to an action of slander. The course he took was to lay the facts that had been brought under his notice before the proper authorities and leave to them the duty of investigation. In so doing he exercised an undoubted privilege which it is not in the public interest to penalise.

Again, the Lord Ordinary thinks that the defender went beyond what was necessary for his purpose in suggesting in the letter of 1st September that the pursuer had been guilty of criminal conduct ; but this was a mere comment on the facts narrated, and it is obvious from the rest of the letter that the defender was under the belief (now ascertained to be erroneous) that the woman who infected the two children was suffering from a different type of fever from scarlet fever ; that the pursuer had been made aware of this at the time and had nevertheless persisted in putting this woman into a bed in close proximity to the children. If she had done so the word "criminal" would perhaps not be too strong to characterise her conduct.

The next point made is that after receiving the report of the committee of management the defender nevertheless determined to press for a further inquiry. A less resolute person might have been content to let the matter drop ; but it does not follow because the report failed to carry conviction to the defender's mind that his demand for an independent investigation was actuated by malice. Indeed, the report of the committee contained passages which were calculated to induce the defender to take the further action he had indicated in his first letter. The opinion expressed by them that the statements made by the defender should either be substantiated by evidence or withdrawn by him was, to say the least of it, injudicious. At all events, the defender acted within his legal right in bringing the whole matter under the notice of the Local Government Board, and throwing upon them the responsibility of making further investigation if they thought fit. At first sight it seems to savour of persecution that the defender after this second inquiry had resulted in the complete exoneration of the pursuer should have made an application for a third inquiry ; but

this demand was, in my opinion, justified by the additional information he Jan. 15, 1913. had received from what *prima facie* he was entitled to regard as a reliable source. It is to be regretted that the defender should have lent such a credulous ear to the statements of the doctor whose mistaken diagnosis, if the view of the hospital authorities was well founded, was at the root of the whole trouble. But, if he honestly believed these statements, he had a right to communicate them and to ask for a further inquiry. The fact that the Local Government Board did order a new inquiry shows that the additional facts weighed with them as they did with the defender. I fail to find any trace of malice in the letters of the defender founded on, or anything inconsistent with the view that he acted throughout from a genuine desire to secure proper management of the hospital. The pursuer makes a formal averment in Cond. 7 that the defender knew that there were no grounds in fact for imputing criminal conduct to the pursuer; but this statement must be read along with the context, from which it appears that his so-called knowledge depended upon his unreserved acceptance of the views expressed by the hospital committee. Other knowledge it is not maintained that he had, for his original informant had plainly not withdrawn the imputations of which he induced the defender to be the mouthpiece.

The last matter from which malice is sought to be inferred is that the defender, after the result of the third inquiry had been made known to him, declined to withdraw the imputations he had made against the pursuer, or to grant her the fitting reparation of a full apology. I agree with Lord Dundas that an expression of regret might well have been made that the pursuer had been subjected to so much anxiety and distress as the result of the defender's communications, but neither an apology nor a withdrawal could be legally demanded. The defamatory information was expressly transmitted on the footing that it depended on hearsay, and none of it was made on the defender's own authority. I can well understand that he takes up the position even now that, believing the source of his information to be reliable, he was justified in acting as he did. To have apologised for having believed the information would be to reflect upon the source from which it came; and, as the pursuer at first sought reparation as well as an apology, the defender's caution is all the more intelligible. On the whole I do not think there is anything in the terms of his agent's letters—assuming, as I do, that they were written by the defender's instructions and with his full approval—to justify an inference of malice. The result is that this action falls to be dismissed, but I desire to add, in case our judgment might be misconstrued, that I assume throughout that there were no grounds for any reflection on the pursuer's conduct as matron of the Alloa Hospital, and that she has succeeded in completely vindicating her character as the result of the three searching inquiries to which it has been subjected.

LORD GUTHRIE.—I am of the same opinion. The case made by the pursuer raises no question of law, and the parties are agreed on all the essential facts, except as to the existence of malice on the part of the defender in writing the letters of 1st September 1911 and 11th January 1912, which are the foundation of the pursuer's case. On the one hand, it is admitted that the defender, writing these letters about matters of public importance,

Jan. 15, 1913. in which he had a legitimate interest, to the public bodies whose duty it was to investigate these matters, occupies a position of privilege, which will bar all action against him at the instance of the pursuer unless she makes such averments as will be reasonably relevant, if proved, to establish malice on his part in writing the letters. On the other hand, it is admitted that, without direct averment of antecedent acts and causes, there may be such averments of extravagant words or conduct as will be sufficient foundation for a reasonable inference of malice.

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Lord Guthrie.

The pursuer does not suggest any antecedent reason why the defender should have entertained malice towards her. She founds on statements passed on by him to the proper authorities as hearsay requiring investigation, but she does not suggest that he in any way originated these statements, or even altered them. Nor does she aver any communication, verbal or written, of these statements to persons who had no duty of inquiry into their accuracy or inaccuracy.

It is impossible not to feel sympathy for a person like the pursuer, who has been subjected to the anxiety, pain, and expense of three inquiries into charges which these inquiries have proved unfounded, and to regret that these charges should ever have been made. Such sympathy and regret might, perhaps unduly, weigh with a Court dealing with the authors of these baseless charges. The case is very different where, as here, the action is brought, not against the authors of the charges but against a citizen who, in the exercise of what seems to me to have been a public duty, transmitted the derogatory allegations to the proper authority, not as well founded but as requiring investigation. Any regret that we may have that the defender did not, through his agents in their concluding letters, express the sympathy and regret to which I have above referred is, however, in the region of moral, not of legal obligations.

I agree with your Lordships in thinking that the pursuer's four points, taken not singly but together, as she is entitled to have them taken, cannot reasonably lead to the inference of malice on the part of the defender when he wrote the letters complained of. These points are:—(1) Failure to make inquiry before writing the letters; (2) extravagance of language in the letters themselves; (3) refusal to rest satisfied with the first (the hospital) inquiry, or with the second (Dr Dittmar's) inquiry, and persistence in demanding the third (Sheriff Fleming's) inquiry; and (4) refusal, after the favourable result of all three inquiries, to withdraw the statements passed on by him, and apologise and make reparation for having passed them on. Your Lordships have dealt fully with all these points, and I have nothing to add. The argument of the pursuer seems to me to ignore the nature and result of the legal doctrine of privilege. For instance, it was urged that the defender fell under the rule that he who passes on a slanderous statement is as responsible as he who originates such a statement, a rule which can obviously have no application where, as here, the defender, if he had not a duty, certainly had a right, to pass on the statements in question so long as he left them unaltered and communicated them only to the responsible authorities.

On the whole matter, I am of opinion that the issues should be disallowed and the action dismissed.

LORD JUSTICE-CLERK.—I concur in the opinions which have been Jan. 15, 1913. expressed, to the effect that the averments in the record are not relevant to entitle the pursuer to have issues approved of for trial. The defender, who Couper v. Lord Balfour of Burleigh. was legitimately interested in a family whose head was an employee on his estate, proceeding upon information given to him as to the circumstances in which a child of that family died of scarlet fever—information which, if true, seemed to him to imply that irregularities had taken place in regard to that child when it was in the infirmary in Alloa—wrote the first letter complained of. That letter was written to a public body—those in charge of the infirmary. It set forth what he had been told by the parent and the medical man, and asked that an inquiry should be held into the circumstances. The statements in the letter were, on the face of them, slanderous if they were not correct as to fact; and, as they are not maintained by the defender to be statements he can substantiate, the pursuer would be entitled to an issue in ordinary form unless the defender can maintain that there is privilege, and that therefore no issue can be allowed unless malice be competently averred so as to be put in issue. Upon the question whether there is privilege there can be no doubt. The statements complained of were made to a public authority with a view to inquiry, and must be presumed to have been made in the *bona fide* exercise of the citizen's right to bring before the proper authority what has been communicated to him, and as to which inquiry in the public interest is called for. There is no *prima facie* presumption in such circumstances that the person reporting and asking for investigation has any personal or sinister motive in calling the attention of those responsible for the working of a public institution to the matter, and asking them to look into it. There can be no question, as Lord Macnaghten observed in the case of *Jenoure v. Delmege*,¹ that in such cases "*bona fides* is always to be presumed."

There is no doubt that in this first letter the defender expressed himself in emphatic language which Lord Dundas has quoted. But I cannot see that, when he reports the information he has received—expressly calling attention to the fact that he is not speaking of his own knowledge but is speaking only from hearsay—and only says that if it is true a serious responsibility had been incurred, any malice can be inferred. He made no assertion of its truth. He put it as a quotation of what had been laid before him, and the mere statement that if it should turn out to be true it pointed to criminal responsibility, cannot, in my opinion, be held to imply malice. That he should have, and express, an opinion as to the character of what was done, if it should be established that it was done, cannot be accepted as entitling a pursuer to an issue in a case where malice must be put in issue, if he had a right and duty, as I am of opinion he undoubtedly had, to lay the matter before the proper authority for inquiry.

It is true that the defender made an application for a further inquiry; but this was on new information conveyed to him by a medical man. I cannot see how it can be said that his request for an inquiry on this new information can possibly be made a ground for implying malice in the previous proceedings, nor how it can be made to imply malice by itself.

¹ [1891] A. C. 73.

Jan. 15, 1913. The suggestion that the citizen who is *bona fide* informed of some alleged reprehensible conduct occurring in a public institution is to have malice implied against him, because he places the matter in the hands of the public body whose subordinate's conduct is impugned without first making inquiry himself, is a suggestion to which I cannot give my assent. It would surely be a most unfair burden to put upon any citizen that, when informed of there being something reprehensible occurring in a public institution, he should be necessary for him, before asking the proper body to examine into the matter, to make an examination himself, and that if he did not do so, it should be inferred that he harboured malice. I think his conduct might well be challenged by the public authority itself, if he attempted to conduct any inquiry among their subordinates without calling them in, he having no right to interfere with their establishment. If the person in regard to whom the allegations were made were under the control of the person accused of slander—as in the case of a servant living in his family coming under suspicion—something might be said for holding that the master ought to make inquiry within his own circle, as the head of his own house, and should not rush to make accusations recklessly. But no case could arise for civil damages unless he made an assertion of guilt. But here there was no relation between the parties at all. The defender had no right to make inquiries into the working of the infirmary. If he thought that an inquiry should be held, he, in my opinion, acted rightly in laying the matter before those who were in the control of the establishment in which it was reported that something had been done which was not right. I cannot, therefore, hold that, in asking that he did in asking for the inquiry, he can be held to have displayed specific malice.

But then it is said that—to use the Lord Ordinary's words—"his statements were tenaciously adhered to and repeated." This is based upon the fact that, being dissatisfied with the action of the hospital authorities, the defender availed himself of his legal right to appeal to the Local Government Board. I confess I am quite unable to see how, when the law entitles the citizen to take an appeal to a Department that has power to review a matter, the taking of such an appeal can be held to be a ground for inferring malice. The illustration given by Lord Dundas of a party, who has given information to a procurator-fiscal for inquiry, applying to the Crown Office who, being dissatisfied by the refusal of the procurator-fiscal to proceed seems to have done the most apposite. If there was no malice to be implied from the giving of the information to the procurator-fiscal, how could an application for review made to the proper reviewing authority be any ground for implying malice? It is significant that in his first letter he expressly referred to, and reserved his right to invoke the jurisdiction of, the Local Government Board should he see cause to do so. When it is said by the Lord Ordinary as a ground for implying malice that "the statements were tenaciously adhered to and repeated," it appears to me that the mistake is made of looking on the statements as being statements of alleged fact. The defender's position throughout was that he asserted only that he was informed, and desired to have the matter inquired into by the proper authority. As his persistence consisted in taking a legitimate appeal where he had a right of appeal, I cannot see nothing there indicating specific malice. After the Local Government

Board inquiry was held, and a report obtained, the circumstances leading to Jan. 15, 1913. the second proposed issue arose. The defender wrote to the Local Government Board enclosing a letter received from a Dr Robertson. That letter, on the face of it, shows that some new alleged facts had been laid before the defender, and it was upon this new matter that he asked for inquiry, and this new matter was inquired into by Sheriff Fleming, who after inquiry found that there was no ground for what was set forth in Dr Robertson's letter.

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of Burleigh.
Lord Justice-
Clerk.

Then occurred the correspondence between the agents for the pursuer and the defender and his agents. This is founded upon as implying malice. I do not think it necessary to go into this fourth ground stated by the Lord Ordinary to justify the allowing of issues as in a relevant case. Lord Dundas has done so very fully, and I agree entirely with what he has said, and also what he has said on the case referred to in debate. I am unable to see—if it be held that the implication of malice cannot be legitimately made on the first three grounds directly connected with the letters forming the subjects of the proposed issues—that the fact that the defender declines to meet a demand for apology, when the things he reported as matter for inquiry have not been substantiated, can be held to draw back, so that from that fact it can be held that when he wrote the letters asking for inquiry he was actuated by malice.

I concur entirely in what your Lordships have said as to the pursuer being vindicated as regards her conduct by the inquiries which were made.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the defender's first plea in law, and dismissed the action.

G. M. WOOD & ROBERTSON, W.S.—W. & J. COOK, W.S.—Agents.

W. B. SIEVWRIGHT (Crockart's Trustee), Pursuer (Respondent).— No. 69.

Morison, K.C.—D. Anderson.

HAY & COMPANY, LIMITED, Defenders (Appellants).—*D.-F. Dickson*—Jan. 16, 1913.

J. G. Jameson.

Crockart's
Trustee v.
Hay & Co.,
Limited.

Bankruptcy—Illegal preference—Act 1696, cap. 5—Transaction in the course of trade—Sale of insolvent's goods by auctioneer—Retention by auctioneer of debt due to him.

A farmer, on surrendering the lease of his farm, instructed a firm of auctioneers, with whom he was accustomed to deal, to conduct a dis-pleenishing sale of the farm effects. At the date of instructing the sale he was in debt to the auctioneers, and he was (but not to their know-ledge) in embarrassed circumstances; but in employing them he had no intention of giving them any preference over his other creditors. The sale took place within sixty days of his sequestration. The auctioneers, who had a clause of lien in their conditions of sale, having retained from the proceeds of the sale the sum due to them, the trustee in the farmer's sequestration brought an action against them to recover this sum on the ground that they had obtained a preference contrary to the Act 1696, cap. 5.

Held that, as the transaction was entered into in the ordinary course of trade and without any intention of conferring a preference, it was not struck at by the statute; and defenders *assolvièd*.

Graig's Trustee v. Macdonald, Fraser, & Co., Limited, (1902) 4 F. 1132, distinguished.

Jan. 15, 1913. The suggestion that the citizen who is *bona fide* informed of some alleged reprehensible conduct occurring in a public institution is to have malice implied against him, because he places the matter in the hands of the public body whose subordinate's conduct is impugned without first making inquiry himself, is a suggestion to which I cannot give my assent. It would surely be a most unfair burden to put upon any citizen that, when informed of there being something reprehensible occurring in a public institution, it should be necessary for him, before asking the proper body to examine into the matter, to make an examination himself, and that if he did not do so it should be inferred that he harboured malice. I think his conduct might well be challenged by the public authority itself, if he attempted to conduct any inquiry among their subordinates without calling them in, he having no right to interfere with their establishment. If the person in regard to whom the allegations were made were under the control of the person accused of slander—as in the case of a servant living in his family coming under suspicion—something might be said for holding that the master ought to make inquiry within his own circle, as the head of his own house, and should not rush to make accusations recklessly. But no case could arise for civil damages unless he made an assertion of guilt. But here there was no relation between the parties at all. The defender had no right to make inquiries into the working of the infirmary. If he thought that an inquiry should be held, he, in my opinion, acted rightly in laying the matter before those who had the control of the establishment in which it was reported that something had been done which was not right. I cannot, therefore, hold that, in anything that he did in asking for the inquiry, he can be held to have displayed specific malice.

Couper v.
Lord Balfour
of Burleigh.
Lord Justice-
Clerk.

But then it is said that—to use the Lord Ordinary's words—“his statements were tenaciously adhered to and repeated.” This is based upon the fact that, being dissatisfied with the action of the hospital authorities, he availed himself of his legal right to appeal to the Local Government Board. I confess I am quite unable to see how, when the law entitles the citizen to take an appeal to a Department that has power to review a matter, the taking of such an appeal can be held to be a ground for inferring malice. The illustration given by Lord Dundas of a party, who has given information to a procurator-fiscal for inquiry, applying to the Crown Office when dissatisfied by the refusal of the procurator-fiscal to proceed seems to me most apposite. If there was no malice to be implied from the giving of the information to the procurator-fiscal, how could an application for review made to the proper reviewing authority be any ground for implying malice? It is significant that in his first letter he expressly referred to, and reserved his right to invoke the jurisdiction of, the Local Government Board should he see cause to do so. When it is said by the Lord Ordinary as a ground for implying malice that “the statements were tenaciously adhered to and repeated,” it appears to me that the mistake is made of looking on the statements as being statements of alleged fact. The defender's position all along was that he asserted only that he was informed, and desired to have the matter inquired into by the proper authority. As his persistence consisted in taking a legitimate appeal where he had a right of appeal, I can see nothing there indicating specific malice. After the Local Government

Board inquiry was held, and a report obtained, the circumstances leading to Jan. 15, 1913. the second proposed issue arose. The defender wrote to the Local Government Board enclosing a letter received from a Dr Robertson. That letter, on the face of it, shows that some new alleged facts had been laid before the defender, and it was upon this new matter that he asked for inquiry, and this new matter was inquired into by Sheriff Fleming, who after inquiry found that there was no ground for what was set forth in Dr Robertson's letter.

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G. M. WOOD & ROBERTSON, W.S.—W. & J. COOK, W.S.—Agents.

W. B. SIEVWRIGHT (Crockart's Trustee), Pursuer (Respondent).— No. 69.
Morison, K.C.—D. Anderson.

HAY & COMPANY, LIMITED, Defenders (Appellants).—*D.-F. Dickson—* Jan. 16, 1913.
J. G. Jameson.

Crockart's
Trustee v.
Hay & Co.,
Limited.

Bankruptcy—Illegal preference—Act 1896, cap. 5—Transaction in the course of trade—Sale of insolvent's goods by auctioneer—Retention by auctioneer of debt due to him.

A farmer, on surrendering the lease of his farm, instructed a firm of auctioneers, with whom he was accustomed to deal, to conduct a dis-
penishing sale of the farm effects. At the date of instructing the sale he was in debt to the auctioneers, and he was (but not to their know-
ledge) in embarrassed circumstances; but in employing them he had no intention of giving them any preference over his other creditors. The sale took place within sixty days of his sequestration. The auctioneers, who had a clause of lien in their conditions of sale, having retained from the proceeds of the sale the sum due to them, the trustee in the farmer's sequestration brought an action against them to recover this sum on the ground that they had obtained a preference contrary to the Act 1896, cap. 5.

Held that, as the transaction was entered into in the ordinary course of trade and without any intention of conferring a preference, it was not struck at by the statute; and defenders *assolvièd*.

Craig's Trustee v. Macdonald, Fraser, & Co., Limited, (1902) 4 F. 1132, distinguished.

Jan. 16, 1913.

Crockart's
Trustee v.
Hay & Co.,
Limited.

2D DIVISION.
Sheriff of
Perth.

WILLIAM B. SIEVWRIGHT, accountant, Perth, trustee on the estate of John Crockart, formerly farmer, North Cassochie, near Methven, which was sequestrated on 17th December 1910, brought an action in the Sheriff Court at Perth against Hay & Company, Limited, auctioneers and live stock salesmen, Perth. The pursuer's claim was for payment of £185, 12s. 9d., with interest thereon.

It was admitted on record that Crockart, on 22nd October 1910, handed over to the defenders his stock, crop, and implements, in order that they might carry out a dispenishing sale; and that the defenders, who had an article in the conditions of sale which stipulated that they should have a right of general retention or lien for debts due to them, had retained the sum sued for out of the proceeds of the sale against a debt due by Crockart to them.

The pursuer pleaded, *inter alia*;—(3) Said voluntary tradition of stock, crop, and implements within sixty days of Crockart's bankruptcy, in the circumstances averred, having disturbed the equality of division of Crockart's estate, is illegal (a) at common law, (b) under the Act 1696, chapter 5, and does not entitle defenders to retain the sum sued for.

The defenders pleaded, *inter alia*;—(2) The defenders having been in lawful possession, in the ordinary course of trade, of moneys (the proceeds of the said dispenishing sale) for which they were liable to account to Crockart or those in his right, were entitled to compensate his admitted debt to them, in virtue of (a) the common law, (b) the usage of trade between auctioneers and live-stock salesmen and their customers, (c) the express conditions upon which the defenders dealt with him, and (d) the course of dealing between him and the defenders. (3) The transaction challenged having been *bona fide* and in the ordinary course of business, the defenders should be assoilzied.

A proof was led in the Sheriff Court, the import of the facts established at which appears in the following interlocutor pronounced by the Sheriff-substitute (Sym) on 12th January 1912:—“ . . . Finds (1) that the defenders, Hay & Company, Limited, are auctioneers and live-stock salesmen at Perth, and that they conduct sales at their marts and many dispenishing sales at farms; (2) that they have conditions of sales, of which No. 12 of process is a copy, which stipulate that ‘the sales conducted by them, either at their mart or elsewhere, shall be subject to the following conditions, which shall be binding on all persons concerned,’ and which include a condition that the auctioneers ‘shall have the right of general retention or lien over all goods and money coming into their possession for any debt or liability, howsoever arising, of the owner or consigner to them’; (3) that frequently, in the course of their business, they make advances to farmers who deal with them, and that these advances are frequently, and indeed usually, repaid by the price of stock which such farmers put into their hands for sale; (4) that John Crockart was tenant of North Cassochie, Methven, prior to Martinmas 1910, at which date, by arrangement with the landlord, he terminated his tenancy of that farm; (5) that for some years prior to 1910 the defenders dealt with the said John Crockart in the way described, there being sometimes a balance against him, and such balance being from time to time extinguished or at other times much reduced, all as shown in the account No. 33 of process; (6) that, in particular, the defenders advanced to Crockart, on 21st June 1910, the sum of £100, he being to a small extent at the time indebted to them for balance of cash

and of stock removed without payment, and that the £100 was used Jan. 16, 1913.
by him in paying rent claimed by his landlord (as to part of which
claim there was at this time a dispute); (7) that at that time the
defenders had no special knowledge of the state of his affairs, and
that they made the advance in the ordinary course of their business
and of their dealings with him, supposing him to be solvent; (8) that
in June or July 1910 Crockart arranged with his landlord, with whom
he had still a dispute, to go out of said farm at Martinmas 1911, but
that he, towards the end of August 1910, changed his intention, and
arranged with the landlord to renounce the lease as at Martinmas
1910 (a less advantageous year for outgoing), and that very shortly
after that he met the witness Mr J. D. Hay at Perth Cross on a
market day, and told him so, and told him that his firm (the defen-
ders) would be entrusted with his dispenishing sale; (9) that the
conducting of dispenishing sales is not only a common part of the
defenders' business, but is in this district a common part of a farmer's
business, not only if he retires, but also if he leaves one farm and takes
another; (10) that the only difference in the defenders' usual condi-
tions in the case of a dispenishing sale is that the buyers have three
months' credit or discount at 3d. per £ for cash, and that they are
allowed time to remove the goods, and that it is announced at the
beginning of such sales by the auctioneer that the terms will be as
usual, but with three months' credit or [discount for] cash, and with
such opportunity of removal; (11) that the date fixed on for the sale
was 22nd October 1910, and that a handbill, No. 10, was issued on 10th
October by the defenders, who had the subjects of sale delivered over to
them on the morning of the sale day for the purpose of their business;
(12) that the sale of the crop and stock and turnips produced, after
deduction of commission and expenses, £321, 4s.; (13) that the said
net amount, £321, 4s., was brought into Crockart's current account
with the defenders, and that they afterwards paid out wages to his
servants till Martinmas 1910, amounting to £21, 4s., which sum was
also brought into account; (14) that it now appears, though the de-
fenders are not shown to have known it, that in the summer and
autumn of 1910 Crockart's affairs were embarrassed; (15) that the
sale not having been a good one, and litigation having arisen with
Crockart's landlord as to the last year's rent on North Cassochie, and
arrestments having been used on the money in defenders' hands after
the sale by the said landlord on the dependence of his action, and by
another creditor on the amount of a decree for a small sum (the
balance of a bill), and other claims having been made, Crockart
applied for sequestration of his estates, the date of which sequestra-
tion is 17th December 1910; (16) that the pursuer was confirmed
trustee on the estate, and represents creditors prior to said 22nd
October 1910; (17) that in accounting with the pursuer the defenders
have given him an accurate account of the sale, and have remitted to
or for him £135, 11s. 3d., but are retaining £185, 12s. 9d. which is due
to them on their current account with Crockart, and that the pursuer
maintains that the sum must be paid over to him as the trustee, leav-
ing them to make a claim for it, because Crockart was insolvent when
he voluntarily handed over his whole stock (which practically was
his whole estate) for sale, and the sale was for equal distribution
among all creditors, or if that was not so, the handing over of the
stock was in satisfaction of the prior debt due to the defenders, and
within sixty days of said 17th December, and the equality of distri-

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bution is thus disturbed; (18) that the defenders maintain their right to retain the sum of £185, 12s. 9d. in dispute, on the grounds set forth in their second and third pleas in law; (19) that Hay & Company got the conduct of the sale not to give them a preference, but in the ordinary way of business so far as they were concerned: Upon these findings of fact, finds as matter of law (1) that an auctioneer employed in the ordinary way of his business to sell for a customer has, in accounting with the customer for the prices received, a right to retain against him not only his expenses and commission, but also to retain the amount of other debts which have arisen in the ordinary course of dealing between them; but (2) that when, on 22nd October, Crockart handed over and gave possession of his estate to the defenders, already his creditors for a considerable sum, so as to put the defenders in a position to obtain full payment of said debt then unsecured, and that when he was insolvent and within sixty days of his sequestration on 17th December, Crockart was not acting in the ordinary course of business, and did what amounted to a satisfaction or security for their said unsecured debt, and which is exposed to the operation of the Act 1696, cap. 5: Therefore repels the defences, and ordains the defenders to make forthcoming to the pursuer, as Crockart's trustee, the sum claimed in the initial writ, reserving always to the defenders their whole claims to rank as creditors on Crockart's estate. . . ."

The defenders appealed to the Court of Session, and the case was heard before the Second Division (without the Lord Justice-Clerk), on 12th and 13th December 1912.

At the hearing both parties accepted as correct the first eighteen findings in the Sheriff-substitute's interlocutor.

Argued for the appellants;—The appellants were entitled to hold the sum in question in respect of their lien,¹ or on the principle of accounting in bankruptcy.² To succeed, therefore, the respondent must show that the transaction fell within the Act 1696, cap. 5; and there was nothing to support this plea except the fact that the bankrupt had employed as auctioneers the appellants, with whom he had always dealt, and had not gone to another firm of auctioneers. The effect of the Act 1696, cap. 5, was stated by Professor Bell,³ and in the issue in *Blinchow's Trustee v. Allan & Company*.⁴ On the law as there stated the appellants had two answers to the respondent's case. In the first place it was not shown that the bankrupt had intended to create a preference in favour of the appellants.⁵ If such an intention was not proved, it was immaterial that the transaction had in fact resulted in a preference. It was an open question whether, if the parties were *in bona fide*, it was also necessary, in order to exclude the statute, to show that the transaction was in the ordinary

¹ *Miller v. Hutcheson & Dixon*, (1881) 8 R. 489; *Glendinning v. Hope & Co.*, 1911 S. C. (H. L.) 73; *Bell's Com.* (7th ed.) ii. 3.

² *Mitchell v. Mackersy*, (1905) 8 F. 198.

³ *Com.* (7th ed.) ii., p. 196, *et seq.*

⁴ (1831) 9 S. 317, at p. 319; see also 7 S. 124 and 753; 9 S. 599; 7 W. & S. 26.

⁵ *Pringle's Trustee v. Wright*, (1903) 5 F. 522; *Loudon Brothers v. Reid & Lauder's Trustee*, (1877) 5 R. 293; *Bruce v. Hamilton*, (1832) 10 S. 250; *Hepburn v. Bell*, (1816) reported in *Bell's Com.* (7th ed.) ii., p. 199; *Price & Pierce, Limited, v. Bank of Scotland*, 1910 S. C. 1095, *per* Lord Kinnear, at pp. 1109, 1110.

course of business.¹ But, secondly, this latter point had in any case been established by the appellants. The sale of the bankrupt's stock was clearly within the course of his trade and was, therefore, protected.² *Craig's Trustee v. Macdonald, Fraser, & Company, Limited*,³ was distinguishable, as it appeared that the transaction in that case was entered into with a view to the approaching bankruptcy of the trader.

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Argued for the respondent;—An auctioneer had no general right of lien⁴; and the appellants could found only on the article in the conditions of sale. But this would not avail them in the circumstances of this case, for the transaction fell within the Act 1696, cap. 5. Admittedly fraud had not been actually proved, but a sinister motive was indicated by the fact that the management of the sale had been entrusted to a creditor. It was not, however, necessary under the Act to prove an *animus fraudandi*⁵; and the only respect in which motive was of importance was that, even if the transaction were in the course of trade, it would not be protected if the debtor were in point of fact actuated by an intention to create an undue preference.⁶ The question in the case, therefore, was whether the transaction was in the course of business. This could not be affirmed of the transaction for it was not carried through in pursuance of the bankrupt's business; but was the delivery *per aversionem* of his stock for the purpose of winding up the business.⁷ The stipulation for a lien in the conditions of sale operated in the same way as the receipt in *Craig's Trustee v. Macdonald, Fraser, & Company, Limited*⁸; and that case was a direct authority in favour of the respondent. The feature which distinguished *Anderson's Trustee v. Fleming*⁹ was that in that case the transaction challenged was just one of a series of similar transactions.⁹

At advising on 16th January 1913,—

LORD DUNDAS.—The pursuer (respondent) is trustee in the sequestration of John Crockart, who, until Martinmas 1910, was a tenant farmer in

¹ Loudon Brothers v. Reid & Lauder's Trustee, 5 R. 293, *per* Lord President Inglis and Lord Shand, at p. 301.

² Anderson's Trustee v. Fleming, (1871) 9 Macph. 718; Morton's Trustee v. The Fifeshire Auction Co., Limited, 1911, 1 S. L. T. 405; Loudon Brothers v. Reid & Lauder's Trustee, 5 R. 293.

³ (1902) 4 F. 1132.

⁴ Bateman's Law of Auctions, (8th ed.) p. 347.

⁵ Matthew's Trustee v. Matthew, (1867) 5 Macph. 957, *per* Lord President Inglis, at p. 961; Nicol v. McIntyre, (1882) 9 R. 1097, *per* Lord Young, at p. 1100; McCowan v. Wright, (1852) 14 D. 968; Lord Newton, in Blincow's Trustee v. Allan & Co., 7 W. & S. 26, at p. 31. As to the form of issue formerly allowed, Wilson v. Drummond's Reps., (1853) 16 D. 275, and Ramsay v. Donald & Son, (1854) 16 D. 720, were referred to.

⁶ Goudy on Bankruptcy, (3rd ed.) 93, 94; Bell's Com. (7th ed.) ii. 170, 204.

⁷ Goudy on Bankruptcy, 21; Morton's Trustee v. Fifeshire Auction Co., Limited, 1911, 1 S. L. T. 405.

⁸ 9 Macph. 718.

⁹ Carter v. Johnstone, (1886) 13 R. 698, *per* Lord Shand, at p. 708; Torrance v. Trail's Trustees, (1897) 24 R. 837, *per* Lord Ordinary (Kyllachy), at p. 841. Schuurmans & Sons v. Goldie, (1828) 6 S. 1110, was also referred to.

Jan. 16, 1913. Perthshire. Crockart's estates were sequestrated on 17th December 1910; he had been rendered notour bankrupt on or about 29th October. The defenders (appellants) are a firm of auctioneers in Perth. On 22nd October 1910 the defenders, in accordance with instructions received by them from Crockart in September, sold by auction his waygoing stock, crop, and implements. They claim to be entitled to retain a sum of £185 out of the price realised by the sale in payment of a balance due to them by Crockart on account current. The pursuer says this money must be paid over to him as trustee in the sequestration, because otherwise—the sale having been within sixty days of Crockart's bankruptcy—the defenders would obtain an illegal preference over his other creditors in the matter of their debt, contrary to the Act 1696, cap. 5. The real question comes to be whether or not the handing over by Crockart of his stock, &c., to be sold by the defenders, was a transaction in the ordinary course of trade or business between the parties, and, as such, outside the scope of the Act. The Sheriff-substitute, who evidently gave much care and study to the matter, has, with great difficulty and hesitation, decided that question in the pursuer's favour. The case is a narrow one; but I have come to the conclusion that the defenders are entitled to succeed.

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The material facts are summarised in the nineteen findings of fact contained in the interlocutor appealed against. The appellants' counsel accepted these as correct and sufficient. The respondent's counsel did so also, subject to two qualifications: (1) that finding 19 should be deleted in so far as it bears that the defenders got the conduct of the sale in the ordinary way of business so far as they were concerned; and (2) that an additional finding should be made to the effect that, at least in July 1910 and onwards, Crockart was in fact insolvent, and knew, or ought to have known, that he was so. I think finding 19 is quite right as it stands. Nor am I for making the additional finding suggested. The Sheriff-substitute has found "(14) that it now appears, though the defenders are not shown to have known it, that in the summer and autumn of 1910 Crockart's affairs were embarrassed." It seems probable, but I do not think it is actually proved, that Crockart was in fact insolvent from July onwards. That he knew he was insolvent is not, in my judgment, proved; and in any case it is, I think, perfectly clear that Crockart had no intention at all, when he placed the sale in the defenders' hands in September, and allowed them to conduct it in October, of creating any preference in their favour, or any idea that such preference would, or might, result from his doing so. The transaction was, I believe, an honest one throughout on his part, as it seems clearly to have been on the part of the defenders.

We must decide, then, whether or not the transaction was one in the ordinary course of trade or business between the parties. For the pursuer, it was argued that it was not, because a dispenishing sale of practically the whole assets of a man giving up his farm, and perhaps farming altogether, could not, *ipsa natura*, be in the ordinary course of business from his point of view, even if it were so (which was not admitted) from that of the auctioneers. I do not agree with this argument. The sale was a necessary and proper step in the giving up of the farm, and that was a circumstance, though perhaps an exceptional one, in the ordinary business

career of the farmer; and the latter quite naturally gave the conduct of Jan. 16, 1913, the sale to the auctioneers through whom he had for years been in use to buy and sell stock, who in the ordinary course of their business had from time to time advanced money to him, and whose ordinary business included displenishing sales of all kinds. There was nothing, I think, so exceptional in the nature of the transaction itself as to take it out of the ordinary course of trade. It was no more exceptional than, *e.g.*, the transaction which was sustained in *Loudon Brothers*¹; and I observe that in *Craig's case*² Lord Moncreiff regarded a displenishing sale as being *prima facie* in the ordinary course of business. But the pursuer's counsel argued that, even so, that transaction could not stand; because, assuming that Crockart did not mean to create a preference, his acting, none the less, resulted in fact in the creation of a preference, and that was enough to bring the transaction within the scope of the Act 1696, cap. 5. I think the weight of the authorities is against this contention.

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Professor Bell³ says:—"The plain intendment of the Act of 1696 was to comprehend all conveyances made to a creditor, if directly or indirectly intended to confer on him a preference over other creditors." In *Bruce v. Hamilton*⁴ the Lord Ordinary (Moncreiff), after quoting this passage, added:—"Before, therefore, there can be any room even for reasoning on a case as within the statute, it must at the least appear that the conveyance was made with the intention of giving to the particular creditor satisfaction or security of the prior debt; for if this intention did not exist, there could be no intention to give it as a preference." The Court agreed with the Lord Ordinary, Lord Justice-Clerk Boyle observing:—"This was a transaction in the ordinary way this bankrupt carried on his business, and is just one of the cases excepted from the statute, which does not cut down any incidental preference arising from such transaction." The case of *Anderson's Trustees v. Fleming*⁵ bears a very close resemblance to the present case, except that the persons claiming to retain were not auctioneers but bleachers, and that the subjects concerned were a parcel of goods and not (as here) the bulk of the customer's belongings, neither of which distinctions appears to me to be material. There was a clause of lien, similar to the clause here present, which was held to be effectual. The Court held that the transaction was one in the ordinary course of trade, and not struck at by the Act 1696, c. 5, there being no collusion or improper intention, no device to defeat creditors, nor anything secret or suspicious in the way it was gone about. Lord Kinloch said:—"There was no special purpose to constitute such security, which I consider indispensable to the operation of the statute. The goods were sent in the ordinary course of trade, and so the case falls under the well-known statutory exception, which holds good for the simple reason that no special transaction of security is thereby gone about. . . . There was no special security constituted. The preference has arisen by the operation of the law in the ordinary course of trade. Therefore the statute is inapplicable." The case of *Loudon Brothers*¹ is the next important authority on this matter of intention. Lord Mure, who gave the

¹ 5 R. 293.² 4 F. 1132.³ Com. (7th ed.), ii. 202.⁴ 10 S. 250.⁵ 9 Macph. 718.

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leading opinion, expressed the view that "if it is proved that the transaction was entered into in the ordinary course of trade, it cannot be held to come within the provisions of the statute unless it is also distinctly shown that a preference was intended to be conferred." After referring to the authorities, his Lordship proceeded to sustain the transaction under consideration, though it was of an exceptional character, because "there was no collusion and no intention to confer a preference over other creditors," but the transaction was "one of a description which may fairly be said to have taken place in the ordinary course of business and dealing between the parties, and to come within the ordinary transactions of life." Lord Shand agreed, but reserved his opinion as to whether the same result ought not to follow "in reference to any case in which it is shown that the transaction, even though not in the ordinary course of business, was yet *in bona fide*, and that no preference was intended to be given or taken." In the view I take of the present case, no occasion here arises for determining the point reserved by Lord Shand. The earlier case of *Blinchow's Trustee*,¹ which passed through many stages, was commented on in *Loudon Brothers*,² Lord Mure observing that its value as an authority was "that it shows that whenever the transaction challenged comes within the course of trade it will not be set aside, unless it is also proved that it was entered into with a view of conferring an undue preference." One may be thankful that cases like *Blinchow's Trustee*¹ are not now tried by way of jury; but the form of issue there adjusted—its terms are given by Lord Mure—is instructive in connection with the words just quoted. The case of *Craig's Trustee*³ does not, I think, help the pursuer here. The facts were peculiar, and the decision a narrow one. I am not sure that I appreciate some of the views expressed by the learned Judges who formed the majority. But assuming the case to be well decided, it is easily distinguishable from this case. The defenders there had no averment that the transaction was in the ordinary course of trade; and there were facts tending to show that they had grave suspicions of Craig's insolvency, and obtained an antedated receipt with the view of securing their own position in preference to his other creditors. The cases I have referred to—many others were cited at the discussion—are, I think, sufficient to establish that, if a transaction is *prima facie* in the ordinary course of business and the affairs of life, it is not enough to take it out of that category and bring it within the scope of the Act 1696, cap. 5, to show that it incidentally results in a preference, if it is clear that there was no intention to create one.

If, then, as I hold, the transaction here in question was not within the scope of the statute, the defenders were, I think, clearly entitled to retain the £185, looking to the clause of lien which was usual in their contracts, and employed on this occasion. *Anderson's Trustee v. Fleming*⁴ is a direct authority in their favour. We were referred to other cases, *inter alia*, *Miller*,⁵ where this Court held that an auctioneer has at common law a factor's lien for a general balance, and *Glendinning v. Hope & Company*,⁶

¹ 7 S. 124 and 753, 9 S. 317 and 599, 7 W. & S. 26.

² 5 R. 293.

³ 4 F. 1132.

⁴ 9 Macph. 718.

⁵ 8 R. 489.

⁶ 1911 S. C. (H. L.) 73.

where the law of lien was discussed with special reference to stockbrokers; Jan. 16, 1913. but I see no occasion to deal with these, or to aim at a definition of the nature, quality, and limitations of the right of lien possessed by auctioneers in general, or by the defenders in the circumstances of this case, apart from special contract.

For the reasons stated, I think we ought to sustain the appeal, alter the interlocutor appealed against, to the extent and effect . . . [His Lordship then suggested the terms of the interlocutor printed *infra*].

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LORD SALVESEN.—In this case the Sheriff-substitute has set forth the material facts in a series of careful and exhaustive findings the accuracy of which was not challenged. It is only necessary, therefore, to refer to those which, in my opinion, directly bear upon the points in controversy, viz. :—“(9) That the conducting of dispenishing sales is not only a common part of the defenders' business, but is in this district a common part of a farmer's business, not only if he retires, but also if he leaves one farm and takes another”; “(19) that Hay & Company got the conduct of the sale not to give them a preference, but in the ordinary way of business, so far as they were concerned”; and “(14) that it now appears, though the defenders are not shown to have known it, that in the summer and autumn of 1910 Crockart's affairs were embarrassed.” So far as the bankrupt is concerned, the material finding in fact is that he was insolvent at the time he instructed the defenders to conduct his dispenishing sale; and there is also a finding in law that when he gave them possession of his stock, plant, and crop for the purpose of sale, he was not acting in the ordinary course of business, and did what amounted to a satisfaction or security for the defenders' debt, contrary to the Act 1696, cap. 5. The Sheriff-substitute has accordingly decreed against the defenders to pay to the bankrupt's trustee the sum of £185, 12s. 9d., the amount of their debt against Crockart which was unsecured prior to the date when they were put in possession of the bankrupt's effects for the purpose of sale.

The Sheriff-substitute reached his conclusion with difficulty, and after a full argument I have come to an opposite result. It has always been recognised that a transaction in the ordinary course of business is not struck at by the statute even when it has the effect of conferring a preference on a creditor, and takes place within sixty days of notour bankruptcy. Professor Bell, in dealing with this class of exceptions to the operation of the Act 1696, cap. 5, says: “The only general doctrine that can be hazarded is, that wherever the transaction is in the ordinary course of dealing, and requisite or suitable to the fair purpose of the debtor proceeding with his trade, and unaccompanied by indications of collusion or notice of insolvency, it is not challengeable, although the effect may be to give a preference to one creditor over the rest.” The decided cases both before and after the date when the Commentaries were published entirely support this proposition. The question is whether the transaction now challenged falls within it.

Now, it is quite plain here that as Crockart was giving up his farm it was necessary that some firm of auctioneers should be employed to carry through the dispenishing sale. It is part of the defenders' ordinary busi-

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ness to conduct such sales ; and they were employed on the ordinary terms. According to the Sheriff-substitute's note, it did not occur to Crockart that he was doing them any favour in so employing them ; and they were the auctioneers with whom he had previously conducted most, if not all, of his business in disposing of stock. It was natural, therefore, that he should employ them ; and it is expressly held that he did not do so for the purpose of giving them a preference. It is true that Crockart was giving up his farm without any intention of taking another ; but I not think that circumstance by itself makes this transaction one not in the ordinary course of trade. If he had been solvent he would have acted in precisely the same way. The dispenishing sale was a necessary part of his business as a farmer ; for he had renounced the lease of his farm, and required to cede possession of it at the Martinmas term. He was thus administering his affairs on the same footing as if he had taken another farm and was intending to continue his business as a farmer ; and it appears to me to make no difference that he had definitely resolved to give up farming and to embark on some other mode of earning his livelihood. In short, the transaction on which he entered with the defenders was, to use the language of Mr Bell, "requisite or suitable to the fair purpose of his proceeding with his trade" ; and it was not suggested that there were here any indications of collusion or notice of insolvency to the defenders ; while the mere fact that the effect of the transaction was to give the defenders a preference over other creditors does not make it challengeable under the statute.

These points are well illustrated by the case of *Anderson's Trustee*,¹ where goods were sent by manufacturers to certain bleachers with whom they were in the habit of doing business within sixty days of notour bankruptcy. The bleachers claimed to retain the goods in their hands at the date of the manufacturers' sequestration in security of an open account and acceptances for work done upon other goods. It was held that the sending of the goods for the purpose of being bleached was a transaction in the ordinary course of trade, and was not struck at by the Act, although it resulted in the bleachers obtaining a preference over the other creditors. It was suggested in the present case that it was the bankrupt's duty to have entrusted his dispenishing sale to an auctioneer who was not his creditor ; and it was said that whenever he had reason to know he was insolvent he became a trustee for the general body of creditors, and so was precluded from giving a preference to one creditor over the others. I do not think that is the law. So long as he remains in the administration of his estate, an insolvent is entitled to conduct his affairs in ordinary course. Thus, if he chooses to pay a creditor in cash it does not matter although he does so with the intention of conferring a preference on that creditor even where the creditor knows of his insolvency.² From a moral point of view the debtor's duty, when he knows himself to be insolvent, is to hold his estate for equal distribution amongst his creditors ; but he is under no legal disability to deal with it as he thinks fit, and even to exhaust it in paying one creditor to the prejudice of the rest, provided he makes his payment in

¹ 9 Macph. 718.

² Pringle's Trustee, 5 F. 522.

cash. The same principle appears to me to apply to transactions in the ordinary course of trade. It may be a material element in considering whether a particular transaction was or was not in the ordinary course of trade to ascertain the debtor's intention in entering into it; but here the Sheriff-substitute holds that the bankrupt had no intention of conferring a preference, and indeed it appears that he hoped (probably without much justification) that the sale would realise sufficient to meet all his liabilities. The only thing that can be said against the transaction is that the effect of it was to confer a preference. The same contention was maintained unsuccessfully both in the bleachers' case, to which I have referred above, and in *London Brothers*.¹ The latter case is interesting as showing that the circumstance that a transaction is unique in the debtor's business does not necessarily take it out of the exception of being in the ordinary course of trade. The transaction there challenged was the return of an article which had been purchased in the ordinary course of trade but had been found useless for the buyer's purpose, and this was held to be within the ordinary course of business, having in view the absence of all intention to confer or obtain a preference.

An apparent difficulty is created by the decision in the case of *Oraig's Trustees v. Macdonald, Fraser, & Company, Limited*.² The facts there were in some respects not dissimilar from those of the present case, but there are two points of distinction which I think explain the decision. In the first place, the defenders neither averred nor proved that the transaction had taken place in the ordinary course of trade; and, in the second place, it was obvious that both they and the bankrupt suspected his insolvency. The receipt which was the foundation of the claim by the defenders was admittedly antedated with the object of evading the effect of the 1696 Act. The argument seems accordingly to have turned on the effect of the receipt, which, coupled with the subsequent delivery of the stock, was treated as a voluntary assignation and so reducible as having been granted within sixty days of notour bankruptcy. There is another important distinction which appears from a passage in Lord Moncreiff's opinion. He says,—"Although it may not be unusual for auctioneers to make advances against sales, I do not think there is evidence before us to establish that, according to the settled usage of trade, or according to the course of dealing, the defenders were entitled to retain for a general balance." In the present case it appears that one of the conditions on which the defenders conducted their sales was that they should have the right of general retention or lien over all goods and moneys coming into their possession for any debt or liability, howsoever arising, of the owners or consigners to them. They had regularly done business on these terms with the bankrupt, and had recouped themselves for advances made to him from time to time out of the proceeds of stock which they sold on his account. The dispenishing sale was conducted by them on the same condition. I do not think their lien would be excluded even if there had been no such general course of dealing, because in the case of *Müller* ³ it was expressly decided that auctioneers who received horses to sell on commission and keep in their stables until sold were

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¹ 5 R. 293,² 4 F. 1132.³ 8 R. 489.

Jan. 16, 1913. entitled to a lien over the horses for a general balance due to them on all their transactions with the owner; and in the recent case of *Hope*¹ the general law was thus stated by Lord Kinnear:—"Every agent who is required to undertake liabilities or make payments for his principal, and who in the course of his employment comes into possession of property belonging to his principal over which he has power of control and disposal, is entitled, in the first place, to be indemnified for the moneys he has expended or the loss he has incurred; and in the second place, to retain such properties as come into his hands in his character of agent until his claim for indemnity has been satisfied." This proposition applies to the case of the defenders, and indirectly supports the judgment in *Müller*,² which, although cited in *Craig's case*,³ appears to have been overlooked in the opinions given by the majority. I cannot, therefore, regard that decision as ruling the present, for here, not merely was the general lien claimed by the auctioneers established by the course of dealing between the parties, but there was no indication that the bankrupt by employing them to conduct his dispoenishing sale intended to confer any preference upon them, nor any ground on their part to suppose that he was insolvent at the time. In short, the transaction is free from the taint which so largely influenced the majority of the Judges in *Craig's case*,³ and is, moreover, established to have been one in the ordinary course of trade, as to which the evidence in *Craig's case*³ was held to be insufficient.

In my opinion we should substantially reaffirm the Sheriff-substitute's findings in fact, but recall the findings in law with the exception of the first, and should find instead that when on 22nd October Crockart employed the defenders to conduct the dispoenishing sale on his farm both parties were acting in the ordinary course of business; and although this employment incidentally gave the defenders security for their previous advances, the delivery to them of the stock and cropping for the purposes of such sale is not struck at by the Act 1696, cap. 5.

LORD GUTHRIE.—I am of the same opinion. I think Mr Morison was right in saying that the real question in the case, and the only question, is whether the transaction complained of was or was not in the ordinary course of trade. If so, it appears to me that the ninth and nineteenth findings in the Sheriff-substitute's judgment are conclusive of the question, and ought to have led to the finding in law which Lord Dundas has proposed, to the effect that the transaction is not challengeable under the Act because it was in the ordinary course of business. As I understand Mr Morison's argument, he did not in the end maintain, and, in my opinion, on the authorities referred to by your Lordships he could not maintain, that the mere fact of the transaction happening to result in a preference in favour of the appellants, no such preference being intended, would by itself take it out of the ordinary course of business. His argument turned on the specialty that the bankrupt was going out of business and was realising his whole trade assets. That undoubtedly made the transaction one of extraordinary rather than of ordinary administration. But none the less was it,

¹ 1911 S. C. (H. L.) 73, at p. 78.

² 8 R. 489.

³ 4 F. 1132.

in the particular circumstances in which Crockart was placed, the natural and ordinary course for him to pursue. Indeed, had he employed another firm of auctioneers, say Macdonald, Fraser, & Company, as it is said he should have done, he would have been departing from the ordinary course of business so far as his past course of dealing showed. And suppose he had taken this course the transaction would have been equally an act of extraordinary and not of ordinary administration.

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In this view the case of *Craig's Trustee v. Macdonald, Fraser, & Company*,¹ which the respondent maintained was final in his favour, has no application, because it was not averred in that case that the transaction was in the ordinary course of trade, and it was expressly found both by the Lord Justice-Clerk and Lord Moncreiff, who formed the majority, that it was not in the ordinary course of trade. To sustain the transaction in question in the present case because it occurred in the ordinary course of business seems to me in accordance both with the letter and the spirit of the statute.

THE COURT pronounced the following interlocutor:—" . . .

Sustain the appeal: Recall the said interlocutor appealed against: Find in fact in terms of the nineteen findings in fact in the said interlocutor of 12th January 1912, with the following additional finding in fact, viz., and (20) that neither the defenders nor Crockart had any intention of creating a preference in favour of the defenders, or to satisfy or pay to the defenders the debt of £185, 12s. 9d. due by him to them, to the prejudice of his other creditors: Find in law in terms of the first finding in law in the said interlocutor appealed against, and, in lieu of the second finding in law in said interlocutor, find (2) that the transaction complained of was entered into and carried through by the parties in the ordinary course of business, and is not struck at by the Act 1696, caput 5: Therefore sustain the second and third pleas in law for the defenders, assoilzie them from the conclusions of the action, and decern. . . ."

J. MILLER THOMSON & Co., W.S.—CARMICHAEL & MILLER, W.S.—Agents.

ROBERT KIRKLAND MILLS, Pursuer.—*Morison, K.C.—C. H. Brown.* No. 70.

KELVIN & JAMES WHITE, LIMITED, Defenders.—*Clyde, K.C.—Sandeman, K.C.—Lippe.*

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Reparation—Wrongous information to the police—Want of probable cause—Slander—Privilege—Malice—Statements in trade circular.

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Process—Jury trial—Verdict set aside and judgment entered for party unsuccessful at trial—Jury Trial Amendment (Scotland) Act, 1910 (10 Edw. VII. and 1 Geo. V. cap. 31), sec. 2.

In an action of damages, at the instance of a discharged employee against his former employers, a jury found for the pursuer on issues whether the defenders had maliciously and without probable cause lodged with the criminal authorities charges of theft and of fraud against the pursuer, and whether they had caused to be circulated amongst certain business firms a circular in which they maliciously represented that the pursuer had been guilty of fraudulent practices.

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Circumstances in which the Court set aside the verdict on the ground that there was no evidence before the jury either of want of probable cause or of malice; and instead of allowing a new trial entered judgment for the defenders, in respect that all the relevant evidence which could be reasonably expected to be obtained was before them.

Observations of Bowen, L.J., in Abrath v. North-Eastern Railway Company, (1883) 11 Q. B. D. 440, as to the onus of proof on the pursuer in an action of damages for malicious prosecution approved (per the Lord President), and applied.

1st DIVISION. (REPORTED, on a question of diligence, ante, 1912 S. C., p. 995.)

Ld. Ormisdale
and a Jury.

On 28th December 1911 Robert Kirkland Mills, at one time an employee of Kelvin & James White, Limited, nautical and scientific instrument makers in Glasgow, brought an action against the Company, in which he claimed the sum of £5000 as damages, in respect that the defenders had maliciously lodged a criminal information against him, and had circulated slanderous statements regarding him.

The nature of the injuries complained of appears from the following issues for the pursuer and counter issue for the defenders, which, by interlocutor dated 8th March 1912, the Lord Ordinary (Ormisdale) allowed for the trial of the cause:—

“ Issues for Pursuer.

“ 1. Whether the defenders, in or about the months of November and December 1911 and January 1912, falsely, maliciously, and without probable cause, lodged, or caused to be lodged, with the procurator-fiscal at Glasgow, a charge or charges of the theft by pursuer of certain gauges, jigs, or other articles, which were the property of the defenders,—to the loss, injury, and damage of the pursuer? 2. Whether the defenders, in or about said months, falsely, maliciously, and without probable cause, lodged, or caused to be lodged, with the procurator-fiscal at Glasgow or the Crown agent at Edinburgh, a charge or charges of fraud against the pursuer,—to his loss, injury, and damage? 3. It being admitted that on or about the 18th day of November 1911 the defenders printed and circulated, or caused to be printed and circulated, among various firms in their own line of business and others in the city of Glasgow and elsewhere, and, *inter alios*, among the following parties, viz.:—[Here followed a list of names and addresses]—a circular in the terms set forth in the schedule hereto annexed, or in similar terms, and whether the said circular or part thereof is of and concerning the pursuer, and falsely, calumniously, and maliciously represents that the pursuer had been guilty of fraudulent practices, or contains representations to that effect,—to the loss, injury, and damage of the pursuer? Damages laid at £5000.

“ Schedule.

“ Kelvin & James White, Limited,
Nautical and Scientific Instrument Makers,
16-20 Cambridge Street,
Glasgow, 18th November 1911.

“ Dear Sir or Sirs,—We beg to inform you that in consequence of the discovery of serious irregularities, Robert K. Mills, then our works manager, was dismissed from our service on the 8th inst.

“ On the same day, Mr Francis Wood Clark, then our managing director, tendered his resignation as such, to take effect as at the end of the year, which, on being altered at the request of the directors so as to take immediate effect, was accepted.

"You will doubtless take note that neither of these persons has now any authority to act for or represent us in any way whatever.—
We are, yours faithfully,

KELVIN & JAMES WHITE, LIMITED,

C. W. WAINWRIGHT, Secy.

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"Counter Issue for the Defendants."

"1. Whether during the period between 1st January 1911 and 21st September 1911, the pursuer, while in the service of the defenders, fraudulently caused to be made for himself by the defenders' employees, and at the defenders' cost, duplicates of the tools, gauges, patterns, and other articles employed in the manufacture of the defenders' instruments, and also caused to be delivered to himself a complete azimuth mirror, the property of the defenders, and further fraudulently caused the said duplicates and other articles and the said mirror to be forwarded to Birmingham on various dates during said period, for his own purposes, and to await his further instructions?"

The case was tried before Lord Ormidale and a jury between 2nd and 12th July 1912, when the jury found for the pursuer, by varying majorities, upon all the issues, and assessed the damages at £1000.

The import of the evidence which was adduced at the trial will be found set forth in the opinion of the Lord President, *infra*.

On 19th July 1912 the defenders obtained a rule upon the pursuer to show cause why the verdict of the jury should not be set aside as being contrary to the evidence.

Counsel were heard upon the rule before the First Division (without Lord Kinnear and with Lord Ormidale) on 7th to 11th January 1913.

Argued for the pursuer;—The verdict of the jury should not be disturbed. It was the province of the jury to decide whether the defenders had acted with malice and without reasonable or probable cause,¹ and the Court would not set aside their verdict unless it was shown to be so flagrantly wrong that no jury properly discharging their duty would have returned it.² The jury here were entitled to hold, upon the evidence which had been put before them, that the defenders had lodged the criminal information without sufficient cause. Even admitting that the defenders had some reason to suspect the pursuer, their action in pressing the charges with the Crown authorities after the procurator-fiscal had declined to take proceedings, and in thereafter sending out the circular complained of, had been characterised by such recklessness as amounted in law to malice.³ The two elements of malice and want of probable cause might, and in the present case did, run into one another, and the one was proof of the other.⁴ The case of *Lightbody v. Gordon*⁵ was distinguishable, in respect that there no action was complained of beyond the lodging of the information.

Argued for the defenders;—The onus lay on the pursuer of showing

¹ *Lister v. Perryman*, (1870) L. R., 4 E. & I. App. 521, *per* Lord Colonsay, at p. 539.

² *Milne v. Bauchope*, (1867) 5 Macph. 1114; *Campbell v. Scottish Educational News Co., Limited*, (1906) 8 F. 691.

³ *Denholm v. Thomson*, (1880) 8 R. 31.

⁴ *McDonald v. Fergusson*, (1853) 15 D. 545, *per* Lord Fullarton, at p. 548.

⁵ (1882) 9 R. 934.

Jan. 17, 1913. that the defenders had acted without reasonable and probable cause.¹ This onus he had not discharged. As regarded the first two issues, it was for the pursuer to show that the defenders, acting as they were in discharge of a public duty, were actuated by some illegitimate motive,² and there was no evidence whatever to this effect. The whole evidence clearly showed that at the time the information was lodged the defenders were fully justified in lodging it; they *bona fide* believed that the charge of theft or of fraud was well founded, and they had good *prima facie* ground for that belief. That being so, the situation could not be affected by the subsequent actions of the defenders on which the pursuer relied as indicating malice. Nor was it a legitimate inference from the evidence that the defenders were actuated by malice either in the matter of lodging the information or in that of the circular. If the Court were unanimously of opinion that the verdict was contrary to the evidence, then this was a case where judgment should be entered for the defenders and where a new trial should not be ordered, as all the evidence relevant to the cause that could be reasonably expected to be obtained was already before the Court.*

—
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At advising on 17th January 1913,—

LORD PRESIDENT.—The defenders in this case are a limited company of nautical and scientific instrument makers in Glasgow. A large branch of their business consists of compass work, for which they have been for many years famous. The firm was originally founded in the lifetime of Lord Kelvin, who had some very valuable practical patents for compasses. But the type of compass which was regulated by Lord Kelvin's patents is not the only type of compass, and in particular it has been, for certain purposes, one might almost say superseded by another class of compass known as the liquid compass. There is a certain form of liquid compass in the construction of which there are utilised certain patents which belong to Captain Chetwynd and Mr Clark, Mr Clark being one of the directors of the defenders' firm. This liquid compass has been very much used by the Admiralty. The Admiralty requirements necessitate a compass of great steadiness, inasmuch as the compass which they use may be subjected not only to the disturbing influences which come from the sea, but also from the excessive vibration which is the necessary concomitant of the firing of big guns.

¹ *Abrath v. North Eastern Railway Co.*, (1883) 11 Q. B. D. 440, *per* Bowen, L.J., at pp. 455 and 457, *aff.* (1886) 11 App. Cas. 247, and approved in *Cox v. English, Scottish, and Australian Bank*, [1905] A. C. 168, *per* Lord Davey, at p. 170.

² *Lightbody v. Gordon*, 9 R. 934.

* The Jury Trials Amendment (Scotland) Act, 1910 (10 Edw. VII. and 1 Geo. V. cap. 31), enacts:—Sec. 2. "If after hearing parties upon (a) a rule to show cause why a new trial should not be granted in terms of section 6 of the Jury Trials (Scotland) Act, 1815, on the ground that the verdict is contrary to evidence . . . the Court are unanimously of opinion that the verdict under review is contrary to evidence, and further, that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, they shall be entitled to set aside the verdict and, in place of granting a new trial, to enter judgment for the party unsuccessful at the trial."

There are many sizes of this liquid compass—I think about seven or eight Jan. 17, 1913.
in all—which have been for some years made by the defenders' firm.

The compass as made for the Admiralty requirements is necessarily an expensive compass. No money is spared in turning it out, and in particular its metal parts are all, or almost all, made of castings. There are certain smaller portions connected with the compass itself and a larger portion connected with the binnacle head which are not made of castings, but which are made by what are known as stampings and spinnings. It is necessary at once to explain what is the difference between a casting and a stamping and spinning. A casting probably needs no explanation; the word is one of common use, and everyone knows what it means. But "stamping" and "spinning" are not so common. The words are used to describe the formation of a metal design out of a plate. The metal plate is cut and is then introduced between two shaped chucks upon a lathe, and the flat metal is, by the rotation of the lathe and the pressure of the chucks, pressed into the desired shape. When this can be done the result is achieved at a less expense than is the case when each part has to be made by a casting in the ordinary way.

Now Messrs Kelvin & White, Limited, while they in the ordinary commercial sense made the compass, that is to say, while they got all the parts and assembled all the parts when got, yet, not being a firm of founders or spinners, did not actually make all the parts themselves, and for such things as were spun they were in use to deal with the firm of Burt Brothers in Birmingham, with whom they had dealt for some time—in fact the relations between the two firms may be described as of an intimate commercial kind.

On 1st November 1911 a Mr Wynn, who was one of the partners of Burt Brothers, came to Glasgow and requested to see Dr Bottomley, who is the chairman of the directors of Kelvin & James White, Limited. The other directors are his son Dr Frank Bottomley, Mr Baird, Mr Warren, who is a lawyer and a member of the firm that attends to the interest of the widow of Lord Kelvin, and Mr Clark, whom I have already mentioned. Mr Clark was the director who had the practical conduct of the works; but Dr Bottomley, who was a gentleman of great scientific attainments, and who, being Lord Kelvin's nephew, was associated with Lord Kelvin from the very inception of this business, took a general supervision of everything which went on. Now when Mr Wynn saw Dr Bottomley he communicated to him that there was a matter which had given him and his partner at Birmingham considerable cause for anxiety, and he then told Dr Bottomley the story that within the last few months, viz., from the month of May onwards, certain boxes of articles had been sent to their firm in Birmingham from Glasgow. They had been sent by Mr Mills, who is the pursuer in this action, and who was the works manager of Kelvin & White, Limited. They had been sent with instructions that the articles contained in the boxes should be kept until further orders. Without going into detail at this moment the effect upon the mind of the partners of Burt Brothers had been that there was something wrong and something curious about these consignments. They were consignments of things which Burt Brothers said they had never had before, and for which they imagined they could have

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Jan. 17, 1913. no use. Following upon that conversation it was arranged to send some of the practical persons from Kelvin & White, Limited, to Birmingham to see Mills v. those articles and to take an inventory of them and discover what they Kelvin & James White, Limited. were. That was done, and it was then found that there had been sent from the defenders' works to Burt Brothers, first of all, a complete Admiralty compass, and secondly, an absolutely complete set of gauges and jigs for the whole of the current patterns of the Admiralty compass. I shall explain later exactly what jigs are. "Gauges" is an ordinary term which I think everyone understands.

Ld. President.

In consequence of this report from their representatives the directors of Kelvin & White held a meeting on 8th November, at which their lawyer Mr Alexander attended, and they summoned Mr Mills before them. He was then subjected to an examination as to what reason he could give for having sent these boxes with their somewhat mysterious contents to Burt Brothers. The account given by Mr Mills, in the view of the directors, was so unsatisfactory that they dismissed him upon the spot. Having dismissed him upon the spot, and being within the next few days in possession of a little more information, they then, upon the 11th November, informed the procurator-fiscal, with a view of having Mills prosecuted for either theft or fraud, and upon the 18th November they sent out a certain circular.

Before calling your Lordships' attention to the actual terms of the circular it is as well to say this, that Clark had, upon the very morning of the meeting, handed in his resignation. After the meeting with Mills the directors had a meeting with Clark, at which they accepted his resignation, but only upon the condition that he re-wrote the resignation which had arrived that morning, and which was a resignation as from 31st December, which was still to come; they accepted the resignation which he then re-wrote, dating it from the day of its arrival, that is, 8th November, the day of the meeting.

The circular which they sent out on 18th November was sent to their trade connection, and was in these words: "We beg to inform you that in consequence of the discovery of serious irregularities, Robert K. Mills, then our works manager, was dismissed from our service on the 8th inst. On the same day Mr Francis Wood Clark, then our managing director, tendered his resignation as such, to take effect as at the end of the year, which, on being altered at the request of the directors so as to take immediate effect, was accepted." And then the recipient is asked to note that neither of these persons, Mills or Clark, has any authority to act for or represent in any way Kelvin & James White, Limited.

On 28th December Mills raised the present action, which is an action concluding for £5000 damages, and is based, first, upon the complaint of information having been given to the procurator-fiscal, that is to say, in other words, of attempted prosecution; and, secondly, upon the terms of the circular. Four issues were presented to the jury. The first and second issues have to do with the lodging of the charge. There are two issues instead of one, because one is put as a charge of theft and the other is put as a charge of fraud. Both of these issues necessarily have in them the words "falsely, maliciously, and without probable cause." The third issue is based upon the circular. It also contains the word "maliciously," which is tantamount to an admission by the pursuer that the occasion was privi-

leged—it contains the word “maliciously,” but, of course, not the words Jan. 17, 1913.
 “without probable cause.” The defenders took a counter issue, which was
 the fourth issue, which put the question whether the pursuer, while in the
 service of the defenders, for his own purposes fraudulently caused to be
 made for himself the articles that were in the boxes. The matter was tried,
 and the jury by a majority—by a varying majority on the various issues—
 found for the pursuer upon the whole issues, and the present application to
 your Lordships is an application for a new trial upon the ground that the
 verdict was contrary to evidence.

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The first matter that has to be considered is what is the onus which the
 pursuer must discharge in order to succeed upon the first two issues? There
 is a passage in a judgment of Lord Justice Bowen in the case of *Abrath v.*
North-Eastern Railway Company,¹ which I respectfully think expresses
 with great terseness and correctness the law upon this matter. It needs a
 little altering in the phraseology in order to fit it to our Scots practice,
 but the gist of it, I venture to say, is just as good law in Scotland as it is in
 England. I say “as it is in England” because the case of *Abrath*¹ has been
 again and again recognised as an authority, and has been approved of in the
 House of Lords. Lord Justice Bowen in that case said this (at p. 455):
 “This is an action for malicious prosecution, and in an action for malicious
 prosecution the plaintiff has to prove, first, that he was innocent and that
 his innocence was pronounced by the tribunal before which the accusation
 was made; secondly, that there was a want of reasonable and probable cause
 for the prosecution, or, as it may be otherwise stated, that the circumstances
 of the case were such as to be, in the eyes of the Judge, inconsistent with
 the existence of reasonable and probable cause; and, lastly, that the pro-
 ceedings of which he complains were initiated in a malicious spirit, that is,
 from an indirect and improper motive, and not in furtherance of justice.”
 Now, so far as the first of these three propositions is concerned, namely,
 that the plaintiff has to prove that he was innocent and that his innocence
 was pronounced by the tribunal before which the accusation was made, his
 Lordship is there dealing with an actual prosecution. Your Lordships
 remember perfectly well that private prosecution in England is the ordinary
 form of prosecution. Naturally, with our system, the matter is not quite
 the same. The person who practically decides, except in a very few rare
 cases, whether there is to be actual prosecution or not is the Lord Advocate.
 And the gravamen accordingly in Scotland is not, in many cases, the prose-
 cution itself, but is the giving to the procurator-fiscal, who is the representa-
 tive of the Lord Advocate, the information with a view to a prosecution.
 When it is stated, then, that the plaintiff has to prove that he is innocent,
 that is the case in England; whereas here the pursuer is entitled to have
 his innocence presumed. No prosecution did, as a matter of fact, follow in
 this case, and that is the reason why the defenders thought it necessary to
 take a counter issue, as they were entitled to do. Without a counter issue
 it would be held proved that the pursuer was actually innocent of what he
 was alleged to have done. As regards the second proposition, where his
 Lordship says that the circumstances of the case must be such as to be

¹ 11 Q. B. D. 440.

Jan. 17, 1913. in the eyes of the Judge inconsistent with the existence of reasonable and probable cause, there, in Scotland, you would substitute for the word "Judge" the word "jury," because probable cause itself, in our practice, is for the jury and not for the Judge. But the last proposition as to malice is applicable in terms to our own law.

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Now, when I come to consider what want of probable cause is, I am met with the difficulty of giving an actual definition of a negative. But one may say, I think, without fear of being far wrong, that a man has probable cause if, in giving the information, he is acting in a way in which a reasonable man, swayed by no illegitimate motives, would act. Naturally, when I speak of illegitimate motives, that trenches upon the domain of the third proposition, namely, malice; but there is no doubt that the two provinces of want of probable cause and malice rather overlap. You cannot deal with the two as entirely separate. But when one speaks of the way in which a reasonable man would act, one must add, I think, that the test of what a reasonable man would do must be taken according to the state of his knowledge when he gives the information; and, accordingly, the first inquiry in this branch of the subject is to see what the defenders knew when they gave this information to the procurator-fiscal.

When I come to look at what the defenders knew, I think that the salient points are these: First of all, by this time they knew what the things were that had been sent to Birmingham. They knew they were an absolutely complete set of articles which would enable anybody skilled in the trade at once to commence the manufacture of compasses that would suit the Admiralty. The second thing they knew was that these things had been sent with instructions that they should be kept secret, and should not be given up, but should await some further directions that were coming. The next thing they knew was that the class of things that had been sent, and the way in which they had been sent, had created a most uncomfortable feeling in the minds of the partners of Burt Brothers, who, while they did not know exactly what was wrong, had a very strong suspicion, and one which had been in their minds for some time, that something was wrong. The next thing they knew was that on the eve of the day on which they had summoned Mills to give them an explanation, Mills and Clark had both written letters to Burt Brothers with a request that everything that Burt Brothers had belonging to Kelvin & James White, Limited, including the articles referred to in this case, should be sent back; in other words, there had been an obvious attempt on Mills's and Clark's part to get back the contents of these mysterious boxes. The next thing they knew was that it had come to their knowledge that Mills had been throwing out feelers to various people as to setting up in business by himself. And finally they knew that, before they had given any note of warning to either Mills or Clark, Clark had handed in his resignation.

Now all those circumstances were what I may call extraneous of any explanation by Mills himself. But then they also had the meeting with Mills upon the 8th. I have already stated to your Lordships how Mills was sent for and was confronted by the five directors. The learned counsel for the pursuer characterised that as a harsh proceeding. I am bound to say that I cannot see anything harsh in it. I cannot see that the board of

directors were not absolutely entitled, where, as here, the circumstances Jan. 17, 1913. were full of suspicion, to send for the man who was implicated and ask him what explanation he had to give. There are various sources of information as to what happened at this meeting. As a matter of fact the defendants made arrangements for having what was said at the meeting taken down in shorthand, and we have got a transcript of what was said so far as the shorthand writer can reproduce it. If you take what is said literally as you see it in the shorthand notes extended, there is an absolute admission on Mills's part that these articles had been sent to Birmingham, not for the proper purposes of the firm of Kelvin & James White, Limited, but for purposes connected with Mills's possible future business, because, as the shorthand notes run, Mills says: "I anticipated that, when the day came that I left Kelvin & James White, I should be able to get work done by them"—that is by Burt Brothers—"the same as they did for Kelvin & James White. That was the reason; I was looking to my future." It is the case that the shorthand notes have been subjected to a certain criticism by an expert shorthand writer, and he suggests that the sentence which I have just read is in answer to a question which has been omitted, and that if you framed the question in a certain way the sentence which I have read might not have the precise shade of meaning which it obviously has if you read it as I have read it. I do not think that very much matters, because you have also the story of the various people who were at the meeting; and they one and all—I shall not take up your Lordships' time by reading bits of the evidence—they one and all were left, after the meeting, with the distinct impression that Mills had practically admitted that these articles were sent for a purpose of his own and not for the purposes of the firm. And I think we have what may be called contemporaneous evidence of that being the case, because after Mills had been then and there dismissed, when the directors met Clark, Mr Alexander, who was the mouthpiece of the directors, made a speech to Clark, and in that speech he says this: "We have heard from Mr Mills just now an account of it, and he has openly confessed that they"—that is, the articles—"were sent to be useful to him when he was in a position to start for himself with Dents's people." That seems to me to be an absolute confirmation of what all these gentlemen say in the witness-box, namely, that the effect upon them of the interview was that they had no doubt whatsoever that Mills had reluctantly admitted that he had sent the articles for his own purposes.

Now if Mills did make that admission, and if that was the state of knowledge at the time of these persons, there can be no doubt that, in their view, and, indeed, in anybody's view, not only had a grave breach of duty been committed by Mills, but something had been done by him which put him within the reach of the criminal law. I do not think it is at all necessary to consider whether, in the technical sense of the word, there was theft—whether there had been that *animus* which makes theft in the strict sense of the word—and when the complaint came to be made to the authorities, what is complained of is "theft or fraud." The truth is that the question whether the *nomen juris* was theft or fraud was really a matter for the Lord Advocate, and not for the private informant at all;

Jan. 17, 1913. but that it is fraudulent to take your employers' goods without their leave and to send them away to a place where they are eventually to be used for your purpose and not for your employers' purpose, I have no doubt. There is a good deal of fencing on Mr Mills's part as to the word used, that is to say, with the words of a question put to him, namely, whether he proposed to "use" the articles himself. Well that, obviously, is neither here nor there. If a man took a violin which did not belong to him and sent it away to someone else it would be no answer to a criminal charge against him to say that he could not play the violin and could never use it himself. If Mills meant Burt Brothers to use these things, which did not belong to him, for the purposes of his eventual business, undoubtedly that was a fraud. I do not think it is necessary to decide whether, technically speaking, it is a theft or a fraud.

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—
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I now come to a great peculiarity of the case, and that is this, that in the summons the attitude that is taken as regards the sending of these things is not only not an admission of such a thing as I have put—which, of course, would have been fatal—but is the putting forward of an entirely different story; and there is this further peculiarity, that that entirely different story, which, if it is a true story, could easily have been told at the meeting of the 8th, was never breathed at that meeting. The story which is put forward in the summons is this: The Admiralty compass, as I have already said, is a very expensive compass, and there is an opening in the trade for the introduction of a liquid compass which will have the advantages of the liquid compass and yet be made at such a figure as will allow it to be bought by the mercantile marine and by that large class of persons who cannot afford to pay the price which the Admiralty are prepared to pay. The theory which is put forward in the summons, then, is that all these articles were sent to Burt Brothers in order to allow of their making spinings for a cheap liquid compass. I have already mentioned that where you can spin instead of cast it is cheaper to do so.

If I were inclined to deal with the matter very strictly, or, indeed, if I had been sitting as a jurymen, I would be of opinion that, whatever was in the summons, the fact that Mills did not say that at the meeting of the 8th November would be enough to justify the position of the defenders at that time. But I do not propose to do that, because, although the result of Mills's examination is as I have said, there is a part of his examination where, though he falls far short of putting the case as I have put it now, and as it is put in the summons, still there is a sort of hint which might have been developed into the case as it stands in the summons. When he is asked at the beginning of the examination what he had sent the things for, he says this: "All those things you mention were sent with the express purpose of having them stamped." The particular person who was examining him at the time, Mr Alexander, did not really understand the meaning of the word "stamped," and took it—as a layman would do—as meaning the impression of a name or a mark upon them, and consequently did not press the answer in a way that a person who did understand stamping would have done. Dr Bottomley did, because he asked if they were going to stamp circular plate glass, &c., and certain other parts of the compass which were perfectly unfit to be stamped, and no answer was made to that

entirely pertinent question. But still I am content to take it that this Jan. 17, 1913. mention of the stamping was a sort of indication—a sort of embryo—of Mills v. the story that is now told; and seeing that we are not here trying the case, Kelvin & but considering an application for a new trial and to set aside the verdict James White, of the jury as being contrary to evidence, if I could find that there is any Limited. substance for what I may call the innocent view, so that the jury had a Ld. President. possible choice between the one view and the other, then I should not, however much I thought they were wrong, consider myself entitled to disturb their verdict. But if, on the other hand, the allegation as now made is preposterous and upon the face of it false, then the mere fact that it is given and sworn to by the two interested parties, Clark and Mills, does not really create evidence upon which the jury were entitled to go.

Now, I have used the word "preposterous." Preposterous, of course, must be preposterous not to anybody, but to the judgment of the man who understands the subject.—[His Lordship then pointed out that the directors of Kelvin & James White, Limited—or at least some of them—perfectly understood the subject; and he examined at length the evidence which led him to the conclusion that, to anyone who knew the subject, the suggested explanation must have been obviously preposterous. He founded on the following circumstances:—(1) that Kelvin & James White were quite alive to the good market there was for a cheap liquid compass, and had for two years been experimenting with the aid of Messrs Burt in an endeavour to turn out a cheap compass by substituting spun parts for cast parts, and that the result of the experiments had been to demonstrate that it was impossible to produce the necessary parts by spinning; (2) that the pursuer's alleged reason for sending to Messrs Burt the whole range of Admiralty compasses—viz., that he intended that they should turn out for Kelvin & James White compasses completed in all details save for painting and filling in the liquid—was quite untenable, as Messrs Burt were spinners, and spinners only, and had neither the skill and experience, nor the plant, men, and premises, necessary to enable them to do what was suggested; (3) that among the articles sent were not only gauges but jigs; that jigs are frames for holding the parts together temporarily to test the accuracy of their dimensions and to enable the holes for the screws to be bored at the exact spots and to the correct depth; that spun parts, from their method of construction, must always vary in section from cast parts; that a variation of one sixty-fourth of an inch will render such a jig useless; and accordingly that the jigs were perfectly useless if the intention was to make the compasses of spun parts.]

Now, that is the one side—an explanation which, on the face of it, as soon as you come to understand it, is preposterous and ridiculous, and which no man who knew the business at all would accept for a moment. What is the other?—a man who has admitted that he is planning to start a new business, admits to sending, behind the backs of his directors, such a complete set of jigs and gauges, together with a complete Admiralty compass, that with that stock-in-trade he can go into a good shop, like that of one of the London manufacturers which has been mentioned here, and the very next day begin to construct compasses of the Admiralty pattern. Some of these jigs, we are told, and it is quite evident, are the result of

Jan. 17, 1913. years of experiment. It is not entirely a question of design; they represent a great deal of empirical achievement. One improvement follows another, until you get the contrivance, I do not say in the most perfect form—there are probably better jigs yet to be made—but still you get it in very perfect form. All that trouble and labour is abbreviated to the person who has these things. (I have just referred to the London manufacturers whose names have been brought before your Lordships in the debate, and, although they have nothing to do with this case, I say at once that there is not the remotest suggestion of either Messrs Dent or Captain Chetwynd having the slightest knowledge of this matter.)

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Now, when you have those two sides of the matter as they presented themselves to the directors, really the case seems to end. On the one hand you have very obvious reasons for the action of the directors, the circumstance of secrecy and the whole circumstances of the case all pointing the one way. On the other hand you have an explanation, not made at the time but made now, which will not hold water for one moment, and really can only hold water if it is presented to a sufficiently ignorant or uninstructed person. I am afraid the question of instruction in such matters as these is sometimes a little difficult, and it is certainly one of those cases where one regrets very much that in our practice we do not have the advantage, as they have in England, of the services of a special jury, because I cannot disguise from myself that probably the majority of the jury who tried this case never came to a proper understanding of what a jig really was, and as to the deductions that must necessarily be drawn from the nature of it. But as the evidence stands, I say there is here no evidence whatsoever of want of probable cause, because, as I have already said, the mere fact that two people swear to an inherently preposterous story does not create evidence at all.

That, to my mind, settles the first two issues. I have already said that I think the question of theft or fraud was for the Crown Office and not for the defenders. And when you have settled the first two issues, you have, I think, practically settled the third, because, as regards the third, you have, applying the words of Lord Justice Bowen, to find that the sending out of the circular was done in a malicious spirit and from an indirect and improper motive. If I am right in all I have already said, it is impossible to find any malice in sending out the circular. The directors were perfectly entitled to say what they did, and to tell their customers that neither Mills nor Clark would ever in the future be their representative.

The only point, in this connection, which was urged before us, and, I daresay, urged with great effect before the jury, was that malice might be inferred from the fact that after information was lodged, and after a communication had been received from the procurator-fiscal that he did not propose to take proceedings, the directors would not take "No" for an answer, and went back and requested a meeting with Crown counsel. I do not think that is a matter from which it is allowable to extract malice. A person is entitled to call upon the Crown authorities to do what he thinks is their duty. But in this case they were more than ever entitled, for the reasons that I have already given, to secure a thoroughly informed opinion upon the facts of the case. It is absolutely necessary in this case to become

sufficiently acquainted with what the compass is, and how it is constructed, Jan. 17, 1913.
 in order to appreciate what was really meant by sending all those things to ^{Mills v.}
 Burt Brothers. I do not think that the understanding of compass work is ^{Kelvin &}
 within the ordinary training of the Crown Office, even including the Advo- ^{James White,}
 cates-depute, and I think it was perfectly natural that the defenders here ^{Limited.}
 should wish to explain thoroughly to the Crown authorities exactly how the ^{Ld. President.}
 matter stood. And that really is practically the only matter that can be
 appealed to in the question of malice.

It follows that in my opinion there is no evidence whatsoever to support the verdict of the jury upon the first, second, and third issues. I need scarcely add that it also follows from what I have said that I think there ought to have been a verdict for the defenders upon the fourth issue. But I do not think it necessary that your Lordships should deal with that, because if there is no evidence in support of the pursuer's case under the first, second, and third issues, the verdict necessarily goes.

There is another fact which I have not mentioned as regards the first, second, and third issues, because I have necessarily dealt with the knowledge of the defenders at the time that they took these steps, and this particular thing was not known to them at that time, but I refer to it in connection with the fourth issue. It is this, that in addition to the other facts, it is proved that Mills had a complete set of drawings of all these Admiralty compasses made out for him and delivered to him, and that those drawings are now nowhere to be found. That set of drawings would have added the final touch to the equipment of a person who had made available to himself the set of patterns and jigs in the case, and would have enabled him to start the construction of Admiralty compasses at once. But I do not think it necessary to go further into that, because I think it is perfectly unnecessary that we should deal with the fourth issue at all. As regards the first, second, and third issues, as I understand the opinion which I have just delivered is shared by all your Lordships, including, of course, the very valuable opinion of the learned Judge who presided at the trial, it is I think a clear case for entering a verdict for the defenders.

LORD JOHNSTON, LORD MACKENZIE, and LORD ORMDALE delivered opinions in which they reviewed the evidence, and came to the same conclusion as the Lord President on all the points.

THE COURT pronounced the following interlocutor:—"The Lords (including Lord Ormdale who presided at the trial) having heard counsel for the parties on the rule, make the rule absolute, set aside the verdict, and, being unanimously of opinion that the verdict is contrary to evidence, and further, that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, assoilzie the defenders from the conclusions of the action, and decern."

No. 71. STEWART CRUDEN, Claimant (Respondent).—*Wilson, K.C.*—*MacRobert.*

Jan. 21, 1913. THE WEMYSS COAL COMPANY, LIMITED, Appellants.—*Horne, K.C.*—*Russell.*

Cruden v.
Wemyss Coal
Co., Limited,

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule (15)—Remit to medical referee—Finality of referee's report—Proof as to wage-earning capacity.

In an application to end the compensation payable to a miner who had received an injury to his eye, the question of his condition and his fitness for employment was referred to a medical referee under paragraph (15) of the First Schedule to the Act. The medical referee reported that "his condition is such that I consider he ought now to be fit to resume his ordinary work as a miner below ground."

The miner having lodged answers in which he averred that he had not yet recovered from the effects of the accident and that his earning capacity was not restored, the Court *allowed* a proof as to the miner's wage-earning capacity, but excluded all evidence with regard to his physical condition and physical fitness for his ordinary work as a miner below ground, as on those points the medical referee's certificate was final.

Form of interlocutor in *Arnott v. Fife Coal Company, Limited*, 1911 S. C. 1029, *commented on*.

2D DIVISION. IN an application under the Workmen's Compensation Act, 1906, in the Sheriff Court at Cupar for review of compensation paid by the Sheriff of Fife and Kinross. Wemyss Coal Company, Limited, to Stewart Cruden, miner, the Sheriff-substitute (Armour-Hannay) allowed the parties a proof of their respective averments, and, at the request of the employers, stated a case for appeal.

The case set forth that on 9th August 1910 the respondent, who was working as a miner underground, sustained injury to his left eye as the result of an accident in the course of his employment with the appellants, and received full compensation from that date till 31st January 1911, and partial compensation between the latter date and 28th March 1911. That since the last date he had received no compensation, but that the compensation down to 12th June 1911 would be adjusted.

The case further set forth:—“(3) On 12th June 1911 the claimant was examined by Dr George Mackay, 20 Drumsheugh Gardens, Edinburgh, medical referee in ophthalmic cases under the Workmen's Compensation Act, 1906, on a remit under section 15 of Schedule 1 of said Act.

“(4) The report of said medical referee lodged on 13th June 1911 is in the following terms:—‘The said Stewart Cruden has a scar upon the cornea of his left eye, due to a septic ulcer which followed upon an abrasion by a piece of coal accidentally striking his eye while at work on August 9th, 1910. The direct vision of this eye is thereby reduced to about one-fourth of normal for distance, but the eye is now free from inflammation, has a fair field of vision, and, though impaired, is still capable of doing useful service. The other eye is practically normal, only requiring reading glasses suited to his age. Cruden has a good judgment of distance and direction even in subdued light. He has been already engaged for three months in surface work; and his condition is such that I consider he ought now to be fit to resume his ordinary work as a miner below ground.’

“(5) Following upon said report the appellants lodged in process

in the Sheriff Court at Cupar a minute craving the Court to end the claimant's compensation as at 12th June 1911. The claimant lodged answers to said minute, stating *inter alia* that he had not recovered from the injuries which he had sustained, and that he had not recovered his earning capacity following upon said injuries; that he was still under medical treatment; that as the result of the injuries which he had sustained he was suffering from giddiness and headaches, both during his shift and after; that these headaches, &c., were most frequent when he had to stoop or bend, and were a result of the injuries which he had sustained; that they interfered with his capacity for work and his earning ability; that his eyesight was weak as a result of the accident, and became dim and fagged by the end of the shift; and further, that he was unable to work in the glare of a naked light or in strong sunlight. The claimant also stated that, while his earning capacity had been, and was at that time, much reduced as a result of the injuries which he had sustained, he was prepared to try work below ground, so that his earning capacity at mining work might be properly tested. He averred, further, that it was necessary for a certain period to elapse to enable him to accustom himself to his altered conditions.

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"(6) I heard parties on the minute and answers, and allowed the parties a proof of their respective averments, and to the claimant a conjunct probation. The question argued before me was whether the proof should be limited to the question of the workman's earning capacity. Following *Arnott v. Fife Coal Company, Limited*,¹ I allowed an open proof on the footing that certain questions as to the claimant's physical capacity might be necessary and competent, although in a general way evidence on this subject was clearly incompetent."

The questions of law were:—"(1) Was I right in allowing parties a proof of their respective averments, and to the claimant a conjunct probation? (2) Should I have restricted the proof to the wage-earning capacity of a one-eyed miner?"

The case was heard before the Second Division (without Lord Dundas) on 21st January 1913.

Argued for the appellants;—(1) The respondent was not entitled to a proof of his averments. Paragraph (15) of the First Schedule to the Act provided that the medical referee's certificate was to be "conclusive evidence as to the matter so certified." Whether proof was admissible after such a certificate depended on the nature of the workman's injuries and the character of his employment. If, for example, the workman's injury was a broken leg and the referee reported that he had recovered, no further proof was admissible, for in that case the man's leg would be as strong as before the accident.² On the other hand, if the workman had lost a finger then, as he might labour under a certain disability even after recovery from the wound, a proof might be allowed on the question as to whether the workman's chance of employment had been diminished.³ But even in this case

¹ 1911 S. C. 1029.

² *Gray v. Shotts Iron Co., Limited*, 1912 S. C. 1267.

³ *Arnott v. Fife Coal Co., Limited*, 1911 S. C. 1029, 1912 S. C. 1262; *Ball v. William Hunt & Sons, Limited*, [1912] A. C. 496, *per Lord Shaw*, at p. 511 (1912 S. C. (H. L.) 85, footnote), approving of Lord Salvesen's statement of the law in *Carlin v. Stephen & Sons, Limited*, 1911 S. C. 901, at p. 907.

Jan 21, 1913. proof would not be granted unless the workman averred that he could either get no employment at all or no employment at the same rate of wages as before the accident; and the proof would be limited to that question. Here the medical certificate was conclusive as to the respondent's recovery; and the respondent did not aver that he could not get work. All the statements made by the respondent in his answers were, it must be presumed, made by him to the medical referee, and the referee must have taken them into consideration as he was bound to do.¹ (2) In any case the proof allowed should be limited to the question of the respondent's wage-earning capacity. The decision in *Arnott v. Fife Coal Company, Limited*,² was to this effect; and the interlocutor had apparently *per incuriam* been pronounced in terms inconsistent with the opinions.

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Argued for the respondent;—The arbitrator was right in allowing an unrestricted proof. The medical referee's certificate was final only where it was complete and showed that the workman was restored to the physical condition in which he was before the accident.³ The certificate here was not of this kind, and its phraseology was ambiguous. Accordingly the respondent was entitled to a proof as to his wage-earning capacity. The interlocutor here should be in the same form as that in *Arnott's case*.³ Under such an interlocutor proof might be led as to the respondent's wage-earning capacity, and any evidence in contradiction of the referee's certificate would be rejected by the arbitrator.

LORD JUSTICE-CLERK.—I am very clearly of opinion that the first question which is put to us ought to be answered in the negative. I do not think this is a case in which a general proof should have been allowed of the respective averments of parties. The medical report here is given as a judgment, and that judgment, so far as it relates to the physical capacity of the applicant, is final. No doubt, in one of the cases quoted to us, *Arnott v. Fife Coal Company*,² a general proof was allowed in circumstances somewhat similar to, though not quite the same as, those here. I cannot help thinking that there must have been some mistake in that case, and that the proof was not intended to be as extensive as was allowed; and I am not satisfied that we are bound in any way by what was done in that case.

Dealing with this particular case, I think the second question should not be set aside altogether, but I think it may be better stated. It is a pity that the Sheriff-substitute put into the question the words "the capacity of a one-eyed miner." I think the proper course would be to supersede consideration of the second question, and to remit to the arbitrator to allow the respondent a proof relating to his wage-earning capacity, excluding therefrom all evidence with regard to his physical condition and his physical fitness for his ordinary work as a miner below ground.

¹ Regulations dated June 27, 1907, by the Secretary of State and the Treasury as to the duties and remuneration of medical referees in Scotland under the Workmen's Compensation Act, 1906, Rule 10.

² 1911 S. C. 1029, 1912 S. C. 1262.

³ *Gray v. Shotts Iron Co., Limited*, 1912 S. C. 1267, *per* Lord President Dunedin, at p. 1272.

LORD SALVESEN.—I am of the same opinion. I am not surprised that Jan. 21, 1913. the Sheriff-substitute should have allowed an open proof here, following as he did the interlocutor which was pronounced in the case of *Arnot v. Fife Cruden v. Wemyss Coal Coal Company, Limited.*¹ I agree with your Lordship, however, in thinking that it is difficult to reconcile the form of the interlocutor with the opinions of the Judges who decided that case, and I am disposed to think that, if the matter had been noticed and brought before their Lordships of the First Division, the interlocutor would have been in somewhat more qualified terms.

But it is obvious that the Sheriff-substitute himself contemplates that certain matters are foreclosed by the report of the medical referee, for he says that he allows a proof only on the footing "that certain questions as to the claimant's physical capacity might be necessary and competent, although in a general way evidence on this subject was clearly incompetent." Now, I do not think it is satisfactory where the Sheriff-substitute is of opinion that a general proof would be incompetent that he should nevertheless allow a proof at large on the footing that there might be certain questions which might be competent.

It is admitted by Mr MacRobert that the medical referee's report is conclusive as to the matters which he finds. It is his duty under the Act to find among other things whether the claimant is fit to resume his work; and although the referee's report is not very accurately expressed, I take him as meaning that it is his opinion that the claimant was at the date of his report fit to resume his ordinary work as a miner below ground. He has therefore decided that matter so that it is now concluded, and there can be no further inquiry with regard to it.

I agree with your Lordship that we must restrict the proof substantially as the Sheriff-substitute has himself indicated; but I think we must define that in the interlocutor, and I am quite satisfied with the terms of the interlocutor which your Lordship in the chair proposes.

LORD GUTHRIE.—I am of the same opinion. The medical referee has found that the claimant ought now to be fit to resume his ordinary work as a miner below ground. I think, with Lord Salvesen, that we must take it that he means that the claimant is fit to resume his ordinary work, although the certificate is rather ambiguously expressed.

In the end, it was not denied, on the one side, that the referee is final in regard to the three matters specified in paragraph (15) of the First Schedule, namely, the condition of the workman, his fitness for employment, and the kind of employment for which he is fit. On the other side, it is not denied that although the medical referee is final in these three matters, there is another question which is involved in all these cases, and on which he is not final, namely, wage-earning capacity. It is certainly necessary that we should make it distinct that the proof of wage-earning capacity does not include evidence of the three matters to which I have just referred. I think the interlocutor which your Lordship proposes makes that quite clear.

¹ 1911 S. C. 1029, 1912 S. C. 1262.

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THE COURT pronounced the following interlocutor:—"Answer the first question of law therein stated in the negative, and supersede consideration of the second question: Remit the cause to the arbitrator to allow the respondent in the appeal a proof relating to his wage-earning capacity, excluding therefrom all evidence with regard to his physical condition and physical fitness for his ordinary work as a miner below ground, and to proceed as accords."

D. R. TULLO, S.S.C.—W. & J. BURNES, W.S.—Agents.

No. 72.

Jan. 21, 1913.

Graham v.
Barr &
Thornton.

MRS MARY GRAHAM, Pursuer (Appellant).—*D.-F. Dickson—Kirkland.*

BARR & THORNTON, Defenders (Respondents).—*Horne, K.C.—Carmont.*

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—Accident arising out of and in the course of the employment—Workman killed while returning from work.

A workman, employed underground in a coal mine, on finishing his day's work returned to the surface and was proceeding home by a track along the side of a private branch railway line, the property of his employers, when he was knocked down and killed by an engine at a point 400 yards distant from the mouth of the pit.

Held that the accident did not arise out of and in the course of his employment.

Caton v. Summerlee and Mossend Iron and Coal Co., Limited, (1902) 4 F. 989, followed.

1st DIVISION.
Sheriff of the
Lothians and
Peebles.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court of the Lothians, at Linlithgow, Mrs Mary Graham, widow of John Tennant Graham, coal miner, claimed compensation for herself and two pupil children, in respect that her husband was killed by an accident which arose out of and in the course of his employment with Barr & Thornton, coalmasters, Fauldhouse.

The Sheriff-substitute (Macleod) refused compensation, and at the request of the pursuer stated a case for appeal.

The case set forth:—

"1. The deceased was a haulage man in the employment of the respondents, who are coalmasters at Fauldhouse, at their No. 1 Cultrig Pit.

"2. There are no boundaries to mark the extent of surface occupied by the respondents, but in the immediate vicinity of the mouth of the shaft of the said pit the respondents had the usual surface colliery properties. The respondents had a colliery office about 120 yards to the west of the shaft mouth, and a private branch railway line (also the respondents' property) took the traffic westwards from the sidings at the mouth of the shaft to another private branch railway line in the joint occupation of the respondents and of the United Collieries, Limited, and thence to a branch line of the North British Railway.

"3. The aftermentioned accident to the deceased took place at a point on the respondents' said private branch railway line about 400 yards to the west of the shaft mouth, and 280 yards to the west of the said colliery office. Between the said colliery office and the

point of the accident there was no property belonging to the respondent Jan. 21, 1913.
 dents except their said private branch railway line.

"4. The deceased's duties were entirely underground, and as soon as he stepped out of the cage at the mouth of the shaft his employment for the day was over, and he was at liberty to proceed at once from the shaft mouth to his home at East Benhar. (This paragraph makes a general statement).

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"5. And in particular on the day libelled, when the deceased had finished his work for the day and had stepped from the cage on reaching the mouth of the shaft, his duties for that day were entirely over, and accordingly he proceeded from the mouth of the shaft to his home at East Benhar.

"6. The deceased had a choice of two routes from the mouth of the shaft to his home. One route consisted of a beaten track across the moor, but this route, though shorter and not exposed to danger from railway traffic, was used by very few of the respondents' workmen. Indeed, except in summer time and after a long spell of dry weather, it was not at all a very attractive route, by reason of the depth of mud on its surface. The route which the deceased generally took was the one which the great majority of the respondents' workmen generally followed—without either the sanction or the prohibition of the respondents. It consisted of a beaten track along the side of the respondents' said private branch railway line, and was so smooth and comfortable that many bicycles were in the habit of traversing it.

"7. The deceased, following his usual custom, proceeded homewards on the date libelled from the mouth of the shaft by the said beaten track along the side of the respondents' said private branch railway line, and when at a point on the respondents' said private branch railway line about 400 yards from the mouth of the shaft he was knocked down and killed by an engine belonging to the North British Railway which worked the traffic for the respondents.

"8. At the time libelled the appellant and her said two children were the only dependants on the earnings of the deceased, and they were wholly dependent thereon.

"On the foregoing facts I inclined in law to the view (1) that though the deceased chose to go homewards from the mouth of the shaft by the respondents' private branch railway rather than go by the other route across the moor, yet in the circumstances the mere choice of route (distinguishing this case from that of *Hendry v. United Collieries, Limited*, 1910 S. C. 709) was not fatal to the appellant's claim; but (2) that on consideration of the question as to the existence of any relationship between the accident at the spot where it happened and the deceased's employment with the respondents, the accident could not be said to have arisen out of and in the course of that employment without disregarding two Scottish decisions, viz.:—*Caton v. Summerlee and Mossend Company*, 11th July 1902, 4 F. 989, and *Anderson v. Fife Coal Company, Limited*, 15th October 1910 S. C. 8—and, having so decided, I assoilzied the respondents with expenses."

The question of law for the opinion of the Court was:—"Was I right in deciding that the accident to the deceased did not arise out of and in the course of his employment with the respondents?"

The case was heard before the First Division on 18th and 20th December 1912.

Argued for the appellant;—It had been decided that, in certain

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circumstances, employment began before and continued after the actual working hours,¹ and in the present case the deceased was still in the course of his employment while he was on the respondents' railway line,² which, for purposes in connection with that employment, was to be regarded as part of their mine.³ Not until he left the line did he cease to be in the course of his employment,⁴ and the accident by which he was killed was one of the ordinary risks of that employment,⁵ seeing that it happened while he was traversing a recognised path within the premises over which his employers had full control.⁶ As the limits of these premises were not marked in any way, a reasonable margin had to be allowed. The case of *Kelly v. "Foam Queen"*⁷ was distinguishable from the present case because the deceased's place of work was not his home. In the cases of *Caton v. Summerlee and Mossend Iron and Coal Company, Limited*,⁸ and *Anderson v. Fife Coal Company, Limited*,⁹ a narrower interpretation was given to the word "employment" than was warranted by the general course of the decisions; and in the light of the generally accepted interpretation of "employment," the deceased should be held to have been in the course of his employment while on his way home and in a place where he was entitled to be.¹⁰

Argued for the respondents;—A workman did not continue in his employment until he reached his home, and an accident happening beyond a reasonable margin of distance from his place of work, as in the present case, could not be regarded as happening in the course of his employment.¹¹ Where the employers' premises were distinctly marked off, a workman might still be in course of his employment though at a little distance from his actual place of work,¹² but in the absence, as in the present case, of ascertained limits to the employers' premises the test to be applied was continuation of duty.¹³ Neither the deceased nor his employers were under any obligation with regard to his duty at the place where the accident happened, and therefore it could not be held to have arisen out of and in the course of his

¹ *Brydon v. Stewart*, (1855) 2 Macq. 30, *Cranworth, L. C.*, at p. 35; *Todd v. Caledonian Railway Co.*, (1899) 1 F. 1047, *Lord M'Laren*, at p. 1051.

² *Mackenzie v. Coltness Iron Co., Limited*, (1903) 6 F. 8, *Lord Adam* and *Lord M'Laren*, at p. 10.

³ *Coal Mines Act*, 1911 (1 and 2 Geo. V. cap. 50), secs. 111, 122.

⁴ *Walters v. Staveley Coal and Iron Co.*, (1911) 49 S. L. R. 623, *Lord Shaw*, at p. 624, 105 L. T. (N. S.) 119.

⁵ *M'Laren v. Caledonian Railway Co.*, 1911 S. C. 1075, *Lord President Dunedin*, at p. 1078.

⁶ *Coldrick v. Partridge, Jones, & Co., Limited*, [1910] A. C. 77, *Lord Shaw*, at p. 82, *doubting* *Davies v. Rhymney Iron Co.*, (1900) 16 T. L. R. 329; *Hoskins v. Lancaster*, (1910) 3 Butterworth's W. C. C. 476.

⁷ (1910) 3 Butterworth's W. C. C. 113.

⁸ (1902) 4 F. 989.

⁹ 1910 S. C. 8.

¹⁰ *Sharp v. Johnson & Co., Limited*, [1905] 2 K. B. 139, and *Crow, Tetley, & Co. v. Catterall*, not reported, but therein referred to by *Collins, M. R.*, at p. 145; *Gane v. Norton Hill Colliery Co.*, [1909] 2 K. B. 539.

¹¹ *Walters v. Staveley Coal and Iron Co.*, 49 S. L. R. 623, 105 L. T. (N. S.) 119; *Gilmour v. Dorman, Long, & Co., Limited*, (1911) 105 L. T. (N. S.) 54.

¹² *Hoskins v. Lancaster*, 3 Butterworth's W. C. C. 476.

¹³ *Anderson v. Fife Coal Co., Limited*, 1910 S. C. 8.

employment.¹ To be run over by an engine at that place was not one of the ordinary risks of the deceased's employment.²

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At advising on 21st January 1913,—

THE COURT (without Lord Kinnear) after delivering opinions in which they referred to the similarity between the circumstances of the present case and those of the Second Division case of *Caton v. Summerlee and Mossend Iron and Coal Company, Limited* (4 F. 989), answered the question of law in the affirmative.

J. DOUGLAS GARDINER & MILL, S.S.C.—W. & J. BURNES, W.S.—Agents.

MRS CATHERINE GIBB, Pursuer.—*Sandeman, K.C.—MacRobert.*
THE EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED,
Defenders.—*G. Watt, K.C.—Macmillan, K.C.—Black.*

No. 73.
Jan. 23, 1913.

Reparation—Negligence—Contributory negligence—Accident—Proximate cause.

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In an action of damages against a tramway company tried before a jury the pursuer's case was that, when crossing a street, she stopped in the four-foot way between two sets of car rails to allow a car to pass, and that her dress was caught by a stay that projected beneath the car and she was thrown down and run over. She maintained that had the car been provided with side guards, as it should have been, the accident would not have happened. The defenders pleaded contributory negligence, their case being that the pursuer, not looking where she was going, had herself walked into the car.

Counsel for the pursuer asked the Judge to direct the jury "that, even if they be of opinion that the pursuer contributed by her fault to the accident which happened, she is not disentitled to recover damages from the defenders, if the jury are also of opinion that reasonable care on the part of the defenders, viz., provision of side guards to the car, would have prevented the accident." His Lordship refused the direction, and the pursuer excepted to his ruling.

In a bill of exceptions *held* that the direction had been rightly refused in respect that, if the pursuer's own negligence was a *causa proxima* of the accident, the fact that there might also have been contemporaneous negligence on the part of the defenders which affected the accident did not entitle her to a verdict; and bill *refused*.

Radley v. London and North-Western Railway Company, (1876) 1 App. Cas., *distinguished*, and observed, *per* the Lord President, that the doctrine of that case applies only where the negligence of the defender is due to an act of volition subsequent to the contributory negligence of the pursuer.

(REPORTED *ante*, 1912 S. C. 580.)

On 20th June 1911 Mrs Catherine Gibb brought an action against the Edinburgh and District Tramways Company, Limited, in which she claimed the sum of £2000 as damages in respect of personal

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Lord Hunter
and a Jury.

¹ *Kelly v. "Foam Queen"* 3 Butterworth's W. C. C. 113; *Hendry v. United Collieries, Limited*, 1910 S. C. 709; *Davies v. Rhymney Iron Co., Limited*, 16 T. L. R. 329; *Caton v. Summerlee and Mossend Iron and Coal Co., Limited*, 4 F. 989.

² *McLaren v. Caledonian Railway Co.*, 1911 S. C. 1075, Lord President, at p. 1078; *Kitchenham v. Owners of s.s. "Johannesburg,"* [1911] 1 K. B. 523, [1911] A. C. 417.

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injuries sustained by her through being knocked down and run over by a tramway car belonging to the defenders.

The pursuer averred, *inter alia*:—(Cond. 2) "About mid-day on 14th September 1910, when out shopping, the pursuer had occasion to cross from the east to the west side of Lothian Road at a point some yards to the north of the Edinburgh Savings Bank's branch office there, near the top of said street. Pursuer, in so crossing, saw the defenders' car, No. 81, approaching from the south, going in the direction of Princes Street, and she stopped between the two sets of tramway rails with the intention of allowing the car to pass her. There was no car approaching from the opposite direction, that is from Princes Street, near pursuer at the time. The car was travelling at full speed—at the rate of about ten miles an hour. The pursuer had taken up a position midway between the two sets of rails so as to be clear of the car, but when it was about halfway past her the lower part of the skirt of her dress was drawn in by the suction caused by the car and caught by the vertical stay on the right side of the car, or became jammed between the main stay and the body of the car. The pursuer was in consequence thrown violently to the ground and dragged by the car for some distance on the causeway on her face. The right rear wheel of the car passed over her left leg. . . ."

(Cond. 3) "The said accident was due to the fault and negligence of the defenders. The bottom end of the upright rod of said vertical stay in the car in question projected thereunder to the extent of about 1 inch. Said projection was unguarded, and was a source of great danger to a person standing at the side of the car as it passed. It was specially dangerous to a woman, as her dress is liable to be sucked in under the car as it passes and to catch on the vertical projection. Further, the main stay was unguarded, and a woman's dress is liable to be caught between the stay and the car. It was the duty of the defenders to have had both the vertical stay and the main stay guarded, but this they failed to do. Had the stays been guarded the accident would not have happened. Further, and in any event, it was the duty of the defenders to have had the side of the car between the body and between the front and back wheels guarded, and also to have had the wheels themselves guarded. This is usual and customary. The defenders failed in this duty. There was no guard at the side of the car between the wheels to prevent a person who had fallen from getting beneath the car and under the wheels, nor were the rear wheels guarded in front. Had the defenders adopted either of these precautions the accident would not have happened."

The defenders pleaded, *inter alia*, contributory negligence, and averred:—"The pursuer left the pavement on the east side of the street to cross over to the other side without looking where she was going or observing what traffic was on the street. She walked straight forward without taking notice of anything, and quite regardless of where she was going and of the approach of the defenders' car. Her peculiar action was observed by the driver of the car, who rang his bell loudly to attract her attention, and at the same time shouted to her, as it was obvious that she was about to walk straight up against the car. Her conduct was also observed by the constable on duty at the place, and by bystanders who also shouted to her. The pursuer, however, took no notice of these repeated warnings, but continued on her course as before. The driver of the car applied both brakes hard, but before the car could be brought to a standstill the pursuer collided

with the body of the car on the right-hand side, and fell to the ground, Jan. 23, 1913. and the right rear wheel of the car passed over her left leg."

On 7th December 1911 the Lord Ordinary (Guthrie) allowed an issue in ordinary form for the trial of the cause, and on a reclaiming note the Court adhered.*

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The trial took place on 25th and following days of June 1912 before Lord Hunter and a jury. The jury unanimously found for the defenders.

On 8th July 1912 the Lord Ordinary (Hunter) signed a bill of exceptions for the pursuer, in which it was stated:—

"The pursuer maintained [at the trial], *inter alia*, that the defenders were negligent in respect that they had failed to provide side guards for their cars, and that, had this precaution been adopted, the injuries to the pursuer would have been prevented.

"The pursuer led evidence to the effect that she had stood in the four-foot way between the two lines of rails waiting till the car passed; that her dress was caught by the car and she was thrown down; that had there been guards at the side of the car the injury sustained by the pursuer would in all probability have been avoided.

"The defenders maintained that the cars were safe without side guards, and led evidence to the effect that the pursuer, in a preoccupied manner, walked against the side of the car, with the result that she was thrown down on the street.

"It was common ground between the parties that the pursuer fell clear of the car, but that her leg went under the car, and was run over by the front wheel of the rear bogie.

"After the evidence of both parties had been closed, and after their respective counsel had addressed the jury, the presiding Judge charged the jury to the effect that if they came to be of opinion that the pursuer's carelessness contributed to the accident they must return a verdict for the defenders, and that the question as to their opinion with reference to the propriety of having side guards or not was immaterial. Counsel for the pursuer did then and there request the presiding Judge to direct the jury:—

"That, even if they be of opinion that the pursuer contributed by her fault to the accident which happened, she is not disentitled to recover damages from the defenders, if the jury are also of opinion that reasonable care on the part of the defenders, viz., provision of side guards to the car, would have prevented the accident."

"Which direction the presiding Judge refused to give. Whereupon the counsel for the pursuer respectfully excepted to his Lordship's refusal."

Counsel were heard before the First Division (without Lord Kinnear and with Lord Hunter) on 23rd January 1913.

Argued for the pursuer;—The Lord Ordinary was wrong in not giving the direction asked for. The question for the jury to decide was what was the *causa proxima* of the accident. The pursuer was entitled to have an answer to the question whether or not the *causa proxima* was the absence of guards. This question arose even if the jury were of opinion that the pursuer was guilty of contributory negligence.¹ The law applicable to such circumstances as the present

* Reported 1912 S. C. 580.

¹ M'Naughton v. Caledonian Railway Co., (1858) 21 D. 160, per Lord Wood, at p. 167.

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was that, although the pursuer's negligence may have contributed to the accident, yet if the defenders could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the pursuer's negligence would not excuse them.¹ In the present case the last act of negligence was that of the defenders in leaving the side of the car unguarded. Had it not been for that act the ultimate injury, that is the injury to the pursuer's leg, would not have happened.

Argued for the defenders;—The law laid down in *Radley's* case² did not apply. In order to give rise to circumstances to which that law would apply there must be a new act of volition, or the opportunity for a new act of volition, on the part of defenders after the pursuer's act of negligence. There was no such opportunity here. If it were an act of negligence to have no side guards upon the car, it would be necessary for the pursuer to show that this act of negligence could have been remedied after the pursuer's negligent act of walking into the passing car. This was a plain case where the pursuer was injured through her own fault without fault on the part of the defenders, or at highest where there was want of reasonable care on both sides; in neither of which cases could the pursuer recover from the defenders.³

LORD PRESIDENT.—This is an action of damages at the instance of a lady who met with an accident by being run over by one of the tramway cars belonging to the Edinburgh and District Tramways Company. She did not allege in her action any fault on the part of the driver of the car, but her complaint was that the car was not provided, as it ought to have been, with a side guard filling up the space between the front and the back wheels. She said that the provision of such side guards was a proper precaution adopted elsewhere, and that the absence of them constituted negligence on the part of the defenders. She averred that, if there had been side guards, it would not have been possible for her leg to get under the car. The Tramway Company put in defences in which they admitted that there were no guards. They contended that the side guard was not a proper contrivance, and that, while it might prevent one class of accidents, it courted another, and that there was no negligence in the facts in which she averred negligence to be. But they also said that the real cause of the accident was the pursuer's own actings, in respect that she had simply walked into the car while it was in motion and so was run over. This was denied by the pursuer.

In that state of matters your Lordships, upon a former occasion, held that there was a relevant case made, and sent it for trial to a jury upon the usual issue of fault.

The learned Judge, after hearing evidence which was directed, on both sides, to making good the points which I have just mentioned as being in the pleadings, charged the jury—and now I am reading from the statement

¹ *Radley v. London and North-Western Railway Co.*, (1876) 1 App. Cas. 754, *per* Lord Penzance, at p. 759; *Mitchell v. Caledonian Railway Co.*, 1909 S. C. 746.

² 1 App. Cas. 754, at p. 759.

³ The "*Bernina*," (1887) 12 P. D. 58, *per* Lindley, L.J., at p. 89.

in the bill of exceptions—"charged the jury to the effect that if they came Jan. 23, 1913. to be of opinion that the pursuer's carelessness contributed to the accident, Gibb v. they must return a verdict for the defenders, and the question as to their Edinburgh opinion with reference to the propriety of having side guards or not was and District immaterial." Now, the learned counsel for the defenders did not take any Tramways Co., Limited. exception to that portion of the charge. If that is so, they cannot be heard Ld. President. now to say that that portion of the charge was misleading. It would be possible to argue that, if that sentence which is quoted in the bill of exceptions had been the only thing that the learned Judge said, it might have been misleading, because it would be possible to argue upon the question of what the true meaning of "carelessness" is, and it would be possible to argue upon the true meaning of the words "contributed to the accident"; and it is only after the words "contributed to the accident" that the Lord Ordinary goes on to say that "the question as to their opinion with reference to the propriety of having side guards or not was immaterial." But inasmuch as they have not excepted, I think, in accordance with the well-known practice of this Court, we must hold that there was no ambiguity, because these matters had been explained in the other portions of the learned Judge's charge which are not here quoted. And I have no doubt whatsoever that they were so explained; no Judge, I am certain, ever charges a jury upon the question of contributory negligence without explaining to them what the true meaning of the word "contributory" is, and I have no doubt it was done here. I may mention here that I think the leading authority upon this matter is the opinion of Lord Young in the case of *Woods v. Caledonian Railway Company*.¹ In the same way, I think that the expression "carelessness" must be taken with the evidence that we know was led upon the only point which was alleged, namely, that the pursuer walked into the car.

Now, that having all been satisfactorily explained to the jury in a way which one must consider was proper and in accordance with the law, the learned counsel afterwards asked the Judge to add to what he had already said the following: "That, even if they"—the jury—"be of opinion that the pursuer contributed, by her fault, to the accident which happened"—and again I say that here the words must be taken in their true sense—that is to say, as meaning that she contributed materially to the cause of the accident—"she is not disentitled to recover damages from the defenders, if the jury are also of opinion that reasonable care on the part of the defenders, viz., provision of side guards to the car, would have prevented the accident." The learned Judge refused that direction, and to that refusal exception is taken.

I am of opinion that the learned Judge very rightly refused that direction, because I think it would have been either a wrong direction or, at least, a misleading direction. The learned counsel for the pursuer bases his argument on this, that it always comes to be a question of what is the actual *causa proxima* of the accident, and then he defines the accident here as the loss of the pursuer's leg. "Now," he says, "I was entitled to maintain to the jury that the actual particular accident, to wit, the loss of the leg, would

¹ (1886) 13 R. 1118.

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not have occurred if there had been a side guard ; and if the failure to provide a side guard is a negligent act, then the loss of the leg is due to that negligent act and to that act alone, and has nothing to do with the question of the pursuer walking into the car, and I did not have an opportunity of pleading this with effect to the jury, because the direction which was asked for was not given."

I think there are two fallacies in that argument. In the first place, I do not think that the accident, in the strict sense of the word, or rather—because I wish to use what I think is the proper word—the legal wrong for which the pursuer is suing is the loss of the leg. The legal wrong was the car running over the pursuer. After that it was more or less luck what happened. No doubt the pursuer's damage would be measured by what happened, and she would recover much more damages, if the defenders are in fault, for the loss of the leg than she would have recovered for a trifling injury or scratch. But that is not really the legal wrong: the legal wrong is running over her. I think that is the first fallacy.

The second fallacy is the assumption that it could be still in the pursuer's mouth to say that the proximate cause of the accident was the want of the guard in a case where the jury had come to the conclusion that the pursuer had been guilty of contributory negligence in the proper sense of the word. Of course, if the jury had not come to the conclusion that the pursuer had been guilty of contributory negligence, then *cadit questio*,—there is nothing else left but the possible fault of the Tramway Company in not providing the guard. And such a case might have arisen on other facts at the trial. Supposing it had been the case that the pursuer was standing, not on the tramway line, but in its vicinity, and that she had, by no fault of her own, been violently thrown upon the tramway lines—by the fault of somebody else coming up behind her, or through the pressure of a crowd, or anything of that sort,—and then she had been run over by the tramway car, that would have raised the pure question of whether there was negligence on the part of the Tramway Company in not having a side guard. But in this case Lord Hunter only put that matter to the jury in the event of their coming to the conclusion that she had not been, in the proper sense of the word, guilty of contributory negligence. But if it is once found that, in the proper sense, she had been guilty of contributory negligence, I think it is tantamount to a finding that the want of the guard is not the only *causa proxima* of the accident. The truth is that, although *causa proxima* is used in the singular, yet no doubt there are cases where the accident is so much the result of the actions of two different parties, that the act of both or of one or other, or rather the acts of the two combined, are truly the *causa proxima*.

The only other thing I have to say is that I respectfully entirely agree with the analysis of the various positions which are set forth by Lord Lindley in the case of the "*Bernina*,"¹ which was cited to us by Mr Macmillan, and when you come to consider the facts of this case, it is certain that the case comes under one of the categories in which he says that A, the injured party, could not sue B, who is supposed to be the injurer.

No one doubts the proposition that is generally associated with the case

¹ 12 P. D. 58, at p. 89.

of *Radley v. London and North-Western Railway Company*.¹ The learned Judge, who presided at the trial of this case, has told us that he explained that to the jury. I do not think, on the facts of this case, that he need have done so, because the facts of this case do not seem to me to raise a case analagous to the case of *Radley v. London and North-Western Railway Company*.¹ In other words, I do not think there is any instance of the doctrine of *Radley's* case¹ except instances in which the subsequent negligence is due to a subsequent act of volition. Now, here there was no room for a subsequent act of volition, because nobody says that, after the lady stepped into the track of the tramway lines, it would have been possible for the Tramway Company to have let down a side guard. And, accordingly, the original negligence in not having a side guard—if that was negligence—could never have been made to do duty again for the subsequent act of negligence which may infer liability, as in *Radley*.¹

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On the whole matter, therefore, I think that the bill of exceptions must be refused.

LORD JOHNSTON.—I have come to the same conclusion as your Lordship on the following—it may be somewhat narrow, but to me sufficient—ground, namely, that the result of the argument for the pursuer is that an injured person cannot commit, or rather be responsible for, contributory negligence if the primary negligence is of such a character that it is continuous before, during, and after the accident. There is nothing in the authorities, so far as I can see, to justify this result, and its mere statement satisfies me that the argument itself is unsound. While I base my own judgment upon that somewhat narrow ground, I desire to say that I entirely agree with the wider views expressed by your Lordship.

LORD MACKENZIE.—I agree with your Lordship that, when the circumstances under which the accident happened are explained, it is clear that the direction was rightly refused. In a case of this kind, the succession in point of time appears to me to be essential, and, as the act which immediately preceded the accident was that the pursuer walked up against the side of the car, the question of setting up subsequent negligence on the part of the defenders does not arise. It is impossible, that being the act which immediately preceded the accident, that there could be any opportunity for subsequent negligence on the part of the defenders—that is to say, you cannot use the want of the side guard as negligence subsequent to that act of the pursuer which was the proximate cause of the accident. Accordingly, I am of opinion that the bill of exceptions should be refused.

LORD HUNTER.—I concur. I may say I only referred to *Radley's* case¹ because counsel for the pursuer argued at length upon it, and asked me to direct the jury upon the lines of *Radley's* case.¹ I explained *Radley's* case¹ to the jury, and asked them to disregard it in so far as the law I was laying down to them was concerned.

THE COURT refused the bill of exceptions.

CONNELL & CAMPBELL, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

¹ 1 App. Cas. 754.

No. 74.

(Poor) MISS MAY M'KEAN, Petitioner (Respondent).—

Jan. 24, 1913.

W. A. Fleming.

JAMES HERBISON, Respondent (Appellant).—*Aitchison.*M'Kean v.
Herbison.*Poor's-roll—Sheriff—Reporters on probabilis causa litigandi—Applicant's agent acting as reporter on her application.*

It is incompetent for a procurator for the poor in the Sheriff Court, who is acting as agent for an applicant for the benefit of the poor's-roll, to act as a reporter on *probabilis causa litigandi* with regard to that application.

2D DIVISION. MISS MAY M'KEAN, Yoker, presented an application in the Sheriff Court at Dumbarton for the benefit of the poor's-roll for the purpose of prosecuting an action against James Herbison, Dalnuir. This application was signed by Andrew Duncan, one of the agents for the poor. The Sheriff-substitute (Macdiarmid) remitted to "any two agents for the poor to inquire and report" whether the applicant had a probable cause of action.* A report by two agents for the poor, one of whom was Andrew Duncan, the agent who had signed the application for admission to the roll, to the effect that, after inquiry, she had been found to have a probable cause of action, having been submitted, the applicant was, by interlocutor (dated 30th December 1912) of the honorary Sheriff-substitute (W. M. Henderson), admitted to the roll.

Herbison thereupon appealed to the Court of Session. On the case appearing in the Single Bills of the Second Division on 24th January 1913, counsel for the appellant objected to the respondent's admission to the roll, in respect that one of the two reporters on *probabilis causa litigandi* who had reported on the respondent's application was the agent who was acting for her at the time.

THE COURT (consisting of the Lord Justice-Clerk, Lord Dundas, Lord Salvesen, and Lord Guthrie) pronounced the following interlocutor:—"Find that the proceedings before the agents for the poor on the remit to them by the Sheriff-substitute were irregular and incompetent in respect that the agent for the applicant was one of the two agents who reported in favour of the admission of the applicant: *Hoc statu* recall the interlocutor of 30th December 1912, and remit the petition to the Sheriff to remit of new to the agents for the poor to inquire and report, and thereafter to proceed as accords."

SHIELD & PURVIS, S.S.C.—DOVE, LOCKHART, & SMART, S.S.C.—Agents.

* The Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), enacts:—First Schedule, Rule 163. "The Sheriff shall remit the application [for the benefit of the poor's-roll] to the procurators for the poor, who shall notify the parties, and after inquiry shall make a report to the Sheriff."

MRS M. WALLS OR DRYLIE AND OTHERS, Pursuers (Respondents).— No. 75.

D.-F. Dickson—Wilton.

THE ALLOA COAL COMPANY, LIMITED, Defenders (Appellants).— Jan. 25, 1913.

Horne, K.C.—Carmont.

Drylie v.
Alloa Coal
Co., Limited.

*Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—
"Accident"—Pneumonia following upon chill—Chill due to partial im-
mersion in water accumulating in a mine through breakdown of a pump.*

During the working time in a coalpit, which was a wet pit, water began to accumulate owing to a defect in the pump; and the pump being stopped for repair, the water accumulated still further. When the miners found the water rising they decided to leave the pit, and hastened to the pit bottom, where they were kept waiting for twenty minutes, during which time they were severely chilled by the water which rose to their knees, and by exposure to the current of cold air descending the shaft. One of these miners on reaching the pit head lingered there for at least twenty minutes, and on arriving at his home complained of chill, and next day suffered from a cough, hoarseness, and pains, but went to his work. After several days—on three of which he worked at the pit—he was found to be suffering from pneumonia, of which he ultimately died.

In an application by his dependants for compensation under the Workmen's Compensation Act, the arbitrator awarded compensation, holding that the pneumonia was due to the chill which the deceased had received, and that his death resulted from injury by accident arising out of and in the course of his employment.

In an appeal a Court of Seven Judges (*diss.* Lord Salvesen) held that the occurrence in the mine on the day in question was an "accident," and that there was evidence on which the arbitrator might competently find that the deceased's pneumonia was due to that occurrence; and affirmed the arbitrator's decision.

MRS MARGARET WALLS OR DRYLIE, widow of John Drylie, a brushing contractor in the employment of the Alloa Coal Company, Limited (on behalf of herself and her pupil children), and her son John Drylie junior, presented an application in the Sheriff Court at Alloa for compensation under the Workmen's Compensation Act, 1906, in respect of John Drylie's death. The Sheriff-substitute (Leslie), after hearing the case with the assistance of a medical assessor, awarded compensation, and at the request of the employers stated a case for appeal.

2D DIVISION,
with three
consulted
Judges.
Sheriff of Stir-
ling, Dum-
barton, and
Clackmannan.

The case set forth that on 25th September 1911 while Drylie, who was a healthy man, "was at work along with two other men in the defenders' Brucefield Pit, owing to a defect in the pump, water began to accumulate at the pit bottom; that the pump was stopped in order that this defect might be remedied; that the stoppage allowed the water still further to accumulate; that when the men found the water rising they became somewhat alarmed, and decided to leave their work and the pit; that they arrived at the pit bottom heated from the exertion of their work and their haste on the way to the shaft; that the cage did not descend for them in reply to their signals until they had stood for about twenty minutes at the pit bottom while the repair to the pump was being completed; that, while they were standing there, the water rose two inches, until they were immersed up to the knees in icy-cold water; that there was a draught of cold air falling down the shaft upon them; that they were

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severely chilled by this exposure ; that on reaching the pit head the deceased John Drylie remained hanging about for twenty minutes or half an hour ; that he complained of chill on arrival at his house ; that on the following day, Tuesday, 26th September, he suffered from cough, hoarseness, and pains, but went to his work ; that he left his work early ; that the next day, Wednesday, was an idle day, and he only left his house to arrange about his pay lines ; that occasionally while quite well he did not remain a full shift in the pit ; that on Thursday and Friday he was again at work, but not for the full shifts ; that his cough continued during these days ; that on Friday, 29th September, he was shivering, and complained of cold all over ; that on Saturday, 30th September, he was seen by a doctor, who suspected pneumonia ; that on Sunday, 1st October, the doctor was assured that he was suffering from pneumonia ; that on 8th October John Drylie died of pneumonia ; that the Brucefield Pit is a wet pit ; that the workmen there generally get wet at their work ; that John Drylie was exposed to wetting at his work on the days following 25th September ; that it was unusual for water to accumulate in the pit to the depth of two feet ; that it was unusual to repair the pump when men were at work in the pit ; that the pneumonia from which deceased died was due to the chill which he received on 25th September ; that his remaining at the pit head in his wet condition, and his working on the days following, and his wetting on these days, had not a favourable effect upon the illness caused by the chill on 25th September ; that the pneumonia from which deceased died was a natural sequence of the chill to which he was exposed on 25th September.

"On these facts I found (1) that the death of the deceased John Drylie resulted from injury by accident arising out of and in the course of his employment with the appellants ; (2) that the respondents were entitled to compensation from the appellants in terms of the Workmen's Compensation Act, 1906, to the amount of £265, 3s. 8d."

The question of law was :—"Did the death of the deceased John Drylie result from injury by accident arising out of and in the course of his employment with the appellants ?"

The case, after a hearing before the Second Division on 7th, 8th, and 12th June 1912 was sent, in respect of the importance of the question submitted, to a Court of Seven Judges ; and it was again heard before the Second Division, with the Lord President, Lord Kinnear, and Lord Mackenzie, on 19th and 20th December 1912.

Argued for the appellants ;—(1) There was no "injury by accident" in this case. The word "accident" must be construed in the popular sense¹ ; and accordingly the applicant must prove some incident happening at a particular place and date which caused the injury.² There was nothing of that kind here, for all that occurred was that the deceased contracted a chill, and no one would call that an accident. The cases of *Sheerin v. Clayton & Company*,³ and *Yates*

¹ *Fenton v. Thorley & Co., Limited*, [1903] A. C. 443, *per* Lord Macnaghten, at p. 448 ; *Brintons, Limited, v. Turvey*, [1905] A. C. 230, *per* Halsbury, L.C., at p. 232. *Ismay, Imrie, & Co. v. Williamson*, [1908] A. C. 437, and *Clover, Clayton, & Co., Limited, v. Hughes*, [1910] A. C. 242, were also referred to.

² *Eke v. Hart-Dyke*, [1910] 2 K. B. 677.

³ [1910] 2 I. R. 105.

v. South Kirkby, &c., Collieries, Limited,¹ were not consistent with the decisions of the House of Lords, and were wrongly decided.² (2) The injury did not arise out of the deceased's employment. To get wet and chilled was not a risk peculiar to or usually connected with the employment,³ and in this respect the present case was distinguished from such cases as poisoning by sewer gas⁴ or by carbon-monoxide gas.⁵ Further, there was no evidence to connect the deceased's death with what happened in the mine. None of the other miners who were exposed to the same conditions as Drylie suffered from pneumonia; and it was quite as probable that Drylie's death was due to his having lingered at the pit head as to his having waited at the bottom of the pit. His conduct made it impossible to hold that there was the necessary causal connection between the alleged accident and his death⁶; and, that being so, the Court ought to reverse the arbitrator's decision.⁷

Argued for the respondents;—(1) The stoppage of the pump owing to its defective state was an accident; or, at all events, the stoppage of the pump and the consequent accumulation of water where the miners were compelled to wait was an accident. To satisfy the definition of the words "injury by accident" it was not necessary to prove any direct physical injury or lesion; thus a "physiological injury"⁸ or nervous shock⁹ was an accident.¹⁰ (2) Drylie's death was due to the accident in the mine. The accident did not require to be the immediate,¹¹ or the sole,¹² cause of the workman's injury or death; it was enough if the injury or death could be traced to the accident.¹³ Here the necessary connection was established. But

¹ [1910] 2 K. B. 538.

² *Ystradowen Colliery Co., Limited v. Griffiths*, [1909] 2 K. B. 533; *M'Millan v. Singer Sewing Machine Co., Limited*, *supra*, p. 346; *Martin v. Corporation of Manchester*, (1912) 28 T. L. R. 344, 5 *Butterworth's W. C. C.* 259.

³ *Blakey v. Robson, Eckford, & Co.*, 1912 S. C. 334; *Rodger v. Paisley School Board*, 1912 S. C. 584; *Butler v. Burton-on-Trent Union*, (1912) 5 *Butterworth's W. C. C.* 355.

⁴ *Eke v. Hart-Dyke*, [1910] 2 K. B. 677.

⁵ *Kelly v. Auchenlea Coal Co., Limited*, 1911 S. C. 864.

⁶ *Dowds v. Bennie & Son*, (1902) 5 F. 268; *Chandler v. Great Western Railway Co.*, (1912) 5 *Butterworth's W. C. C.* 254, *per Fletcher-Moulton, L.J.*, at p. 257.

⁷ *Lendrum v. Ayr Steam Shipping Co., Limited*, *supra*, p. 331; *Martin v. Corporation of Manchester*, 28 T. L. R. 344, 5 *Butterworth's W. C. C.* 259.

⁸ *Stewart v. Wilsons and Clyde Coal Co., Limited*, (1902) 5 F. 120, *per Lord M'Laren*, at p. 122.

⁹ *Yates v. South Kirkby, &c., Collieries, Limited*, [1910] 2 K. B. 538.

¹⁰ *Morgan v. Owners of s.s. "Zenaida"*, (1909) 25 T. L. R. 446; *Warner v. Couchman*, [1911] 1 K. B. 351, [1912] A. C. 35; *Pugh v. London, Brighton, and South Coast Railway Co.*, [1896] 2 Q. B. 248; *Malone v. Cayzer, Irvine, & Co.*, 1908 S. C. 479; *Sheerin v. Clayton & Co.*, [1910] 2 I. R. 105, were referred to.

¹¹ *In re Etherington and The Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K. B. 591, at pp. 598 and 603.

¹² *Clover, Clayton, & Co., Limited, v. Hughes*, [1910] A. C. 242; *Isamay, Imrie, & Co. v. Williamson*, [1908] A. C. 437.

¹³ *Dunham v. Clare*, [1902] 2 K. B. 292; *Golder v. Caledonian Railway Co.*, (1902) 5 F. 123; *M'Innes v. Dunsmuir & Jackson*, 1908 S. C. 1021;

Jan. 25, 1913. supposing the Court were of opinion that it was not, the question being one of fact, the arbitrator's decision could not be disturbed unless there was absolutely no evidence to warrant his finding¹; and as that could not be maintained here, the decision on this point must stand.

Drylie v.
Alloa Coal
Co., Limited.

At advising on 25th January 1913,—

LORD DUNDAS.—This case seems to me to lie very near the line which separates liability and non-liability for compensation by an employer. The Sheriff-substitute has decided that it lies on the side inferring liability; and I do not see any sufficient ground for disturbing his decision.

The difficulty of the case is to a large extent caused by the unsatisfactory way in which some of the findings are expressed; but the gist of the facts found may, I think, be summarised as follows—I quote the actual words where it seems advisable to do so. On 25th September 1911 the workman, John Drylie, a healthy man of forty-five, was engaged at his work in the appellants' Brucefield pit—a "wet pit," where the employees usually get wet at their work. Owing to a defect in the pump, water began to accumulate at the pit bottom; the pump was stopped, in order to repair it; and the "stoppage allowed the water still further to accumulate." The men, becoming alarmed at the rising water, decided to leave work and the pit; they reached the pit bottom heated by the exertion of their work and their haste; and the cage did not descend for them, in reply to their signals, until they had stood for about twenty minutes, while the repair to the pump was being completed. The water, icy-cold, rose up to their knees, and a draught of cold air was falling from the shaft upon them. "They were severely chilled by this exposure." On reaching the pit head Drylie remained hanging about for twenty or thirty minutes; he "complained of chill" on arriving at his house; and, on the 26th, suffered from cough, hoarseness, and pains, but went to his work, which he left early. On the 27th, an idle day, he only left his house to arrange about his pay lines. On the 28th and 29th he was at work, but not for the full shifts; his cough continued during these days, and on the 29th he was shivering, and complained of cold all over; on the 26th, 28th, and 29th he was (as was usual) exposed to wetting at his work. On the 30th Drylie was seen by a doctor, who suspected pneumonia; on 1st October "the doctor was assured that he was suffering from pneumonia"; and on 8th October he died of

Dunnigan v. Cavan & Lind, 1911 S. C. 579; Kelly v. Auchanlea Coal Co., Limited, 1911 S. C. 864; Thoburn v. Bedlington Coal Co., Limited, (1911) 5 Butterworth's W. C. C. 128; Stapleton v. Dinnington Main Coal Co., Limited, (1912) 5 Butterworth's W. C. C. 602, were referred to.

¹ Warnock v. Glasgow Iron and Steel Co., Limited, (1904) 6 F. 474; Spence v. William Baird & Co., Limited, 1912 S. C. 343; Mitchell v. The Glamorgan Coal Co., Limited, (1907) 23 T. L. R. 588; Hawkins v. Powells Tillery Steam Coal Co., Limited, [1911] 1 K. B. 988; Richard Evans & Co., Limited, v. Astley, [1911] A. C. 674; "Swansea Vale" Owners v. Rice, [1912] A. C. 238; Grant v. Glasgow and South-Western Railway Co., 1908 S. C. 187; Coe v. Fife Coal Co., Limited, 1909 S. C. 393, at p. 396; Mackinnon v. Miller, 1909 S. C. 373; Euman v. Dalziel & Co., 1912 S. C. 966, and *supra*, p. 246.

pneumonia. The arbitrator further finds "that it was unusual for water to Jan. 25, 1918. accumulate in the pit to the depth of two feet; that it was unusual to Drylie v. repair the pump when men were at work in the pit; that the pneumonia Allosa Coal from which deceased died was due to the chill which he received on 25th Co., Limited. September; that his remaining at the pit head in his wet condition, and Lord Dundas. his working on the days following, and his wetting on these days, had not a favourable effect upon the illness caused by the chill on 25th September; that the pneumonia from which deceased died was a natural sequence of the chill to which he was exposed on 25th September." On these facts the Sheriff-substitute found that Drylie's death resulted from injury by accident arising out of and in the course of his employment with the appellants, and awarded compensation to his dependants. The question of law is, as too often happens, badly stated. It ought to have been in the form given in *Euman*,¹ or in substantially similar words.

The appellants' counsel maintained that there was here no accident at all within the meaning of the Act; and alternatively, that, if there was such an accident, there was no evidence to justify the arbitrator in attributing the man's death to it.

The words "accident" and "personal injury by accident" occurring in the Act of 1906 and the earlier Act of 1897 have been frequently interpreted and applied by the Courts, and particularly by the House of Lords. In *Murray v. Denholm & Company*,² I took occasion to examine with some care the pronouncements of the House upon this point, and I refer to my observations without repeating them. The guiding rules laid down by Lord Macnaghten in *Fenton v. Thorley & Company, Limited*,³ and again in *Clover, Clayton, & Company, Limited, v. Hughes*,⁴ and since then repeatedly adopted and re-affirmed by the House of Lords, would seem to be simple and clear enough to follow; but, as many subsequent decisions testify, it has not always been found easy to apply them consistently and satisfactorily to the manifold and varying circumstances which are constantly brought before the Courts. In a recent Irish case, not unlike the present in some respects, where the applicants were successful, the Lord Chancellor (Sir Samuel Walker) observed that "the word 'accident' has, where used in this statute, long ceased to have the meaning the man in the street would attribute to it."⁵ But I think one may postulate, as a result of all the decisions, that you must have a definite "accident" of some sort—not necessarily an occurrence extraneous to the workman—involving something unusual, unexpected, and undesigned, to which the injury or death can be unequivocally—or at least, by a reasonably inferred train of causation in fact—attributed; and also, probably as a corollary, that death from disease—apart from the industrial diseases specially mentioned in the Act of 1906 and subsequent statutory rules and orders—is not an "accident," unless the disease which caused death can be definitely collocated in the relation of effect to cause with some unusual, unexpected, and undesigned event arising, at an ascertained time, out of the employment. Examples of an "accident" where there was no "extraneous occurrence" are seen in *Fenton*,³ *Clover, Clayton*,

¹ 1912 S. C. 966.² 1911 S. C. 1087.³ [1903] A. C. 443.⁴ [1910] A. C. 242.⁵ *Sheerin v. Clayton & Co.*, [1910] 2 I. R. 105.

Jan. 25, 1913. *Drylie v. Alloa Coal Co., Limited.*¹ and *M'Innes.*² The necessity for a sufficient train of causation in fact, though not necessarily as matter of natural or probable sequence, is illustrated, e.g., in *Malone,*³ *Dunham,*⁴ and *Ystradowen Colliery Company, Limited.*⁵ Cases in which death from disease was held to have been caused, or sufficiently contributed to, by personal injury by accident are found in, e.g., *Brintons, Limited,*⁶ *Dunnigan,*⁷ and *Kelly*⁸; while a contrary result is illustrated, e.g., by *Eke,*⁹ *Steel,*¹⁰ and *Broderick.*¹¹ *Kelly's* case⁸ has some features of special similarity to the present. The workman's death was caused by pneumonia, contracted owing to inhalation of carbon-monoxide gas in a mine. There was also an incident of delay in cold and draught at the pit bottom. It appeared that death from pneumonia was not a usual occurrence from blastings generating the gas—it was apparently unprecedented; but on this occasion a lethal dose had been unexpectedly generated and administered to the workman. The Court declined to interfere with the arbitrator's decision in favour of the applicants. If *Kelly's* case⁸ was rightly decided, as I think it was, it seems to carry the respondents here a long way towards success. The circumstance of Drylie finding himself immersed to the knees in icy-cold water was abnormal; it, in its turn, was, as matter of fact, due to an abnormal cause—the stopping of the pump while men were at work in the pit; and, if the pneumonia of which he died was in fact caused by his immersion, I think the elements of an “accident” are here present. That the immersion and its consequences arose out of, as well as in the course of, his employment seems clear enough. The man when at his work in the pit left his place owing to the rising water, and had to go to the pit bottom for his means of exit from the pit. Now, whether or not the pneumonia which caused Drylie's death resulted directly from his having been “chilled,” or having “contracted a chill”—the two things are, I apprehend, pathologically distinct, but I take either hypothesis—is a question of fact. The arbitrator, who heard medical evidence on both sides, and also had the advantage of the assistance and advice of a medical assessor, found in fact “that the pneumonia from which deceased died was due to the chill which he received on 25th September.” I think this finding must mean that the arbitrator drew the inference from the evidence before him that the pneumonia (and death) resulted directly from the man's immersion in icy-cold water at the pit bottom on the given date; and I cannot say that he could not competently so find. I am therefore of opinion, as I was after the hearing in the Second Division, that the appellants have failed to show cause for disturbing the arbitrator's decision.

I am keenly alive to the kind of danger which the Lord President has more than once alluded to when he spoke of the driving force of step-by-step decisions towards an ultimate point un contemplated at the outset. But I do not think the present case, if determined as I think it should be, would mark any new departure in decision; and I take it that the Court will

¹ [1910] A. C. 242.

² 1908 S. C. 1021.

³ 1908 S. C. 479.

⁴ [1902] 2 K. B. 292.

⁵ [1909] 2 K. B. 533.

⁶ [1905] A. C. 230.

⁷ 1911 S. C. 579.

⁸ 1911 S. C. 864.

⁹ [1910] 2 K. B. 677.

¹⁰ [1905] 2 K. B. 232.

¹¹ [1908] 2 K. B. 807.

always find grounds for calling a halt when they are invited to proceed to Jan. 25, 1913. extreme and unreasonable conclusions (*cf. M'Millan v. Singer Company, Limited*,¹ and *Spence*²). The present case could never be fairly cited in the future as indicating that the Court is willing to hold that a mere ordinary disease (*e.g.*, pneumonia) entitles a workman to compensation; the Court must be satisfied—or be unable to say that an arbitrator had not, on the facts, ground upon which he might reasonably be satisfied—that the disease was attributable to some particular event or occurrence of an unusual and unexpected character, incidental to the employment, which could, in the light of the decisions, be fairly described as an accident.

LORD JUSTICE-CLERK.—When this case was heard before the Second Division, the opinion I formed was in accordance with that now expressed by Lord Dundas. But there being a difference of opinion on the bench, and the case being one relating to the application of the Act of Parliament to cases of injury due to causes which, as was expressed in the Appeal Court, were not such as would be called “accidents” by the “man in the street,” I thought it advisable, and my brethren concurred with me that it would be right, to have the case disposed of by a larger bench. With the advantage of another debate from the bar, and consultation with your Lordships who sat at the rehearing, my opinion in favour of the respondents has been confirmed. Lord Dundas has fully and clearly expressed the views which lead me to the conclusion I have formed, and I adopt them in every particular, and content myself with expressing my concurrence in his opinion.

LORD SALVESEN.—This case is one of the most important that we have had to determine under the Workmen's Compensation Act, as it is the first in which an arbitrator has decided that a death which resulted from pneumonia ensuing on a neglected cold was a death resulting from injury by accident. Pneumonia is well known to be at present one of the most common diseases, and latterly it has become responsible for an increasing share in the mortality of the people of Scotland. The case therefore requires the most careful consideration, as, if decided in accordance with the views of the Sheriff-substitute, it opens up an endless vista of litigation under the Workmen's Compensation Act, and would tend to extend the application of the Act to numerous cases which can scarcely have been contemplated by its framers.

The first question is whether the deceased miner suffered an injury by accident. In my opinion there was no accident in the sense in which the Courts have hitherto held that the word “accident” falls to be construed, *i.e.*, in its ordinary and popular acceptation. That there was an accident to the pumping machinery in the appellants' mine is perhaps true, and it is also true that in consequence there was a greater accumulation of water in the pit than was ordinarily met with even in this wet mine, where (as it is expressly found) the miners generally get wet at their work. But would anyone say in popular language that the deceased had met with an accident

¹ *Supra*, p. 346.

² 1912 S. C. 343.

Jan. 25, 1913. because he required to stand for some twenty minutes at the bottom of the pit in water which gradually rose so that he was ultimately immersed up to the knees? If so the other men who were with him at the time equally met with an accident, because they all stood in the pit bottom during the same time and under exactly the same conditions. I cannot imagine that any of these men when they came to the pit head would have so described their experience. It was argued that the decisions, especially some in the House of Lords to which we were referred, have extended the definition of "accident" so as to include an occurrence of this kind; but I do not think any of the cases cited is really in point; and I notice that even in the most recent the general rule prescribed for the guidance of inferior Courts already referred to still holds its own. There is no case where a death from a disease such as pneumonia has been held to be a death resulting from an injury by accident, because it might be with more or less probability attributed to an accidental exposure to wet or cold. In the case of *Eitherington*¹ it was held that the representatives of a man who was insured under an accident policy, and who died of pneumonia in consequence of his having had a heavy fall on wet ground while hunting, were entitled to recover under the policy. In that case, however, the decision was reached on considerations which cannot be taken into account in cases arising under the Workmen's Compensation Act; as for instance that the construction of the policy contended for by the insurance company would limit their liability in a way that could not have been contemplated by the other contracting party. Apart from this the decision appears to me to be well warranted by the fact that pneumonia immediately supervened on what undoubtedly in popular language would be described as an accident.

The only case decided in the House of Lords, so far as I am aware, where a death from disease not preceded by some direct lesion was held to be a death resulting from injury by accident is the well-known anthrax case (*Brintons, Limited, v. Turvey*²). In that case there was a vigorous dissent by Lord Robertson, and the Judges who formed the majority were careful to guard against the decision being extended to ordinary cases of disease. Thus Lord Lindley said: "I hope that the decision in this case will not be regarded as involving the doctrine that all diseases caught by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen's Compensation Act. That is very far from being my view of the Act, and I concur with the observations made by Cosens-Hardy, L.J., on this point at the end of his judgment"; and Lord Chancellor Halsbury said: "I so far agree with my noble and learned friend that I think, in popular phraseology, from which we are to seek our guidance, it excludes, and was intended to exclude, idiopathic disease." The ground of the decision really was that the accident consisted in a particle of matter striking the man in the corner of his eye, and so causing some abrasion through which the infection was communicated to his body. It is true that the County Court Judge had found that there was no abrasion of the eye, but Lord Macnaghten pointed out that the medical evidence seemed to be that without some abrasion infection was hardly possible. The illustrations

¹ [1909] 1 K. B. 591.

² [1905] A. C. 230.

given by the Lord Chancellor are all of accidents in the popular sense Jan. 25, 1913.
 causing a wound, and so permitting the entry into the body of the germs Drylie v.
 of erysipelas, tetanus, or the like. If so, this decision is quite in accordance Alloa Coal
 with the principle given effect to in other cases, although its application to Co., Limited.
 the particular facts might well have given rise to acute divergence of opinion. Lord Salvesen.
 It is a different thing to say that, because of the decision in *Brintons'* case,¹
 we are to hold that pneumonia contracted by a workman in the course of
 his employment, through some accidental exposure having occurred which
 made him more or less liable to contract the disease, is to be treated as an
 injury resulting from accident.

Let me illustrate what I mean by a few concrete cases. A workman is
 employed by his master to take a journey by train. He arrives at the
 station to find that his train has been delayed by an accident. He has to
 wait for some time, exposed, it may be, to wet or merely to a cold draught,
 and in consequence catches a cold which he neglects, and which ultimately
 produces pneumonia which carries him off. Could any reasonable person
 say that he had been injured by accident, or that his death had resulted
 from injury by accident? Again, a window is accidentally broken in a
 factory, and it happens to be a cold day outside. One of the workmen
 contracts a cold from the draught to which he is exposed owing to the
 window having been broken. Can it be affirmed that the cold was the
 result of an injury by accident? Similar illustrations might be multiplied;
 yet in all such cases, if we are to affirm the judgment of the Sheriff-sub-
 stitute, it will be open for the arbitrator to find, if he were bold enough to
 attribute the disease to a particular exposure resulting from some accidental
 occurrence, that it was the result of an injury by accident within the meaning
 of the Act. I do not know where the liability would stop if this principle
 were once recognised. It may be assumed that every workman who catches
 a cold must have been exposed to conditions which were somewhat out of
 the ordinary. If a wetting produced by a breakdown of a pump in a wet
 mine is an accident, although it produces no ascertainable effect upon the
 parts exposed, how can that be distinguished from a wetting resulting from
 a heavy rainfall which made the mine wetter than usual on the day on which
 the cold was said to have been caught? Or, again, suppose that a miner
 had had to wait at the bottom of the pit somewhat longer than usual, owing
 either to the negligence of the men who worked the cage or to an unusual
 number of men having to be taken up on the particular day, and was exposed
 in consequence for some minutes longer than usual to the cold draught pre-
 vailing at such places, and that he caught a cold which might or might not
 terminate fatally, can he or his representatives recover on the footing that
 he sustained an injury by accident? Great importance was attached by the
 respondents' counsel to the circumstance that there was in this case an acci-
 dent to the pumping machinery. That appears to me to be an entirely
 irrelevant consideration. The question is whether the man met with an
 accident. It is true that if the water had risen so high that he had been
 drowned, or if hot water had escaped from a boiler used in the pit, and he
 had died from contact with it, his death would rightly be attributed to

¹ [1905] A. C. 230.

Jan. 25, 1913. accident; but in each of these cases it would have been the result of some external agency, contact with which had produced an injury. Medical men tell us that pneumonia is caused by the multiplication of the germs of the pneumonia coccus, which exist in the respiratory organs of most healthy people, but which are harmless until the vitality has been markedly impaired. These scientific theories are not common knowledge; and I think it would surprise the man on the street if he were told that a person who died from pneumonia, contracted, as that disease usually is, by exposure to cold, had died from accident. The case of traumatic pneumonia is in an entirely different position. It is exactly analogous to the cases referred to in the Lord Chancellor's opinion in *Brintons, Limited*.¹ The body suffers a lesion through which the poisonous germ effects an entrance. Here there was nothing of the kind. The men who were immersed up to their knees in cold water suffered no lesion, although in the case of one of them his vitality may have been reduced by the exposure. I am therefore quite unable to reach the conclusion that the deceased met with an accident which caused him an injury, or that the pneumonia resulted from injury by accident within the meaning of the statute.

I have kept in view in these observations the decision of the Extra Division in the case of *Kelly*.² The ratio of that decision is not necessarily in conflict with the conclusion at which I have arrived, although I should not myself have reached the same conclusion as the Extra Division. In that case the accident which caused the man's death was the direct result of his lungs having been exposed to a dose of carbon-monoxide gas. The disease was thus set up by an external agency which operated directly on the part of the body in which it was produced. Lord Kinnear in that case says that the word accident implies "some external act which could be the subject of a notice to the employer. . . . Therefore you have to look for some external fact distinct from the idiopathic condition of the man himself which can be described as an unforeseen and undesigned occurrence causing injury to the workman." Here the deceased's legs were the only parts of his body which came in contact with the only external agency that can be postulated, viz., a quantity of cold water. If his legs had in consequence got inflamed, or if the water had been corrosive in its character, there would perhaps have been an injury by accident; but his legs were in no way injured, although the fact that the man suffered from cold feet may have exposed him to certain risks of catching disease which he might otherwise have escaped. The cases are therefore essentially distinct, although it was a peculiarity of *Kelly's* case² that the poisonous gas which pervaded his lungs was in itself inert, and operated by preventing or obstructing such aeration of the blood as was necessary to combat the disease.

If the circumstances above described constitute an accident then I do not think there can be much doubt that it arose not merely in the course but also out of the employment. There remains, however, the question whether there was evidence from which the Sheriff-substitute could legitimately infer that the death of John Drylie resulted from an accident. After the general narrative of facts there are two findings which it is

¹ [1905] A. C. 230.

² 1911 S. C. 864.

somewhat difficult to construe. The Sheriff-substitute found that the "pneu- Jan. 25, 1913.
monia from which deceased died was due to the chill which he received Drylie v.
on 25th September," and also at the very end of his narrative "that Alloa Coal
the pneumonia from which deceased died was a natural sequence of the Co., Limited.
chill to which he was exposed on 25th September." I think these two Lord Salvesen.
findings must be read together and that they amount to this, that as the
pneumonia was a natural sequence of the chill, the Sheriff-substitute con-
sidered himself entitled to find that the chill was in fact the cause of the
deceased's death. There are no doubt circumstances in which this disease
follows so immediately on an unusual exposure as to justify the inference
that the exposure caused the disease. No difficulty on this score could
arise in the case of *Etherington*¹; but the remaining facts found by the
arbitrator here show that the present case does not belong to this simple
category. After getting to the pit head the deceased loitered for twenty
minutes on the surface before going home. On the following day he suffered
from the symptoms of a severe cold, but went to his work, which he
left early; the next day—Wednesday—was an idle day, but Drylie was
again out of his house to arrange about his pay lines; on the two fol-
lowing days he was again at work but not for the whole shifts; on Friday,
29th September, he was shivering and complained of cold all over, but
it was not until 1st October that the doctor who saw him, and who on the
previous day had suspected pneumonia, was satisfied that he was actually
suffering from that disease. On 8th October he died. I confess that
the circumstances suggest to my mind nothing more than that the man
caught a cold on 25th September, presumably as the result of the exposure;
that he absolutely neglected it, and it was only after four or five days of
such neglect that the pneumonia set in. To loiter at the pit head without
occasion for twenty minutes or half an hour after he had been standing in
icy-cold water, and to work in this wet pit on three out of the four follow-
ing days, during each of which he was exposed to a wetting at his work,
seems to have been grossly imprudent for a man who was suffering from a
severe cold. No doubt the arbitrator had the benefit of the advice of a
medical assessor; but he has narrated all the material facts on which he
relied for his own conclusion, and we are just as able to draw an inference
ourselves as he was. It may be matter of reasonable conjecture that the
disease from which Drylie died commenced with a cold which he caught
on 25th September, but it is just as reasonable to conjecture that if he had
gone straight home after his wetting or had not gone to his work the rest
of the week nothing more serious would have happened. The Sheriff-sub-
stitute has found that his so working had not a favourable effect upon the
illness, which he thinks commenced on 25th September, a negative way of
stating what happened in the interval which does not do full justice to the
facts. The pneumonia itself did not develop for nearly a week, and I do
not think the inference which the arbitrator drew was warranted by the
facts he has stated; unless, indeed, the fact that a man has caught a cold
during his work from which he never recovers until pneumonia supervenes
is a ground for inferring that the circumstances which produced the cold

¹ [1909] 1 K. B. 591.

Jan. 25, 1913. also produced the supervening pneumonia, however long the interval that elapsed. In my opinion the arbitrator was not entitled to find anything more than that the exposure on the 25th September led to the deceased taking a cold which, like any other cold if neglected—as it was in the present case—might have serious consequences. In my opinion, we ought to answer the question of law in the negative.

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Lord Salvesen.

LORD MACKENZIE.—In my opinion there is sufficient in this case to justify the arbitrator in reaching the conclusion he did. I confess that I have all along felt that the difficulty in this case lay in the facts and not in the law. Like many other cases which we have had to consider, there is a difficulty in the application of the law to the facts, and therefore I state quite shortly what I think the true view of the facts found by the arbitrator is.

He finds, in the first place, that the workman died on 8th October from pneumonia; and as I read his findings, he also finds in fact that the pneumonia was directly caused by what occurred on 25th September; that what happened on that day was an unintended and unexpected occurrence, which caused hurt or loss, and that that unintended and unexpected occurrence consisted in an unusual accumulation of water which alarmed the men who were working there, and induced them to hasten to the pit bottom. I may remark here, in passing, that I do not think miners drop their graith and run for nothing, and the circumstances of this case are in marked contrast to one of the illustrations that have been given—that of a heavy shower of rain. The men ran to the bottom, and while they were waiting there the water rose upon them and they were immersed up to their knees, and were chilled by exposure to the water and to the air.

Now, it appears to me that according to the law which has been laid down in many cases, both in the House of Lords and here, that is a case of injury by accident arising out of and in the course of employment. You can give the time, you can give the day, you can put your finger on the circumstances and the place of the occurrence of a definite event by which injury was caused to the workman. The facts in this case are in marked contrast to those in *M'Millan v. Singer Sewing Machine Company, Limited*,¹ which was decided by the First Division on 7th December 1912, where we refused to hold that, where a man merely caught cold, that entitled him to compensation under the Act. In that case the line was drawn, and we held that the claimant had failed to make any relevant averment of an occurrence. Here there was an occurrence.

As regards the law, I confess that I do not think any good purpose is to be served by resuming the various cases. I am content, for my part, to refer to what has been said by the Lord President in the case of *Euman v. Dalziel & Company*,² by Lord Kinnear in the case of *Kelly v. Auchinlea Coal Company*,³ and to the law as explained in *Eke v. Hart-Dyke*.⁴

LORD GUTHRIE concurred in the opinion of Lord Dundas.

LORD PRESIDENT.—I have had the advantage of reading the opinion

¹ *Supra*, p. 346.

² 1911 S. C. 864.

³ *Supra*, p. 246.

⁴ [1910] 2 K. B. 677.

which has been delivered by Lord Dundas, and I concur in that opinion in Jan. 25, 1913. all its parts, and therefore do not think it necessary to attempt any review of the cases.

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If this were a new question, and we were deciding it for the first time, I think there would be great force in much of what Lord Salvesen has said. I do not hesitate to say that if I had been sitting in the House of Lords in the case of *Brintons*,¹ I think I should have voted with Lord Robertson; and if I had been there in the case of *Ismay*,² I certainly should have voted with Lord Macnaghten. But sitting in this Court I am bound to take the cases as I find them, and—whatever my own opinions may be—to follow loyally the doctrine that has been laid down by the House of Lords.

Now, I think that that doctrine may be stated in a single sentence, and it is this: The fact of disease is not an accident, but the contraction of disease may be by accident. When you seek to apply that doctrine to the question in the present case, namely, Was this disease of which the man died contracted by accident? it seems to me you have to answer two questions. The first question is: Was it contracted in consequence of what happened on the 25th September? Or is it impossible to say when and where it was contracted? Now, upon that matter I agree the evidence is very thin. But here we are not actually deciding upon the evidence. What we have got to decide is: Was there evidence upon which the arbitrator could reasonably come to the conclusion that it was contracted in respect of what happened on the 25th September? Well, I cannot say there was not. I think he was entitled to come to that conclusion, although personally I should perhaps have hesitated to do so.

The next question is: Was that which happened on the 25th September an "accident" in the sense of the statute? I think it was, because—to use the words of Lord Macnaghten in *Fenton v. Thorley & Company, Limited*³—it was "an untoward and unexpected event." Accordingly, upon the whole matter, I agree with the majority of your Lordships.

LORD KINNEAR was absent at advising.

THE COURT pronounced the following interlocutor:—" . . . Find in answer to the question of law stated in the case that there was evidence upon which it could be competently found that the death of the deceased John Drylie resulted from injury by accident arising out of and in course of his employment: Therefore affirm the award of the arbitrator, and decern. . . ."

D. R. TULLO, S.S.C.—W. & J. BURNES, W.S.—Agents.

¹ *Brintons, Limited, v. Turvey*, [1905] A. C. 230.

² *Ismay, Imrie, & Co., Limited, v. Williamson*, [1908] A. C. 437.

³ [1903] A. C. 443.

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Steel-
Maitland.

JAMES TAYLOR, Appellant.—*D.-F. Dickson—Guild.*
 MRS MARY RAMSAY STEEL-MAITLAND, Respondent.—
Constable, K.C.—W. Mitchell.

Lease—Outgoing—Compensation for improvements—Market garden—Agricultural Holdings (Scotland) Act, 1908 (8 Edw. VII. cap. 64), secs. 23 (1), 29 (2), and 35 (1)—Varying portions of arable farm cultivated as market garden—Whether market garden in sense of Act—Lease providing rotation of crop for market garden—Whether provision cancelled by Act or waived by landlord.

Under a lease, dated May 1892, of a farm of 150 acres let "primarily as an agricultural subject" the tenant was "entitled to use all or so much of the land" as he might think proper for the purposes of a market garden, but subject to conditions including a condition as to rotation of crop, which permitted only two years' continuous cultivation of market-garden produce. The tenant annually kept 50 acres, but not always the same 50 acres, under cultivation as a market garden.

In 1902 he proceeded to erect a forcing-house for the production of early rhubarb, the process being that the rhubarb stools are forced in the house and then transplanted to the fields where they remain for from three to five years. While the forcing-house was being erected the landlord's factor wrote to the tenant inquiring as to his intentions, and advising him that the conditions of the lease would be "strictly enforced." The house was completed, and rhubarb was cultivated until the expiry of the lease in 1911, when the tenant claimed compensation for improvements on his holding under the Agricultural Holdings (Scotland) Act, 1908, in respect of the forcing-house erected by him and of rhubarb stools left in the ground. These he maintained were improvements executed "without notice of dissent by the landlord" in the sense of section 29 (2) of the Act.

Held that the fact that the ground cultivated had varied from time to time did not prevent the 50 acres under cultivation at the expiry of the lease from being a market garden within the meaning of sec. 29 of the Agricultural Holdings Act, 1908, for the purpose of a claim for compensation for improvements. *Diss.* Lord Johnston, who was of opinion that the provisions of the Act as to market gardens did not apply, because, as no fixed part of the farm had been in cultivation wholly or mainly as a market garden, there was no "holding" within the meaning of the Act.

Held further (1) that the restrictions as to rotation contained in the lease were not removed by sec. 23 (1) of the Act, which applied only to arable land; (2) that the factor's letter was a "notice of dissent" within the meaning of sec. 29 (2), in so far as the improvements claimed for were in contravention of the lease; and (3) that the tenant was entitled to compensation for the rhubarb, but only if and in so far as the cultivation had not been in contravention of the terms of the lease, and for the forcing-house, but only if and in so far as it constituted an improvement in connection with such a cultivation.

Lease—Outgoing—Compensation for improvements—Market garden—Agricultural Holdings (Scotland) Act, 1908 (8 Edw. VII. cap. 64), sec. 29 (2)—Improvements "then executed."

The Agricultural Holdings (Scotland) Act, 1908, sec. 29 (2), which makes certain provisions with regard to improvements on market gardens, begins with these words:—"Where under a lease current on the first day of January 1898 a holding was at that date in use or cultiva-

tion as a market garden . . . and the tenant thereof has then Jan. 28, 1913.
executed thereon . . . any improvement . . .

Held that the word "then" means "thereafter."

Smith v. Callander, (1901) 3 F. (H. L.) 28, *followed*.

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ON 11th May 1911 a case was stated for the opinion of the Sheriff of 1st DIVISION.
the Lothians and Peebles by James Inglis Davidson, Saughton Mains, Sheriff of the
Midlothian, the arbiter appointed by the Board of Agriculture and Lothians and
Fisheries in a reference under the Agricultural Holdings (Scotland) Peebles.
Act, 1908, between James Taylor, sometime farmer, Easter Drylaw,
Davidson's Mains, Midlothian, and Mrs Mary Ramsay Steel-Maitland
of Barnton. The case was stated at the request of Taylor under sec-
tion 9 of the Second Schedule to the Act.

The case set forth the facts as follows:—"2. By lease, dated 24th
and 30th May 1892, entered into between Sir James Ramsay Gibson
Maitland (whose successor the said Mrs Mary Ramsay Steel-Maitland
is) and the said James Taylor, the said Sir James Ramsay Gibson
Maitland let to the said James Taylor All and Whole the farm and
lands of Easter Drylaw aforesaid, and by subsequent agreement
between the said Sir James Ramsay Gibson Maitland and James
Taylor, dated 12th and 14th January 1894, and incorporated with
said lease, and subject to the provisions thereof, certain other lands
were let to the latter. Said farm and lands were let for the period of
nineteen years from and after Martinmas 1892, and said other lands
for eighteen years from and after Martinmas 1893. Said lease and
agreement and said whole lands let are hereinafter referred to as the
'lease,' and the 'farm' or 'holding' respectively. The extent of said
lands was 153 acres or thereby, and the rent £851, 8s. The whole
of said farm was arable land. The lease terminated at Martinmas
1911, by notice of termination as at that date being sent to the tenant
by the agents of the proprietrix on 9th November 1910. . . . 4. By
the said lease it is provided that, . . . although the farm is let
primarily as an agricultural subject, the said James Taylor and his
foresaids shall be entitled to use all or so much of the land of the farm
as he or they think proper for the purposes of a market garden, but
subject always to the conditions following, *videlicet*:—(1) None of the
land shall be used for growing any kind of fruit except strawberries;
(2) land used for market garden purposes shall be worked on a four
years' rotation (the first and second years of the rotation being market-
garden produce, and the third white crop, and the fourth year grass);
. . . . (3) in the case of land under four years' rotation the tenant
shall apply not less than 60 tons per acre of well-rotted horse or cow
dung to the land in the first year, and not less than 40 tons per acre
in the second year of the rotation; . . . (4) land which has been
under market-garden produce shall be thoroughly cleaned before being
put under white crop; (5) the tenant shall be bound constantly to
keep all land used for market-garden purposes well cleaned and in
good heart, and to manage it according to the recognised rules of
well-managed market gardens in the vicinity of Edinburgh,' under a
penalty in case of failure. 5. Mr Taylor, who was a market gardener,
residing at Bangholm, Ferry Road, Edinburgh, from the outset grew
market-garden produce at Easter Drylaw, but the forcing of rhubarb
was not carried on by him there until about the year 1902. In the
course of his tenancy he gradually increased the area under market
garden crops until there would be annually about 50 acres. These

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50 acres, however, were not annually precisely the same ground, as Mr Taylor changed the portions of the ground, his custom being to select for market-garden purposes the fields or portions of fields he thought most suitable. The rest of the farm was cultivated as an ordinary arable farm. In evidence Mr Taylor stated: 'Before I entered it, it had been cropped merely as a farm, and I began bit by bit to convert it into a market garden. After I was able to get the land to carry the crops I gradually increased my extent of market gardening. It was in 1899 that I began to grow rhubarb to any particular extent upon it. I required to have it ready for my forcing-houses in 1902. I ultimately extended my rhubarb break to 12 to 15 acres.' At the termination of Mr Taylor's lease at Martinmas 1911, about said quantity of 50 acres of the farm were under market-garden crops, and of these 12 acres or thereby were under rhubarb crop, a considerable part of which, however, had been planted out in the spring of 1911, after he had received notice to quit the holding, which course he had followed in previous years. 6. In or about the year 1901, Mr Taylor removed from certain land which he had rented at Bangholm, and from that date down to November 1911 his whole business was carried on upon Easter Drylaw Farm. As there were no suitable houses upon Easter Drylaw for the growing and forcing of early rhubarb, Mr Taylor erected and equipped suitable forcing-houses. This he did at his own expense, but without the previous consent of the proprietrix. The landlord's knowledge of the erection of the first forcing-house is established by the following letter to Mr Taylor from Mr Grigor, factor on the estate, and Mr Taylor's reply:—

"Mr Grigor to Mr Taylor, 4th November 1903.

"Dear Sir,—I beg to draw your attention to the terms of your lease of Easter Drylaw Farm, and shall be obliged if you will kindly explain what your intentions are with regard to the brick structure you are erecting on the field to the west of the garden.

"I may mention that the conditions of the lease will be strictly enforced.—I am, &c."

"Mr Taylor to Mr Grigor, 5th November 1903.

"Dear Sir,—The building I am erecting is a forcing-house for growing rhubarb.—Yours faithfully."

"From about this time onward to the termination of the lease it is admitted on both sides that the growing of rhubarb at Easter Drylaw was carried on upon a larger scale than had previously been the case. . . . The buildings erected by the claimant for market-gardening purposes were not required, and are not now required or used for the purposes of a purely agricultural farm. . . . 8. The tenant's occupation of the subjects referred to expired on 28th November 1911, and, on 10th November 1911, he intimated a claim under the Agricultural Holdings (Scotland) Act, 1908, in which he claimed, *inter alia*, the sum of £2163, 17s. 7d., being the value of the improvement claimed to have been effected by him on said holding or parts thereof by the planting thereon of the vegetable crops (limited in the claim to rhubarb stools) which continue productive more than two years, and the erection of buildings for the purpose of trade or business of a market gardener. . . . 11. After the arbiter had accepted office, the proprietrix lodged objections to Mr Taylor's claim, in which she repudiated said claim *in toto*, denying it to be competent or well founded, and, alternatively, stating it to be excessive. . . . Proof was led by the parties before the arbiter on 25th, 26th, and 30th

January 1912, and the proof having been closed, the arbiter heard parties on the evidence on 31st January 1912. 13. It was established in evidence that the proprietrix was aware of the manner in which the said farm was being managed and cultivated, and of the proportion thereof annually under market-garden crops, and of the nature and class of crops grown, and that she did not, either verbally or in writing, express any dissent therefrom, but warned Mr Taylor that the terms of the lease would be strictly enforced. In the growing of forced rhubarb it was proved:—(1) That the stools are kept in the forcing-house for from six to eight weeks; (2) That thereafter they are removed to the fields from the house; (3) That the stools require from three to five years' nursing in the field to recover their full vigour.”

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The case further stated:—“14. At the hearing on the evidence, it was contended, *inter alia*, on behalf of the proprietrix that, upon a sound construction of the Agricultural Holdings (Scotland) Act, 1908, and in view of the terms of the lease, and of the facts above set forth, the clauses of said Act, which allow compensation for tenants' improvements on lands let or cultivated as market gardens, do not apply to the claimant's holding as let to and cultivated by him, and that he is not entitled under the Act to any compensation for the improvements which he claims to have made. The contrary view was contended for by the claimant. . . . A question has also been raised by the claimant as to whether, in view of the facts above set forth, the proprietrix has not barred herself from objecting to the validity of the claimant's claim.”

The questions of law were:—“(1) Are the subjects which were let to, and cultivated and used by, the claimant, or any part thereof, a market garden as defined by the Agricultural Holdings (Scotland) Act, 1908,* to which the special provisions as to market gardens con-

* The Agricultural Holdings (Scotland) Act, 1908 (8 Edw. VII. cap. 64), enacts:—

Sec. 23 (1). “Notwithstanding any custom of the country, or the provisions of any lease or agreement respecting the method of cropping of arable lands, or the disposal of crops, a tenant of a holding shall have full right to practise any system of cropping of the arable land on the holding, and to dispose of the produce of the holding, without incurring any penalty, forfeiture, or liability. . . .”

Sec. 29 (2). “Where under a lease current on the first day of January Eighteen hundred and ninety-eight a holding was at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any improvement comprised in the Third Schedule to this Act, the provisions of this section shall apply, in respect of that holding, as if it had been agreed in writing after that date that the holding should be let or treated as a market garden, so however that the improvements in respect of which compensation is payable under those provisions as so applied shall include improvements executed before as well as improvements executed after that date. . . .”

(3) “Where the land to which such agreement relates or so used and cultivated consists of part of a holding only, this section shall apply as if that part were a separate holding.”

Sec. 35 (1). “. . . ‘Holding’ means any piece of land held by a tenant, which is . . . in whole or in part cultivated as a market garden. . . . ‘Market garden’ means a holding cultivated, wholly or mainly, for the purposes of the trade or business of market gardening.”

Jan. 28, 1913. tained in that statute apply? (2) Is the proprietrix, in the circumstances stated in this case, barred from raising any question as to the tenant's right to obtain compensation under the Market Garden clauses of the Agricultural Holdings (Scotland) Act, 1908?"

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On 23rd August 1912 the Sheriff-substitute (Guy) answered both questions of law in the negative.*

* "NOTE.— . . . The present case as presented to me seemed to me, after I first heard parties on it, to be defective, in respect that it did not set forth in geographical and other particular detail as to cropping and improvements the condition of matters as at 1st January 1898. I put the case out for rehearing of parties on this point, and I was then informed that it would be impossible for any amendment of the case to be made so as to give me particulars as to what precise part of the whole holding was in use as a market garden at 1st January 1898, and as to whether any of the improvements which would have given the tenant a claim under the Act of 1897 had then been executed. I was, however, at the same time informed that I might treat the statement in article 5 of the stated case as meaning that from 1st January 1898 down till the expiry of the lease fifty acres, although not the same fifty acres, might be treated as in cultivation as a market garden.

"It is clear that the tenant's claim cannot fall under the first subsection of section 29 of the Act of 1908, as the only agreement in writing between the parties upon which such a claim could be founded is the lease itself, and it is not dated on or after 1st January 1898. Any claim that the tenant has, therefore, must be brought by him under subsection 2 of section 29 of the Act, and he must show that at 1st January 1898 his holding, or part of his holding, was in use or cultivation as a market garden with the knowledge of the landlord, and that he had then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, improvements comprised in the Third Schedule to the Act. Now there were certain of the improvements set forth in that Third Schedule which he was quite entitled to make under the powers which his lease gave him; for example, he had the power to plant strawberry plants and to plant vegetable crops, which might continue productive for two or more years. There is no express power given to him in the lease to grow rhubarb, and it is possible that in the growing of rhubarb or such other vegetable crops he might not be able to grow these at a profit if he followed the rotation of cropping which is provided for in the lease for market gardening. But I repeat again that any such consideration does not affect the question for decision. The question is one of fact: had the tenant at 1st January 1898 actually executed on a part of his holding any of the improvements specified in the Third Schedule to the Act? There is no statement in the case that he had, and there is no doubt that he had not then started to grow rhubarb, which is now the foundation of his claim. I think, however, that if he had at 1st January 1898 executed any of the statutory improvements he would have been entitled to preserve his claim under the Act, and to extend it to any similar improvements that he made after that date. That is really the meaning of the amending provision of the Act of 1898. I make this remark at this stage subject to some observations that I will have to make with regard to the tenant changing the locality of his market garden within the range of his whole holding. I take it that the statement of facts in the stated case is a statement of all the facts relevant to the question to be determined by me that could be stated. If this be so, then the tenant has failed to prove that at 1st January 1898 he had brought himself within the provisions of the Acts of Parliament entitling him to compensation such as he is now claiming in respect of his improvements on a market garden.

"The most of the argument presented to me was on the question as to

The claimant appealed, and the case was heard before the First Jan. 28, 1913.
 Decision on 14th November 1912.

Argued for the appellant ;—The appellant was entitled to compensation in respect of the rhubarb stools left in the land and the forcing house, these being recognised improvements under the Third Schedule of the Agricultural Holdings Act, 1908, made (as required by section 29 (2)) under a lease current on 1st January 1898, after that date, with the knowledge of the landlord, and without any written notice of dissent upon his part. The Sheriff-substitute had decided the case against the appellant on the ground that under section 29 (2) compensation could only be claimed when the improvements had been made before 1st January 1898, but in so doing he had proceeded upon a misconstruction of the word "then," because that word clearly meant "thereafter," when construed as it should be, in accordance with the opinion of the House of Lords¹ upon the construction of the Market Gardeners' Compensation (Scotland) Act, 1897.² The fact that the market garden extended only to a portion of the farm was immaterial in view of the definition of "holding" in section 35 (1), and so too was the fact that the actual portions of land cultivated as a garden varied from year to year, seeing that there had been all through the period from 1898 a continuous use of 50 acres of the farm for the purpose, which fully complied with the provisions of the Act as to continuity of cultivation. Any other reading of the statute was narrow and technical. Further, it was not in the respondent's mouth to complain of the change of ground seeing that she founded on the condition in the lease as to the rotation of crops, which necessitated the change. Lastly, there had been no written "notice of dissent" by the landlord. The mere statement that the terms of the lease would be strictly enforced, followed as it was by obvious acquiescence in what was being done, was not a "notice." Even if it were it was quite unavailing, because the

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whether it was necessary, in order to entitle the tenant to compensation, that the part of his holding which was in cultivation as a market garden at the expiry of his lease should be the same part throughout. If I had come to the conclusion that the tenant had had a claim under the Act in respect of the condition of matters at 1st January 1898, I should have been prepared to hold that he had not lost the right which he then possessed to claim compensation by changing from one part of his holding to another in the growing of market-garden produce. He would have been doing that under the express power given to him in the lease, and I think it would have been only fair and equitable that any right which he had to compensation at 1st January 1898 should not be lost by the exercise of a power antecedently granted to him by the landlord. This opinion, in the view that I have taken of the facts, does not of course affect the determination of the questions submitted to me in the present case.

"These observations apply to the first question of law put to me. As to the second question, I agree with the contention of the proprietor that her actings can never create a right in the tenant, and I do not think that any of her actings can bar her from stating and maintaining her statutory rights. Her actings may give rise to claims at the instance of the tenant if anything she did was contrary to or destructive of his rights. But these are not matters which are raised in the present case."

¹ Callander v. Smith, (1900) 2 F. 1140, Lord Kyllachy, at p. 1144, (1901) 3 F. (H. L.) 28, Lord Chancellor Halsbury, at p. 30, Lord Shand, at p. 31, Lord Davey, at p. 32.

² 60 and 61 Vict. cap. 22.

Jan. 28, 1913. effect of section 23 (1) of the Act was to strike out of the lease entirely the provisions as to rotation, so that the only lease which could be "strictly enforced" was a lease allowing the appellant to cultivate the market garden in any rotation which he pleased. *A fortiori* as regarded the forcing-house the factor's letter on the subject was no notice of dissent.

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Argued for the respondent;—Though the case of *Smith v. Callander*¹ made it necessary to construe the word "then" in subsection 2 of section 29 of the Act as meaning "thereafter," that did not affect the question with which the Sheriff-substitute had to deal as to whether there was here a "market garden" in the sense of the Act. In point of fact there was not. To entitle a tenant to the benefits of the clauses providing market-gardening compensation the holding must be cultivated wholly or mainly for the purposes of market gardening. The whole of the appellant's farm or holding certainly did not comply with that condition, seeing that it was "let primarily as an agricultural subject," and admittedly was in large part used for agricultural purposes. But neither did any part or portion of the farm comply with the condition. Parts of it were from time to time used for market-garden purposes, but no single part was wholly or even mainly used as such. Admittedly part of an agricultural farm might be a market garden within the meaning of the Act, but it required to be a definite and not an ambulatory portion, and it must have been occupied as such on 1st January 1898 and continuously thereafter, and it was only for improvements "thereon,"² i.e., on this definite portion, that claims for compensation could be entertained in the year of ish. The word "thereon" could not otherwise be applied. Even, however, if there was a holding or market garden in the sense of the Act the appellant had not complied with the conditions of the lease as to cropping, which were valid and binding seeing that section 23 of the Act dealt only with arable lands. The lease itself was accordingly a notice of dissent—as was also the factor's letter of 4th November 1903—with reference to any improvements that were excluded by the lease, as were those which were the subject of the present claim.

At advising on 28th January 1913,—

LORD PRESIDENT.—This is an appeal from the judgment of the Sheriff-substitute in a stated case under the Agricultural Holdings Act, 1908. The case is stated by Mr Davidson of Saughton Mains, who was the arbiter in the case, for the determination of certain points of law. The parties to the arbitration are the tenant of the holding of Easter Drylaw on the estate of Barnton and the proprietrix of that estate. The tenant became tenant by lease entered into in 1892. Now, 1892 was prior to the Market Gardeners' Compensation Act of 1897, which is the beginning of the legislation as regards market gardens. The regulating statute now is the Agricultural Holdings Act of 1908, the provisions of which replace the provisions of the former Acts. Under the lease in question the farm was let as an agricultural farm; but the lease contains the following provision:—"Without prejudice to the foregoing conditions, it is hereby provided and agreed that, although the farm is let primarily as an agricultural subject, the

¹ 3 F. (H. L.) 28.

² 8 Edw. VII. cap. 64, sec. 29 (2) and (3).

said James Taylor and his foressaids shall be entitled to use all or so much Jan. 28, 1913. of the land of the farm as he or they think proper for the purposes of a ^{Taylor v.} market garden, but subject always to the conditions following, *videlicet* (1) ^{Steel-} None of the land shall be used for growing any kind of fruit except straw- ^{Maitland.} berries; (2) land used for market-garden purposes shall be worked on a Ld. President. four years' rotation (the first and second years of the rotation being market garden produce, the third year white crop, and the fourth year grass). Then there is a special provision for land under strawberries, which I need not quote. Then "(3) In the case of land under four years' rotation the tenant shall apply not less than sixty tons per acre of well-rotted horse or cow dung to the land in the first year, and not less than forty tons per acre in the second year of the rotation." The object of that is perfectly clear. The farm is to be looked on as an agricultural holding, but the tenant is to have leave, if he chooses, to use portions of it as a market garden. If he does so, he is to treat it in such a way that it will, so to speak, resume its place as an agricultural holding for those who come after him. The tenant, as a matter of fact, availed himself of this option, and he cultivated portions of the farm as a market garden, and practically he cultivated about 50 acres out of the total acreage of about 150. He did not keep to the same 50 acres all along, but he at one time cultivated one portion and at another another; but, roughly speaking, during his tenancy there were generally 50 acres under cultivation as a market garden. In November 1903 the tenant decided to force early rhubarb. With that intention he put up a forcing-house. Upon that the landlord's factor, in November 1903, wrote a letter in these terms:—"I beg to draw your attention to the terms of your lease of Easter Drylaw Farm, and shall be obliged if you will kindly explain what your intentions are with regard to the brick structure you are erecting on the field to the west of the garden. I may mention that the conditions of the lease will be strictly enforced." The tenant answered that the building he was erecting was a forcing-house for growing rhubarb, and after that time the tenant did grow rhubarb and forced rhubarb in the house. At the end of the lease this claim is brought for meliorations under the Agricultural Holdings Act. I should suppose that in the arbitration there are other claims, but the only claim which we have before us is the claim which is made in respect of this rhubarb. That is the only matter upon which the arbiter has asked for assistance as upon a point of law. A claim is made for this house and also for the value of certain rhubarb stools which were left in the ground. I suppose one is entitled to know so much—in fact, it is stated in the case—that the method of forcing rhubarb is that the rhubarb is forced in the house, that the stools are removed to the fields, and take some time to recover.

The section of the Act of 1908 which deals with market gardens is section 29. That section replaces, not in exactly the same terms, but replaces the earlier section in the repealed Act of 1897. (I may say the Act in the Schedule is called the Act of 1895, but that is an obvious misprint; it is 1897, and indeed there is no difficulty raised, because the session and chapter, 60 and 61 Vict. cap. 22, are quoted correctly.) Now that section provides (subsection (2)) that "Where under a lease current on the 1st day

Jan. 28, 1913. of January 1898"—this lease was, of course, current at that time—"a holding was at that date in use or cultivation as a market garden with the knowledge of the landlord"—of that there is no question, for this holding was under cultivation as a market garden under the option given by the

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Ld. President. lease—"and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any improvement comprised in the Third Schedule to this Act, the provisions of this section shall apply, in respect of that holding, as if it had been agreed in writing after that date that the holding should be let or treated as a market garden, so however that the improvements in respect of which compensation is payable under these provisions as so applied shall include improvements executed before as well as improvements executed after that date." The improvements in the Third Schedule include the planting of asparagus, rhubarb, and other vegetable crops which continue productive for two or more years, and the erection or enlargement of buildings for the purpose of the trade or business of a market gardener; so that, so far as the Schedule is concerned, both the rhubarb and the rhubarb forcing-house are improvements for which compensation might be claimed.

Now there are various points of law that have been brought forward by the landlord as excluding this particular claim for compensation. But I may say at once that it is unfortunate that the learned Sheriff-substitute has disposed of the case on a ground which it is impossible to uphold, owing to the fact that his attention was not called to the case of *Smith v. Callander*.¹ He disposes of the case on a very short ground, and one which, if it had been sound, would have been conclusive. The Act deals with the case where, under a lease current at the beginning of 1898, "the tenant thereof has then executed thereon, without having received previously . . . any written notice of dissent." Now the learned Sheriff-substitute has read the word "then" as if it meant "at that date," and if that were so it would end the matter, for there is no question that these improvements were not executed in 1898. But unfortunately in the case of *Smith*¹ the opinions both of the Lord Ordinary in this Court and of the learned Judges in the House of Lords were that the word "then" really meant "thereafter," and accordingly the learned Sheriff-substitute's ground of judgment is gone.

The next point that was argued was that the holding was not, at 1st January 1898, in use or cultivation as a market garden, in view of the provision that not the whole farm but only a portion of it could, at any one time, be so cultivated. I do not think that argument will do, because in the 35th section holding is defined as meaning "any piece of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden." Now this farm is obviously in part cultivated as a market garden, and therefore the argument that it is not a holding will not do. But then section 29 goes on, "and the tenant thereof has then executed thereon," that is, of course, upon the holding—the holding as a market garden. It is found as a fact in the case that nobody can tell now what precise 50

¹ 3 F. (H. L.) 28.

acres were occupied as a market garden in 1898, and therefore the landlord Jan. 28, 1913. argues that you cannot tell whether the improvement as here now was ^{Taylor v. Steel-} really put upon the holding which existed as a market garden in 1898. ^{Maitland.} Well, I do not think that argument will do either. I think that, as the holding shifts from one part of the farm to another, the possibility of Ld. President. making improvements upon that holding also shifts; and I think it would be far too narrow a view to hold that the mere fact that the part of the farm that was cultivated was, so to speak, ambulatory, excluded the tenant from the advantages conferred by the Act.

But then comes the last argument, and this argument is, I think, conclusive against the tenant's claim. The statute says, "without having received previously to the execution thereof any written notice of dissent." Now I remind your Lordships of the letter which I have read, where the factor, seeing the large building in course of erection, says in effect, "Now remember, look at your lease, because we are going to hold you strictly to the terms thereof"—and the lease says that the market-gardening ground is to be treated under a four-year rotation and with a special treatment of dung under that rotation. I think that that is a dissent from the tenant cultivating the land in any way that is inconsistent with that rotation. There are two things to be said about that: First of all, the tenant argues that the provisions as to rotation were swept away by the 23rd section of the Act, which says, "Notwithstanding any custom of the country, or the provisions of any lease or agreement respecting the method of cropping of arable lands, or the disposal of crops, a tenant of a holding shall have full right to practise any system of cropping of the arable land on the holding, and to dispose of the produce of the holding, without incurring any penalty, forfeiture, or liability," and there are certain other provisions which lay certain duties upon the tenant which I need not read. The simple answer to that argument is that of set purpose that provision is applied to arable land only, and therefore a provision in a lease respecting market-gardening ground is not struck at by section 23. The other thing to be said is this—in order to express the argument I have been obliged for the moment to assume that the cultivation of rhubarb is contrary to the provisions as to the four-year shift. I do not consider that I have any right to know that, and I have no right to lay it down. I may know it, and indeed there are various indications in the case which, even if I knew nothing about it, would enable me to guess with something approaching to certainty that the two things are inconsistent; but, at the same time, I do not think we can say that in this Court. That is a matter for the arbiter, who is asking our directions on a point of law, and therefore I think we ought to tell the arbiter that, if he is of opinion that the growing of rhubarb with a forcing-house was a method of cultivation which was inconsistent with the terms of the lease with regard to the use of the land for market-garden purposes, then the factor's letter was a good expression of dissent by the landlord, and that it barred a claim for compensation. I think that we ought to answer the question put to us in that way.

Another question was put as to whether the proprietrix was barred, and there the learned Sheriff-substitute held that she was not. I think he was right, and I have nothing to add on that part of the case.

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LORD JOHNSTON.—This case raises a question of difficulty as to the retro-active effect of the Agricultural Holdings (Scotland) Act, 1908, which has now been substituted for the Acts of 1883 and 1897. It arises under a lease of the farm of Easter Drylaw for nineteen years by Sir James Gibson Maitland, Bart., to James Taylor, dated in May 1892. At that date the first Scottish Agricultural Holdings Act, that of 1883, was still in force. That Act made no provision specially applicable to market gardens, and its provisions with regard to compensation generally were more limited than those contained in the subsequent Acts. It contained a clause, section 5, for which section 4 of the later Act of 1908 is now substituted, limiting its application where a lease executed after its date contained an agreement securing to the tenant fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, for any improvement specified in the third part of the Schedule to the Act. In such cases the compensation in respect of such improvement was to be payable in pursuance of the agreement, and not under the Act. The third part of the Schedule deals with manuring, and is really the only one of the provisions for compensation which could be made to apply to market gardens. The lease of 1892 was executed in full view of the passing of the Agricultural Holdings Act of 1883, and takes advantage of the section to which I have referred by including a special agreement as to compensation.

I think it desirable to look carefully at the provisions of this lease, for, while on the one hand the tenant is designed as a market gardener, and was at its date carrying on that trade at Bangholm on the north side of Edinburgh, and while there are provisions permitting him to continue that trade at Drylaw, on the other hand the subject was an arable farm, supplied with all the farm buildings and all the other appurtenances requisite for that purpose. The lease in its general scope is an agricultural lease, and the express permission to use any part of the ground for market gardening is a matter wholly subsidiary. It is, moreover, not only limited, but its extent and its limitations are very clearly defined.

I have already said that the lease is in its essence an ordinary agricultural lease of an arable farm. It is one which, owing to its proximity to a large town, and to the high rent accordingly commanded, contains a scheme of provisions regarding cultivation very liberal to the tenant. But it contains two very important conditions bearing on its real purpose as an arable holding—First, a provision that the tenant should undertake to keep a sufficient stocking of horses, cattle, and implements, and to cultivate and manage the lands according to the most approved rules of good husbandry, and to apply to them the whole manure made on the farm, and an equivalent of well-made dung bought in for any straw sold off the farm; and second, a provision that the tenant should never in the course of the lease have less than one-fourth part of the whole land of the farm under drilled green crop, all properly cleaned, and manured with not less than forty tons of well-made horse or cow dung per acre.

These are general over-riding provisions. But then it is added that, without prejudice to the foregoing provisions, "although the farm is let primarily as an agricultural subject," the tenant should be entitled to use all or so much of the land of the farm as he might think proper for the

purpose of a market garden. This apparently general provision is, however, Jan. 28, 1913. thus restricted; first, no kind of fruit except strawberries is to be grown; second, any land under strawberries is to be worked on a six-year rotation—three years strawberries, the fourth and fifth years green crop, and the sixth year white crop; third, where land is put under this crop there is to be applied to the land in the first year not less than seventy tons, in the fourth year sixty tons, and in the fifth year forty tons of good farmyard manure. If instead of strawberries the land is used for growing ordinary market-garden produce, fourth, this must be on a four-year rotation, the first and second years of the rotation being market-garden produce, not less than sixty tons of manure being applied the first year and forty the second, the third year white crop, and the fourth year grass, and the land to be thoroughly cleaned before being put under white crop. Moreover, the tenant is taken bound generally to keep all land used for market-garden purposes well cleaned and in good heart, and to manage it according to the recognised rules of well-managed market gardens in the vicinity of Edinburgh. If the tenant fails to observe these conditions of his liberty to use any part of the farm as a market garden, he comes under an obligation to pay an additional pectional rent of £10 an acre for every acre ascertained on a reference not to have been properly managed. Further, there is a general provision that should the tenant choose to crop the ground in any manner other than that specified during the currency of the lease without written consent of the landlord, he comes under an obligation to pay £10 an acre of additional pectional rent for every acre so cropped differently for the year of miscropping, “without prejudice nevertheless to the right of the first party,” the landlord, “to stop such miscropping in whole or in part as he may incline.”

These provisions which I have thus summarised indicate very clearly that the tenant received no roving commission to turn the farm or any part of it into a market garden, but that his permission to do so was limited and defined, in strong contrast to his comparative freedom in cultivating the farm as an ordinary arable farm. Their practical intention and effect was to limit market gardening to the growing of strawberries and of such market-garden produce as could be grown in two successive years, that is, of ordinary vegetables; and, further, to bring the land back at the end of the market-gardening rotation to such a condition that, though it might again be used for market gardening, it might also at once go back to ordinary arable cultivation. The latter would, I think, have been the natural course to follow, and in fact apparently was followed.

One further condition, which I have already referred to, I will shortly note. It is that compensation for unexhausted manures in the land of the farm, without discrimination of ordinary arable and market-gardening use, is provided according to a schedule annexed; this arrangement to come in place of and to supersede the provisions of the Act of 1883 with reference to compensation for tenants' improvements, which were dispensed with by mutual consent.

Before I advert to the Market Gardeners Act of 1897, which came into force on 1st January 1898, and the Agricultural Holdings Act of 1908, which repealed and superseded the Acts of 1883 and 1897, I think it con-

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Jan. 28, 1913. venient to state briefly what has been the course of cultivation of the farm, as stated by the referee after evidence led before him.

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Ld. Johnston. Prior to Mr Taylor's entering on possession the farm was cultivated wholly as an arable farm. Mr Taylor at once began to grow market-garden produce, and gradually increased this use of the land until there were about 50 acres, or one-third of the farm, under market-garden crops. This continued to be the area under this system of cultivation till the termination of the lease. "These 50 acres, however," the referee states, "were not annually precisely the same ground, as Mr Taylor changed the portions of the ground, his custom being to select for market-garden purposes the fields or portions of fields he thought most suitable. The rest of the farm was cultivated as an ordinary arable farm."

It must be added that when he suggested that the case should be amended in certain particulars the Sheriff, to whom it had been presented, was informed "that it would be impossible for any amendment of the case to be made so as to give me particulars as to what precise part of the whole holding was in use as a market garden at 1st January 1898, and as to whether any of the improvements which would have given the tenant a claim under the Act of 1897 had then been executed," but that he might take it "that from 1st January 1898 down till the expiry of the lease fifty acres, although not the same fifty acres," were cultivated as a market garden. This information must therefore be accepted as if it had been part of the case stated by the referee.

We are not told what was the nature of the crops taken prior to 1st January 1898. It is not said that strawberries were cultivated, and I assume, therefore, that the portion of the farm turned to market-gardening purposes prior to that date was cropped, under the four-years' rotation stipulated by the lease, with ordinary market-garden produce. But after the passing of the Market Gardeners Act of 1897 Mr Taylor began to grow rhubarb, and to force rhubarb. This is not a fruit. It is an ordinary market-garden product of the vegetable species. But it cannot be grown in any case, and certainly not for forcing, under the four-years' rotation of the lease. It takes some time for the rhubarb stools to mature for forcing. The process of forcing takes, as we are told, six or eight weeks. The stools are then removed to the fields, and require three to five years' nursing in the open to recover their vigour.

What Mr Taylor did was to plant out rhubarb in 1899 to be ready for forcing in 1902, by which time he had erected a range of forcing-houses adjoining the steading. And from that date to the end of the lease he continued the practice of forcing rhubarb for the early market, having generally about 15 acres of the farm under this crop. But for this rhubarb cultivation so carried on there would probably have been no question between Mr Taylor and Mrs Steel-Maitland, who is now the proprietrix of Drylaw, as, in regard to ordinary market-garden crops, no compensation can be claimed except for unexhausted manure, and as there would probably not be much difference in the actual measure of compensation, whether that compensation falls to be ascertained under the lease or under the Act.

It must be apparent from the above statement that from and after 1st January 1898 Mr Taylor commenced and continued to cultivate in contra-

vention of his lease. He was not stopped. But Mrs Steel-Maitland was Jan. 28, 1913. made aware, through her factor, of the course he was pursuing. She did Taylor v. not either verbally or in writing express any dissent therefrom, but she Steel-Maitland. warned Mr Taylor, particularly when in course of erecting his forcing-houses, and when she was apprised of their purpose, "that the conditions Ld. Johnston. of the lease will be strictly enforced."

Apparently Mr Taylor assumed that the Act of 1897 freed him from the restrictions of his lease, and authorised him, notwithstanding thereof, to do anything in the way of market gardening for which compensation is provided by that Act, and now by the Act of 1908. For he now claims, *inter alia*, compensation (£2163, 17s. 7d.) for the value of the improvement "effected by him on said holding or parts thereof by the planting thereon of the vegetable crops (limited in the claim to rhubarb stools) which continue productive more than two years, and the erection of buildings for the purpose of trade or business of a market gardener," all as detailed in schedule 3 of his claim. These buildings were the forcing-houses.

The parties differed, and a reference was made to Mr James Inglis Davidson under the Act of 1908, before whom it was contended on behalf of the proprietrix that "upon a sound construction of the Agricultural Holdings (Scotland) Act, 1908, and in view of the terms of the lease, and of the facts above set forth, the clauses of said Act, which allow compensation for tenants' improvements on land let or cultivated as market gardens, do not apply to the claimant's holding as let to and cultivated by him, and that he is not entitled under the Act to any compensation for the improvements which he claims to have made."

The question thus raised was one which in the opinion of Mr Davidson was of importance, and the determination of which was necessary before he could proceed to pronounce an award. And he accordingly stated a case for the opinion of the Sheriff under section 11 of the Act of 1908, in which he submitted the following question of law:—"Are the subjects which were let to, and cultivated and used by, the claimant, or any part thereof, a market garden as defined by the Agricultural Holdings (Scotland) Act, 1908, to which the special provisions as to market gardens contained in that statute apply?" The Sheriff answered this question of law in the negative, and an appeal to this Court was taken by Mr Taylor, the tenant.

Before the referee Mr Taylor had also pleaded that Mrs Steel-Maitland was barred by her actings from challenging his right to compensation as claimed. This question also the Sheriff answered in favour of Mrs Steel-Maitland, but at the bar of this Court the contention was abandoned by the appellant's counsel, and need not be further adverted to.

In dealing with the question at issue any reference to the Act of 1897, which was the Act in force during almost the whole of Mr Taylor's time, may be avoided, because the more comprehensive Act of 1908 superseded both the general Agricultural Holdings Act of 1883 and the Market Gardening Act of 1897, and with a still more retroactive effect.

In considering this question for determination it must be kept in mind that we are dealing with a subject held under lease dated prior to and not after 1st January 1898, and therefore under a lease the parties to which could not have had in view any of the provisions of the Act of 1897 or of

Jan. 28, 1913. the substituted Act of 1908. It is very difficult to keep the two positions separate in one's mind, but this decision cannot directly determine a question arising under a lease dated after 1st January 1898.

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Turning to the Act of 1908, section 29 (1) says: "In the case of a holding in respect of which it is agreed by an agreement in writing made on or after the first day of January 1898 that the holding shall be let or treated as a market garden," certain provisions for compensation shall apply. And section 29 (2) says: "Where under a lease current on the first day of January 1898 a holding was at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any improvement comprised in the Third Schedule to this Act, the provisions of this section shall apply, in respect of that holding, as if it had been agreed in writing after that date that the holding should be let or treated as a market garden," that is to say, the provisions for compensation shall apply.

I think that four points arose for consideration of the referee.

First. What is the holding to which it is proposed to apply the compensation provisions of the statute?

Second. Was it in use or cultivation prior to 1st January 1898 as a market garden in the sense of the Act?

Third. Have any of the scheduled improvements been timeously executed, so that the condition precedent of the provisions of the section applying has been fulfilled?

Fourth. Was their execution barred from having that effect by prior written notice of dissent from the landlord?

The first two and the fourth of these questions involve, of course, matters of fact, but are, in the circumstances as set forth to us, questions of law. The third is a pure question of fact.

First. What is the holding? It is quite clear that if the holding be regarded as the whole land under the lease it was not in use or cultivation as a market garden at any time prior to 1st January 1898. It is therefore necessary to find whether "holding" is to receive a more restricted meaning. Now "holding" is, section 35 (1), defined as meaning any "piece of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden." "Market garden" again is, section 35 (1), defined as "a holding" cultivated wholly or mainly for the purpose of the business of market gardening. But to these definitions there is super-added this provision, section 29 (3)—"Where the land to which such agreement relates or so used and cultivated consists of part of a holding only, this section" (that is the provisions of the Act regarding compensation) "shall apply as if that part were a separate holding."

I confess to some difficulty in knowing how to combine these overlapping provisions. They certainly are not a model of perspicuity. But on the best consideration I can give them I think they contemplate two different kinds of holdings, a major holding and a minor holding, a holding and a holding within a holding, and that they apply the term holding both to the holding as a whole and to the particular part of the holding. It is not

to prevent a piece of land held by a tenant being a "holding" in the general Jan. 28, 1913. sense that part of it is cultivated as a market garden. If part of the holding is cultivated as a market garden the provisions of the 29th section are to apply to the part as if it were a separate holding. But the whole or the part, the holding in the major sense or in the minor, must, if the clauses providing market-gardening compensation are to apply, be cultivated wholly or mainly as a market garden. This cannot be said of the whole of this holding. Of what, if any, part of it can it be said? I think it must be answered that no part of the holding can be pointed out which prior to 1st January 1898 was, or indeed since that date has been, in use or cultivation as a market garden, because the market gardening such as it has been has been ambulatory, and for such a state of things the Act makes no provision, and probably did not mean to do so. For I am unable to agree with the learned Sheriff that fair and equitable considerations justify the application of the provisions of the Act to what I have called an ambulatory market-garden holding. It seems to me that considerations of equity are out of place in any case in the interpretation and application of a statute, and that a landlord is more particularly entitled to except to their admission where, as here, a statute is attempted to be applied in such a manner as to impose burdens on him in contempt of contract, and to demand that it be strictly interpreted and strictly applied. There is therefore in my opinion no holding, in the sense of the Act, to which the special provisions for market-gardening compensation apply.

Second. Assuming that the Sheriff's view as to the equitable construction is to find acceptance, was this ambulatory area in use or cultivation *as a market garden* in the sense of the Act? This at once brings one up against the question, Did the Act of 1897, and does this Act of 1908, really throw to the winds a lease such as that in question entered into prior to its date, and empower a tenant, who is by contract under definite restrictions, to contravene such restrictions, grow what crops he chooses, erect what structures he thinks proper, and then come on his landlord at the end of the lease for compensation for the improvements he has thus forced upon the latter? And this question is the more important, in that it is contended, and not without reason if the premise is correct, that erection or enlargement of buildings for market-gardening purposes without the consent of the landlord gives to the tenant of a market garden a right to compensation, whereas if he were tenant of an arable farm he would (section 20) only have a certain limited right of removal.

I do not find that the Act of 1908 goes this length in its interference with contracts already made. I say so for two reasons: First. The Act, section 23, which, notwithstanding that there may be contracts to the contrary, confers freedom of cropping and disposal of produce, only applies to arable lands, and section 29 must be read in the light of section 23. Second. I think that the statutory provisions in question only apply to land used or occupied for market-garden purposes generally, that is, to land which is held under agreement enabling it to be turned to market-gardening purposes without restriction, or to land so held under restrictions, subject to those restrictions. That is to say, in this latter case, where improvements specified in the Third Schedule to the Act or any of them can be compe-

Jan. 28, 1913. tently made by the tenant under the terms on which he holds his lands, and are made, then and then only will the Act give him a right to compensation. This is a different thing from saying that the inclusion of certain improvements in the Third Schedule authorises contravention of the conditions of the holding, and confers a right of compensation in respect of such contravention. As in any view the land in question under rhubarb was in use or cultivation in contravention of the conditions under which it was held, I do not think that it was in use or cultivation as a market garden in the sense of the Act, and therefore that its provisions as to compensation do not apply.

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I pass over for the present the third question.

Fourth. Assuming improvements to have been made which would have brought this holding under the provisions of the Act, were they barred from having that effect by prior written notice of dissent from the landlord? I think they were. A condition in the lease precluding the making of a scheduled improvement is in my opinion sufficient written notice of dissatisfaction to satisfy the condition of bar. The tenant cannot found on a breach of the lease as bringing him under the provisions of this Act, and then plead a continued breach as giving him right to compensation under the Act.

To revert now to the third question. The Act, section 29 (2), makes it a condition precedent to the provisions for compensation applying, in the case of leases current at 1st January 1898, that the tenant "has 'then'" executed, without exception on the part of the landlord, some one or more of the improvements enumerated in the Third Schedule to the Act. The Sheriff has, not unnaturally, interpreted "has then" as meaning "has at or prior to that date"; but he was evidently not aware that the words had, in the case of *Smith v. Callander*,¹ been construed by the House of Lords as meaning "has thereafter." This decision is binding on us, and as the Sheriff's determination depends entirely upon the interpretation which he puts upon this passage in the Act, it follows that it is not well founded. From the statement of the case I think that we must assume that improvements of the class enumerated in the Third Schedule to the Act were made after 1st January 1898, and therefore that the third of the questions which I have suggested for consideration would fall to be answered in the affirmative. In view, however, of the conclusion to which I have come on the other three questions, this matter is, in my opinion, of no importance.

For the reasons stated I think that the first question in the case must be answered in the negative, and that the second is superseded.

LORD MACKENZIE.—The question in this case is whether part of the farm of Easter Drylaw, which was let by lease dated in 1892 (with an addition in 1894), and which the tenant left at Martinmas 1911, is to be held a market garden under the Agricultural Holdings (Scotland) Act, 1908, so as to entitle the tenant to claim compensation for improvements of the nature provided for by the Third Schedule. The special provisions as to market gardens are contained in section 29 of the Act, and the question in the present case arises on subsection (2), which is as follows:—[His Lordship

¹ 3 F. (H. L.) 28.

quoted the subsection]—Under this subsection two conditions must be fulfilled before a tenant is entitled to claim compensation for improvements comprised in the Third Schedule. It must be shown—(1) that the holding was at 1st January 1898 in use or cultivation as a market garden with the knowledge of the landlord, and (2) that the tenant thereof has “then” executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, the improvements in respect of which he claims compensation. The facts stated in the present case by the arbiter and the Sheriff-substitute are that from the outset the tenant grew market-garden produce at Easter Drylaw, and that from 1st January 1898 down to the expiry of the lease 50 acres (although not the same 50 acres) were in cultivation as a market garden. No question is raised in the case as to the landlord not having knowledge that 50 acres were being cultivated as a market garden on 1st January 1898, or as to the cultivation as at that date having been in contravention of any of the provisions of the lease. Whether there has been compliance with the first condition of the subsection is purely a question of fact, and upon this question of fact parties are agreed. The provisions of the subsection so far are therefore satisfied.

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The difficulty arises upon the question whether there has been compliance with the second condition of the subsection. The view upon which the Sheriff-substitute has decided against the appellant proceeds upon a construction of the word “then” which he takes to mean as at 1st January 1898. If the Sheriff-substitute is wrong in this—if the word “then” must be construed as “thereafter”—then the rest of his opinion is in favour of the appellant. Now, in coming to the conclusion that he did, it is evident that the attention of the Sheriff-substitute had not been directed to the case of *Smith v. Callander*.¹ The Act under consideration there was the Market Gardeners (Scotland) Act, 1897, section 4, but the provisions of that Act are so similar to the present, that what was said there applies here. The opinion of Lord Kyllachy in the Court of Session, and the views expressed by the Lord Chancellor, Lord Shand, and Lord Davey, in the House of Lords are distinct authority for construing “then” as meaning “thereafter.” The ground, therefore, upon which the Sheriff-substitute’s opinion rests cannot stand. The word “then” in section 29 (2) must be construed as “thereafter.” There is no question that the improvements for which the tenant here claims compensation were executed after 1st January 1898, therefore so far as this is concerned there has been compliance with the second condition of the subsection.

More serious difficulties, however, remain, one of which is whether, in order to entitle the tenant to compensation, that part of his holding which was in cultivation as a market garden at the expiry of his lease requires to be the same as that which was in cultivation at 1st January 1898. The Sheriff-substitute’s view is that the tenant does not lose his right to claim compensation by changing from one part of his holding to another in the growing of market-garden produce. In this I agree. The definition clause of the Act, section 35, provides that “market garden” means

¹ 2 F. 1140, *aff.* 3 F. (H. L.) 28.

Jan. 28, 1913. a "holding cultivated, wholly or mainly, for the purpose of the trade or business of market gardening," and that "holding" means "any piece of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord." Subsection (3) of section 29 provides: "Where the land to which such agreement relates or so used and cultivated consists of part of a holding only, this section shall apply as if that part were a separate holding." The respondent's argument was that the statute implied a continuity in cultivation, and that in order to have continuity the tenant was bound to show that he had executed the improvements in respect of which he claimed compensation at the time on the same area as was in cultivation as a market garden at 1st January 1898. The argument was also pressed that in order to give the word "thereon" in the second subsection its proper construction, it must refer to the holding or part of the holding which was in cultivation as a market garden at 1st January 1898. Owing to the phraseology I am unable to say that the matter is free from difficulty, but upon the best consideration I have been able to give to the matter the meaning of section 29 (2) seems to be this: If a holding is stamped as at 1st January 1898, either in whole or in part, with the character of a market garden, and if value is left to the landlord or the incoming tenant in that holding, either as a whole or in part, to an extent not greater than the area which was in cultivation as a market garden at 1st January 1898, then, if the improvements which have created that value are of the character contemplated by the Third Schedule, and if the other conditions of the statute have been complied with, the tenant has a claim for compensation. As regards the necessity for continuity, that question does not really arise for determination here. There was a continual cultivation though not of the same 50 acres. I may say, however, that the necessity for continuity seems to me to be implied from the language of subsection 2 where it says that the provisions of the section shall apply in respect of the holding "as if it had been agreed in writing after that date that the holding should be let or treated as a market garden." Applying this provision to the facts of the present case, it means that the holding must to the extent of 50 acres have been continually treated as a market garden. Accordingly I am not prepared to hold that the tenant's claim fails because the situation of the 50 acres upon the holding has changed from time to time.

I now come to consider what appears to me to be the most difficult point in the case. Section 29 (2) deals with improvements which have been executed by the tenant without previous written notice of dissent by the landlord. If previous to the execution of the improvements the landlord has given notice of dissent, then one of the conditions precedent has not been fulfilled and the tenant can have no claim for compensation. Now the claim in the present case is thus described in the case stated by the arbiter. "The tenant's occupation of the subjects referred to expired on 28th November 1911, and, on 10th November 1911, he intimated a claim under the Agricultural Holdings (Scotland) Act, 1908, in which he claimed, *inter alia*, the sum of £2163, 17s. 7d., being the value of the improvement claimed to have been

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effected by him on said holding or parts thereof by the planting thereon of Jan. 28, 1918. the vegetable crops (limited in the claim to rhubarb stools) which continue ^{Taylor v.} productive more than two years, and the erection of buildings for the pur- ^{Steel-} pose of trade or business of a market gardener, all as detailed in schedule 3 ^{Maitland.} of said claim." "In the growing of forced rhubarb it was proved:—(1) That ^{Lord Mac-} the stools are kept in the forcing-house for from six to eight weeks; (2) ^{kenzie.} That thereafter they are removed to the fields from the house; (3) That the stools require from three to five years' nursing in the field to recover their full vigour." Now, the factor on the estate wrote to the tenant on 4th November 1903 in the following terms:—"Dear Sir,—I beg to draw your attention to the terms of your lease of Easter Drylaw Farm, and shall be obliged if you will kindly explain what your intentions are with regard to the brick structure you are erecting on the field to the west of the garden. I may mention that the conditions of the lease will be strictly enforced." He received a reply dated the 5th. "The building I am erecting is a forcing-house for growing rhubarb." Now, the letter of 4th November 1903 was a written notice by the landlord. If there could be any doubt reference may be made to section 35 (3). It is, in my opinion, a notice of dissent within the meaning of section 29, subsection 2, in so far as the improvements by the tenant now claimed for were in contravention of the stipulations in his lease. On the facts of the case it does not appear that any question can arise as to the letter having been received by the tenant previous to the execution of these improvements. Whether the improvements in respect of which the present claim for compensation is made were in contravention of the terms of the lease is in my opinion not a question of law but a question of fact, and must be determined by the arbiter. The lease specially provides that although the farm is let primarily as an agricultural subject, the tenant is to be entitled to use all or so much of the land of the farm as he may think proper for the purposes of a market garden, but subject always to the conditions therein set forth. I do not think it necessary to refer in detail to these, because their application to the facts of the present case is not for the Court but for an agricultural expert. If in executing the improvements in question the tenant has contravened his lease, the result of this is to exclude the application of section 29 (2), and is not merely to found a claim of damages. It was argued by the Dean of Faculty that the effect of section 23 of the Act was to delete from the lease for the purposes of this case all the cropping clauses in it. Section 23, however, does not deal with market gardens but only with arable land. The fact that section 23 does strike out the provisions of every lease regarding the method of cropping arable lands, but says nothing about market gardens, is a strong reason for inferring that the Legislature never intended the Act to have any such effect as that contended for by the appellant. If the appellant's argument were sound, then the provisions of section 29 (2) would apply here as if it had been agreed in writing after 1st January 1898 that the holding should be let or treated as a market garden free from restrictions. I am unable to see how that view can be correct, where, as here, the landlord before the improvements were executed had directed the tenant's attention to the terms of his lease, which contains express restrictions, and had told him they would be strictly enforced. In this view of the case it is right to

Jan. 28, 1913. say as regards the second question put to us, which raises the question of personal bar, that, in view of the terms of the letter I have already referred to, I do not see ground for holding that the landlord can be held to have acquiesced in the execution of improvements contravening the lease when the tenant had express written notice that its terms were to be enforced. Although any point on the second question was given up by the appellant, I think it right, taking the view I do of the case, to express an opinion upon it. On the facts as stated in the case, I do not see how we can give effect to the plea of bar.

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The answer to the first question should, in my opinion, be that the Court find that the provisions of section 29 (2) apply to the 50 acres which were under cultivation at the expiry of the lease, but in so far only as the cultivation thereof had not been in contravention of the terms of the lease; further find that the tenant has a claim for compensation for the erection of the forcing-house in question, but only in so far as it was not erected or enlarged in contravention of the terms of the lease; and continue the cause in order that parties may obtain the opinion of the arbiter: and, as regards the second question, that it is unnecessary to answer it, the appellant not having insisted in his plea of bar.

The Lord President intimated that LORD KINNEAR agreed with Lord Mackenzie's opinion.

THE COURT pronounced an interlocutor in the following terms:—

"Recall the interlocutor of the Sheriff-substitute of 23rd August 1912; find in answer to the first question of law in the case that the provisions of section 29 (2) apply to the 50 acres which were under cultivation at the expiry of the lease, but in so far only as the cultivation thereof had not been in contravention of the terms of the lease; further find that the tenant has a claim for compensation for the erection of the forcing-house in question, but only if and so far as the said forcing-house constitutes an improvement in connection with a cultivation which was not prohibited by the terms of the lease; find it unnecessary to answer the second question of law in the case, and remit to the arbiter to proceed; *quoad ultra* continue the cause."

GUILD & GUILD, W.S.—JOHN C. BRODIE & SONS, W.S.—Agents.

No. 77. JOHN STURROCK, Pursuer (Reclaimers).—*Chree, K.C.—D. P. Fleming.*
Jan. 29, 1913. GEORGE HENRY CARPHIN (John Logie Robertson's Trustee), Defender
(Respondent).—*Sol.-Gen. Anderson—Kemp.*

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Bankruptcy — Sequestration — Trustee — Personal liability — Adoption of bankrupt's contract by trustee.

The trustee on a bankrupt estate sued the former partner of a dissolved firm, of which the bankrupt had been a member, for a debt due to the bankrupt under the agreement of dissolution. The defender was assoilzied on the ground that the pursuer refused to implement the obligations of the bankrupt under the agreement.

Held that the trustee, by thus raising an action founded on the agreement, had not adopted the agreement so as to make himself personally liable for the obligations of the bankrupt under the agreement.

ON 12th April 1912 John Sturrock, solicitor, brought an action against G. H. Carphin, C.A., trustee on the sequestrated estates of the deceased J. L. Robertson, W.S., as such trustee and as an individual. The action concluded for declarator that the defender "has adopted a memorandum of agreement between the said deceased John Logie Robertson and the pursuer, dated 30th December 1907, providing for the dissolution, as at the 10th day of November 1907, of the firm of Wylie & Robertson, law-agents and conveyancers, Edinburgh, of which the said John Logie Robertson and the pursuer were the partners; and that the said defender is now bound as trustee foresaid and as an individual to implement the obligations therein undertaken by the said John Logie Robertson, and that in particular he is bound to free and relieve the pursuer of all claims and liabilities to which he is subject or which he has paid as a partner of the said dissolved firm of Wylie & Robertson," and for decree ordaining the defender to make payment to the creditors of the dissolved firm of Wylie & Robertson of the firm's outstanding debts, amounting to about £2000, and to the pursuer of a sum of £112, being the balance of firm debts paid by him, for which he had a claim of relief against Robertson's estate under the memorandum of agreement.

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2D DIVISION.
Ld. Ormisdale

The pursuer and J. L. Robertson carried on business in partnership as law-agents under the firm name of Wylie & Robertson until 1907, when the business was dissolved under the memorandum of agreement mentioned in the summons. By this agreement it was arranged that Robertson should take over the whole assets and liabilities of the firm and should relieve the pursuer of all claims against him as partner of the firm. Robertson died in 1908, and his estates were thereafter sequestrated, the defender being appointed trustee.

On 20th March 1909 the defender, Carphin, as J. L. Robertson's trustee, had brought an action* against the pursuer, Sturrock, for recovery of a sum which he alleged was due by Sturrock to the dissolved firm of Wylie & Robertson in respect of profits overdrawn by him, and which accordingly was an asset of the firm belonging to Robertson under the memorandum of agreement. In that action it was ascertained that Sturrock was liable to account for a sum of over £700, but that he had paid, or had been called upon to pay, firm debts to a greater amount, for which he had a claim of relief against Robertson's estate under the memorandum of agreement, and as Carphin refused to implement Robertson's obligation under the agreement to relieve Sturrock of these debts, Sturrock was assoilized.

The pursuer in the present action averred:—(Cond. 5) "The ground of action [in the case *Carphin v. Sturrock*] was that the sum sued for being a debt due by the present pursuer to his said firm of Wylie & Robertson was one of the assets of that firm to which the said John Logie Robertson acquired right under said memorandum of agreement of dissolution. The defender founded in said action upon said memorandum of agreement of dissolution, and thus adopted it, and he has become liable for the obligations therein undertaken by the said deceased John Logie Robertson." (Cond. 6) "Notwithstanding that under said memorandum of dissolution the pursuer was freed and relieved of all claims and liabilities as a partner of the firm of Wylie & Robertson, claims amounting *in toto* to a large sum have been made

* This action also depended before Lord Ormisdale, and was decided by him upon the same date as the present case.

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upon him by the creditors of the said dissolved firm, and he has been compelled to pay large sums to these creditors. . . . In order that the pursuer may be freed and relieved of the remainder of the firm's debts which are still due, it is necessary that the defender should pay to the creditors of the firm whose debts still remain outstanding the sums respectively due to them."

The pursuer pleaded;—(1) The defender, Carphin, having enforced the provisions of said memorandum of agreement of dissolution against the pursuer, has thereby adopted it, and is now liable to implement the obligations therein undertaken by the said John Logie Robertson, and in particular to free and relieve the pursuer of all claims and liabilities which remain outstanding against said firm, and the pursuer is accordingly entitled to decree as concluded for.

On 29th June 1912 the Lord Ordinary (Ormidale) pronounced an interlocutor dismissing the action.*

The pursuer reclaimed, and the case was heard before the Second Division on 14th and 15th January 1913. In the action between the same parties, in which Carphin was pursuer, a reclaiming note on a question of expenses (with which this report is not concerned) was presented and heard on the same dates.

Argued for the reclaimer;—A trustee on the estates of a bankrupt tenant, who entered upon and managed the subjects, was held to have adopted the lease and to be personally liable for all the prestations¹: a trustee in bankruptcy who sisted himself in an action originally brought against the bankrupt, thereby "adopted the current contract of litiscontestation," and so became personally liable for the expenses of the cause²: and a trustee on the sequestrated estate of a firm of shipowners, who authorised the business to be carried on for behoof of the estate, was personally liable to cargo-owners for damage to cargo caused by the fault of the master of the vessel.³ The principle underlying these cases was that rights and obligations under a contract were inseparable, and that a trustee

* "OPINION.—[After dealing with the case of *Carphin v. Sturrock* and stating his reasons for assoilzieing the defender]—With regard to the action *Sturrock v. Carphin and Another*, I cannot hold that it is of the same nature as *Doig v. Laurie*, 5 F. 295. In that case there was a definite liability as cautioner resting on the pursuer, clearly ascertained by a letter of guarantee, which also bore that the guarantee was to remain in force until recalled in writing. The pursuer had so recalled the guarantee, but the defender took no steps to have his name removed from the cash-credit bond under which the bank had already made advances to nearly the amount of the guarantee. In those circumstances the pursuer was held to be entitled to call in aid an order of the Court. Here the circumstances are totally different. I cannot give relief when there has not been, and may never be, distress, and, as I read the pursuer's averments, that is the position of matters with regard to the majority of the claims which are enumerated in the summons. To the extent of claims actually made I should have been prepared to pronounce such an order as is asked if the conclusions of the summons had been so restricted, or, indeed, capable of being so restricted. This action in my judgment falls to be dismissed."

¹ *Ross v. Monteith*, (1786) M. 15,290; *Nisbet & Co.'s Trustees*, (1802) M. 15,268; *Kirkland v. Gibson*, (1831) 9 S. 596, *aff.* (1833) 6 W. & S. 340; *Dundas v. Morison*, (1857) 20 D. 225.

² *Torbet v. Borthwick*, (1849) 11 D. 694, *per* Lord Fullerton, at p. 702.

³ *MacKessack & Son v. Molleson*, (1886) 13 R. 445.

could not enforce the one without accepting liability for the other.¹ Jan. 29, 1913. The same principle should be applied in the present case. The defender could not have adopted the memorandum of agreement ^{Sturrock v. Robertson's Trustee.} more emphatically than by making it the basis of an action against the present pursuer, and it followed that he was now bound to implement all the obligations thereunder. The pursuer was entitled to relief from all claims whether or not there had been distress. He was not bound to remain under any obligation of debt.² He was therefore at least entitled to decree in terms of the declaratory conclusions of the summons.

Argued for the respondent;—The cases cited by the reclaimer in which trustees had been held personally liable had no application. They were all instances of continuing contracts under which the trustee took up and carried on a business. In the present case the trustee merely founded on an existing contract as giving him a right to a particular asset. His actings did not amount to adoption, but were only an incident in the discharge of his duty of realisation of the estate.³ The cases of *Craig's Trustee*⁴ and *Dingwall*⁵ merely illustrated the principle that a party to a contract could not enforce his rights without being prepared to implement his obligations, a principle which the defender was ready to admit, but which did not support the pursuer's claim in the present action. The defender was entitled to absolvitor from the conclusions of the summons so far as directed against him personally.

At advising on 29th January 1913,—

LORD SALVESEN.—In this action the pursuer seeks to have it found and declared that the defender, Carphin, adopted a memorandum of agreement between the deceased John Logie Robertson and the pursuer; and that the defender, as trustee on Robertson's estate, is now bound, as such trustee and as an individual, to implement the obligations therein undertaken by the bankrupt; and, in particular, that he is bound to free and relieve the pursuer of all claims and liabilities to which he is subject or which he has paid as a partner of the dissolved firm of Wylie & Robertson. The Lord Ordinary has dismissed the action on the somewhat narrow ground that he cannot give relief where there has never been and may never be distress, and that this is the position of matters with regard to the majority of the claims enumerated in the summons. I cannot agree that that is a sufficient ground for disposing of the action as the Lord Ordinary has done, and it is necessary therefore that we should examine the case upon the merits.

The material facts are as follows:—The late J. L. Robertson carried on the business of a solicitor in partnership with the pursuer under the firm name of Wylie & Robertson from November 1898 to November 1907. The copartnership was dissolved by agreement, the dissolution to take effect as at 10th November 1907. Under the agreement contained in the minute

¹ *Craig's Trustee v. Malcolm*, (1900) 2 F. 541; *Dingwall v. Burnett*, 1912 S. C. 1097; *Goudy on Bankruptcy*, (3rd ed.) 375.

² *Cunningham v. Montgomerie*, (1879) 6 R. 1333, *per Lord Deas*, at p. 1339; *Doig v. Lawrie*, (1903) 5 F. 295.

³ *McGavin v. Sturrock's Trustee*, (1891) 18 R. 576; *Imrie's Trustee v. Calder*, (1897) 25 R. 15.

⁴ 2 F. 541.

⁵ 1912 S. C. 1097.

Jan. 29, 1913. of dissolution signed by the partners Mr Robertson was to continue the business for his own behoof, he taking over the whole assets and liabilities of the firm; and it was expressly stipulated that the pursuer should not be liable for any of the debts apart from the firm's liability to the bank, which does not enter into this case. Mr Robertson continued to carry on business until his death on 23rd June 1908. His estates were afterwards sequestrated, and the defender, Carphin, was elected trustee. As such he undoubtedly became bound to implement the agreement of the bankrupt; but the question is whether he has become liable to do so as an individual, in other words, to pay out of his own pocket in the first instance, with such relief as he may have against the estate in his hands, the whole debts of the dissolved firm.

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The pursuer maintains that he has become so liable on the ground that he adopted the contract contained in the minute of dissolution. Such adoption is said to be inferred from the circumstance that in another action which we have just disposed of he sued for and established the pursuer's liability to account for a sum of £732, 16s. 7d., representing the extent to which the pursuer had overdrawn his share of the profits of the dissolved firm during its existence. Now, the pursuer has been assoilized in that action on the ground that the defender refused to implement the obligations of the bankrupt under the minute of agreement. The defender has accordingly not recovered any sum from the pursuer for behoof of the estate which he administers; and yet it is said that he has rendered himself personally liable by raising the action for all the debts of the dissolved firm. The Lord Ordinary has given countenance to this view in some of the observations contained in his opinion with reference to the case of *Carphin v. Sturrock*. He says: "The pursuer" (that is Mr Carphin) "is compelled to seek elsewhere for his title to sue, and finds it only in the minute of dissolution. If that be so, then the ratio of the decision in *Craig's Trustee v. Malcolm*¹ covers the present case. It is only by adopting the minute that the trustee can show that what was once an asset of the firm of Wylie & Robertson had become a part of the bankrupt's estate." I think it would have been more correct to say that the trustee founded upon the contract contained in the minute of dissolution, but that is a very different matter from adopting it in the sense in which the trustee on the sequestrated estate of a farmer adopts a lease so as to make him personally liable for arrears of rent due to the landlord. Such adoption may be inferred from possession being taken of the subjects let when such possession is not merely for the purpose of realisation of the estate. It has been held in a long series of cases, of which *Ross*² was the earliest cited, that such adoption of a lease by a trustee on a bankrupt's estate renders the trustee personally responsible for implement of the tenant's obligations. In such a case, however, the position of the landlord is changed by the action of the trustee, but for which he would be entitled to resume possession of the subjects let; but the principle upon which this legal result has been reached is not applicable to such a contract as we have here, except to the effect (of which the present

¹ 2 F. 541.

² M. 15,290.

pursuer has already received the benefit) that the trustee is not entitled Jan. 29, 1913. to enforce the contract unless he is prepared to implement the obligations incumbent on the bankrupt. The trustee erroneously believed that he could do so, but he has had to pay the penalty of his mistake in law by having to submit to a decree of absolvitor and to a partial finding for expenses against him. I know of no authority for holding that such a mistaken course, which is not said to have in any way prejudiced or changed the position of the pursuer, should have the extraordinary result of making the trustee personally responsible for the bankrupt's obligations towards the person whom he unsuccessfully sued. The penalty of his rashness in this case would represent a sum of between two and three thousand pounds payable out of his own pocket, for which he can only partially recoup himself, if at all, out of the estate under his charge.

If the principle contended for by the pursuer were sound it would be capable of extensive application. Thus the trustee on the estate of a bankrupt shipowner sues for a balance of freight due to the bankrupt. He is met with a claim of damages for injury to the cargo largely in excess of the freight sued for. The trustee honestly believes that the claim of damages is unfounded, and that it is his duty to prosecute the action. The contrary is found by the Court; and according to the pursuer not merely must the trustee fail in his action, but because he brought it he must be held to have adopted the charter-party to the effect of becoming personally liable for all the shipowner's obligations under the contract of carriage. One is not surprised to find that there is no authority for such a proposition. Apart from the cases upon current leases to which I have already referred, the nearest analogy was said to be found in the liability of a trustee to pay the expenses of a successful action against the bankrupt to which he has sided himself as a party. The reason for this liability, according to the pursuer, was that he has adopted the contract of liti-contestation. This so-called contract is a mere legal fiction for which no doubt there is respectable authority; but it is not upon this ground that the trustee is rendered personally responsible for such expenses. It is because he has elected to side himself as a party to the litigation, and so must incur all the risks of an ordinary litigant. He has, in short, taken control of the pending suit, which, but for his action, would at once have been decided adversely to the bankrupt. There is really no analogy between such a case and that with which we are now dealing. The decision most strongly founded on, that of *Craig's Trustee v. Malcolm*,¹ was not one where the personal liability of the trustee was in issue. The sole question was whether the landlord was entitled to set arrears of rent against a claim by the trustee for the price of certain sheep stock as determined by the valuation of arbiters, which in terms of a clause in the lease he had insisted that the landlord should take over at a valuation. The true ground of judgment was thus stated by Lord Moncreiff in a single sentence: "He thus appealed to the contract, and having done so, he cannot enforce the claim which he has thus obtained against the landlord without satisfying or giving credit for the landlord's counter claims under the same contract." That is merely an

¹ 2 F. 541.

Jan. 29, 1913. application of a principle which was given effect to in somewhat similar circumstances in the case of *Dingwall*.¹ The point now raised might have arisen in *Malcolm's case*² if the valuation of the sheep stock had been less than the arrears of rent due to the landlord, but the decision gives no countenance to the view that in such circumstances the trustee would have been held personally liable for the difference.

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I am therefore of opinion that the unsuccessful action of the trustee founded upon the contract contained in the minute of dissolution did not constitute an adoption by him of that agreement so as to infer personal liability. The trustee is therefore entitled to be assoilized from the conclusions so far as directed against him as an individual; and as no question has been raised with regard to his liability as trustee, the action *quoad ultra* should be dismissed. The pursuer must, of course, pay the expenses of this action.

The LORD JUSTICE-CLERK, LORD DUNDAS, and LORD GUTHRIE concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, assoilized the defender from the conclusions of the action so far as directed against him as an individual, and *quoad ultra* dismissed the action.

PURVES & SIMPSON, S.S.C.—WYLIE, ROBERTSON, & SCOTT, Solicitors—Agents.

No. 78.

WILLIAM CLARK AND OTHERS (Sir William Collins's Trustees),
First Parties.—*Clyde, K.C.—D. P. Fleming.*

Jan. 29, 1913.

Collins's Trustees v. Collins.

MRS CORNELIA THOMPSON PATTISON OR COLLINS AND OTHERS (Alexander Glen Collins's Trustees), Second Parties.—*Macmillan, K.C.—Strain.*

WILLIAM ALEXANDER COLLINS AND ANOTHER, Third Parties.—
Macmillan, K.C.—Strain.

MISS CORNELIA PATTISON COLLINS, Fourth Party.—*Ingram—Mitchell.*

THE OFFICIAL RECEIVER IN BANKRUPTCY, Fifth Party.—
Sandeman, K.C.—J. A. T. Robertson.

JOHN WALTER COLLINS, Sixth Party.—*Moncrieff, K.C.—Hon. W. Watson.*

Succession—Faculties and Powers—Validity of exercise of power—Separation of valid and invalid provisions—Clause of forfeiture in the event of deed of appointment being impugned—Effect of clause on validity of deed.

Succession—Conditions—Clause of forfeiture in the event of gift being impugned—Impugning—Statement of contentions in special case that conditions of gift invalid.

A deed of appointment containing both valid and invalid provisions concluded with a forfeiture clause, which declared that any of the appointees who impugned the appointment "in any manner of way" should forfeit all interest, "to the same effect" as if they had been expressly excluded from any share in the appointed fund.

In a special case brought to determine the validity of the deed of appointment, held that the effect of the forfeiture clause was to bind the conditions of the deed so closely together that (apart from other

¹ 1912 S. C. 1097.

² 2 F. 541.

considerations) it was impossible to separate the valid provisions from Jan. 29, 1913. those which were *ultra vires*, and that accordingly the deed was wholly invalid, and that the fund fell to be divided as if there had been no deed. Collins's Trustees v. Collins.

Held further that parties to the special case who were appointees under the deed, and who had stated contentions questioning the validity of provisions and conditions affecting their shares, would not thereby, under the forfeiture clause, have forfeited their right to benefit under the deed had the deed been valid.

Observations (per Lord Dundas) on the rules regarding the separation of valid and invalid conditions in a deed of appointment.

SIR WILLIAM COLLINS died in 1895 leaving a will by which he 2D DIVISION. directed his trustees, *inter alia*, to hold two-tenths of the residue of his estate for behoof of his son, Alexander Glen Collins, in liferent "and his children in fee, in such proportions and under such terms and conditions as the said Alexander Glen Collins may appoint by a writing under his hand, which failing equally among such children."

Alexander Glen Collins died in 1911 survived by five children, William, Godfrey, Charles, Cornelia, and John. He left a deed of appointment, dated 30th June 1910, dealing with the fund in question. By this deed, the exact terms of which are not material to this report, he divided the fund among his children in certain proportions, but he adjected conditions which were ultimately decided to be *ultra vires*, and conferred rights on persons who were not objects of the power. The deed contained this clause:—"And I do hereby specially provide and declare that should any one of my said sons or my daughter in any manner of way quarrel or impugn the apportionment hereby made or the conditions attached by me to same, or should any person or persons in right of or as representing any of my said sons or my daughter in any manner of way interfere or seek to interfere in the arrangements hereby made by me, then and in that event the son or daughter so quarrelling or impugning the same, or in regard to whose share any interference takes place, shall forfeit all share and interest in the apportionments hereby made, and that to the same effect as if I had entirely excluded him or her from any share in the succession to the said two tenth shares of the residue of my said father's estate: Declaring further, that the share or shares so forfeited or lapsing shall fall and accresce in equal proportions, share and share alike, to and among my remaining children before named and their respective fore-saids, exactly as if the same had been directly given to them along with the sums originally apportioned as aforesaid, and subject to all the conditions applicable to same."

A special case was presented to determine the validity and effect of the deed of appointment. The *first parties* were Sir William Collins's testamentary trustees; the *second parties* were trustees nominated by Alexander Glen Collins in the deed of appointment; the *third parties* were Alexander Glen Collins's sons William and Godfrey; the *fourth party* was his daughter Cornelia; the *fifth party* was the Official Receiver in Bankruptcy, as trustee on the bankrupt estate of his son Charles; and the *sixth party* was his son John.

The fourth and sixth parties contended that certain conditions adjected to their shares under the deed (including the restriction of their right to a liferent and the destination of the fee to strangers to the power) were invalid and should be held *pro non scriptis*, and

Jan. 29, 1913. further, that they were entitled to state these contentions without forfeiting their rights in terms of the forfeiture clause.

Collins's Trustees v. Collins.

The second and third parties contended, *inter alia*, that the deed was wholly valid, and further, that the fourth and sixth parties, by impugning it in their contentions, had forfeited all their rights in the appointed fund.

The fifth party contended that the deed was wholly invalid, since it was impossible to separate the valid provisions from those which were *ultra vires*.

The following questions, *inter alia*, were stated for the opinion and judgment of the Court:—“(1) Is the appointment of the said two-tenths of residue contained in the said deed of direction and apportionment (a) wholly valid, or (b) only partly valid, or (c) wholly invalid? (5) If the third alternative of the first question be answered in the affirmative does the fee of the said two-tenths share of residue now fall to be divided equally among the five children of the said Alexander Glen Collins? (6) Have the fourth and sixth parties by reason of their contentions in this case quarrelled or impugned the apportionment made by the said Alexander Glen Collins by the said deed of direction and apportionment, or the conditions attached by him to the same, to the effect of forfeiting all right on the part of the said parties to take any benefit under the apportionment contained in the said deed?”

The case was heard before the Second Division on 16th and 17th January 1913.¹

At advising on 29th January 1913,—

LORD DUNDAS.—[After narrating the facts and dealing with the portions of the deed which were found to be *ultra vires*].—But it was urged that, assuming parts of the deed of appointment to be *ultra vires* of the grantor, these could, and ought to be, severed from the rest and treated *pro non scriptis*. Counsel founded upon the latter branch of the “plain rule” laid down by the Lord Chancellor (Cairns) in *M'Donald*,² “that if you cannot disconnect that which is imposed by way of condition or mode of enjoyment from a gift, the gift itself may be found to be involved in conditions so much beyond the power that it becomes void. But where that is not so, where you have a gift to an object of the power, and where you have nothing alleged to invalidate that gift but conditions which are attempted to be imposed as to the mode in which that object of the power is to enjoy what is given to him, then the gift may be valid and take effect without reference to those conditions.” The rule thus laid down is authoritative; and the latter branch of it was expressed even more succinctly by Lord Kyllachy in *Middleton's Trustees*.³ But it seems to me that the present case falls under the first rather than under the second part of Lord Cairns's rule. It is manifest that if one attempts to sever the invalid portions of this deed from the rest, a relatively small part of it would be left standing. This was

¹ On the effect of the forfeiture clause the following authorities were referred to:—*Webb v. Sadler*, (1873) L. R., 8 Ch. 419; *Sugden on Powers*, (8th ed.) p. 526.

² (1875) 2 R. (H. L.) 125, *reversing* (1874) 1 R. 794.

³ (1906) 8 F., at p. 1043.

demonstrated when Mr Moncrieff, in his clear and able argument, indicated Jan. 29, 1913. precisely through what parts of the instrument it would, on his own showing, be necessary to draw one's pen. But what appears to me to afford an un- ^{Collins's Trustees v. Collins.} available basis for the view that this deed of appointment must be regarded as wholly invalid is the remarkable clause by which the granter specially ^{Lord Dundas.} provides and declares that should any of his said sons or his daughter in any manner of way quarrel or impugn his apportionment or the conditions he attached to it, or should any person representing any of his said children seek to interfere in the arrangements made by him, the child or person so quarrelling or impugning, or seeking to interfere, should forfeit all share or interest in the apportionments. The clause is, as far as I know, or as counsel could inform us, unique in an instrument of this kind. Its effect is, to my mind, to remove any doubts one might otherwise have entertained as to the possibility of severing, in the construction of this deed, gifts to objects of the power from invalid provisions, conditions, and declarations with which they are intermingled. The appointer himself has welded the mass of his instrument into an indissoluble whole. I think the provisions and declarations are so coupled and bound up with the gifts, such as they are, as to make their efficacy a condition of the gifts; and the result must be that the whole apportionment is invalid. I am therefore for answering head (c) of the first question in the affirmative.

I should here notice a separate argument which it was sought to base upon the forfeiture clause, but which is, in my opinion, quite untenable. It was suggested that the fourth and sixth parties, by reason of their contentions in this case, have quarrelled or impugned the deed of appointment, and thus forfeited all right to take benefit under it. I think the argument is futile. It is obvious that the fifth party, at all events, who takes no benefit under the instrument, and is outside the scope of the clause, could with impunity raise in Court any questions he thought fit as to the construction and meaning of the deed. The trustees also are manifestly entitled to obtain any necessary directions from the Court for their own safety in the matter. I cannot conceive that, if the trustees had raised a multipointing—and a special case of this kind is in substance the same—the fourth and sixth parties could have been held to imperil (indeed, *eo ipso*, to forfeit) their right to benefit under the deed in question by stating their views as to its proper meaning and construction, and claiming shares of the fund upon the footing that their contentions were well founded. The argument on this head was not very vigorously pressed, and I shall say no more about it.

It would serve no good end to review the numerous authorities referred to at the discussion. Each case of this kind must be decided upon a construction of the particular document or documents involved. Nor, if the view I take of this case is well founded, need we now attempt to define precisely how far the old Scots doctrine has been abrogated, about which Lord Deas, after observing that it was plain that the law of England differed in some respects from that of Scotland on this matter, said¹: "For instance, I agree with your Lordships that, if the deed of appointment is to be set aside at all, it must, according to our law and practice, be set aside *in toto*,

¹ Baillie's Trustees, (1862) 24 D., at p. 598.

Jan. 29, 1913. and the whole fund be equally divided. It would not be easy for any Scotch lawyer to doubt that"; the reason being, as Lord Curriehill, in the *Collins's Trustees v. Collins*, same case, explained,¹ "that you cannot tell what appointment the party entrusted with the power would have made, had he known that what he attempted to do was to some extent, at least, inept."² The old rule—clear and simple, though liable perhaps to lead, in some cases, to unfortunate results—was certainly modified by Lord Cairns's "plain rule," already quoted, derived from *Carver v. Bowles*³ and other English cases. Lord Cairns stated this rule to be "beyond all doubt,"⁴ and that it was not in any way disputed at their Lordships' bar; and Lord Selborne observed that the English cases were determined "on principles which, if sound in England, must be equally so in Scotland"⁵; but it is perhaps worth noticing that no Scots counsel seem to have been present. The precise extent to which the old rule was abridged or modified is not so plain. In *Gillon's Trustees*,⁶ the case of *Baikie's Trustees*,⁷ and Lord Curriehill's opinion in it were cited by Lord Rutherford Clark as conclusive authority. But the observations of that very learned Judge must, of course, be read *secundum subjectam materiam*; and the facts of *Gillon's case*⁶ certainly did not admit of the application of the rule of *Carver v. Bowles*,³ for no part of the fee of the fund there to be "divided" was given to any object of the power. It may be that, as was argued by one of the counsel in the present case, the old Scots rule has never been gone back upon where the whole fee is not apportioned to proper objects of the power but part of it is given to a stranger. However this may be, we are not now called upon, if the view I take of this case is right, to solve a problem which may sooner or later come up for definite determination.

On the whole matter, I think we ought to answer head (c) of the first question, and also the fifth question, in the affirmative; and all the other questions in the negative.

The LORD JUSTICE-CLERK, LORD SALVESEN, and LORD GUTHRIE concurred.

THE COURT answered head (c) of the first question and also the fifth question in the affirmative, and the sixth question in the negative.

DRUMMOND & REID, W.S.—WATT & WILLIAMSON, S.S.C.—MACKENZIE & FORTUNE, S.S.C.—J. & R. A. ROBERTSON, W.S.—J. & A. F. ADAM, W.S.—Agents.

¹ 24 D., at p. 596.

² See also *Watson v. Marjoribanks*, (1837) 15 S. 586, *per* Lord Mackenzie, at p. 591.

³ (1831) 2 Russ. & My. 301.

⁴ 2 R. (H. L.), at p. 131.

⁵ 2 R. (H. L.), at p. 135.

⁶ (1890) 17 R. 435.

⁷ 24 D. 589.

MRS MARGARET COYLE OR BROWN, Pursuer (Respondent).—

No. 79.

Moncrieff, K.C.—Keith.

JOHN WATSON, LIMITED, Defenders (Appellants).—*Horne, K.C.—*
Carmont.

Jan. 30, 1913.

Brown v.
John Watson,
Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—
"Accident"—Pneumonia following upon chill—Chill due to standing in a
draught while waiting to be raised from a mine.

During the working time in a coalpit the miners, owing to a wreck in the shaft of the mine, were ordered to ascend to the surface, and proceeded, in obedience to instructions, to the downcast shaft, where they were compelled to wait at a mid-landing for an hour and a half. During this period the miners, who had been sweating at their work, were exposed to a very strong draught from the air passing down the shaft for the ventilation of the mine, and on reaching the surface one of them complained of a chill. On this chill pneumonia supervened, and resulted in the death of the miner.

In an application by his dependants for compensation under the Workmen's Compensation Act, the arbitrator awarded compensation.

In an appeal *held* that there was no evidence on which it could competently be found that the deceased's death was due to an "injury by accident," and arbitrator's award *recalled*.

Drylie v. The Alloa Coal Company, Limited, supra, p. 549, distinguished.

In an arbitration under the Workmen's Compensation Act, 1906, in which Mrs Margaret Coyle or Brown claimed compensation for herself and her pupil children from John Watson, Limited, in respect of the death of her husband, John Brown, the Sheriff-substitute at Hamilton (Shennan) awarded compensation, and, at the request of the employers, stated a case for appeal.

The case set forth:—“(1) The deceased John Brown was in the employment of the appellants in No. 2 Pit, Gilbertfield Colliery, on 26th June 1911. On that day he started work as usual about 7 o'clock A.M., and seemed to be in his usual good health. (2) The place where the deceased worked was dry, and had a good current of air passing through it. (3) Between 8 and 9 o'clock A.M., in consequence of a wreck in the shaft, all the men in the pit where Brown started work were ordered to ascend to the surface. (4) Brown and the men who were working beside him proceeded towards the shaft of No. 2 Pit, by which they were usually raised to the surface. Under ordinary circumstances they were raised within a short time of reaching the bottom. On this day they were met on their way by an official who told them to proceed by the communication road to the shaft of No. 1 Pit. Here they had to wait at a mid-landing for about an hour and a half until the men from the lower seam, who usually ascended by this shaft, had been raised. (5) No. 1 shaft is the downcast shaft for the air current which ventilates the pit, and the current of air which entered the workings at the mid-landing passed round Brown's working place. No. 2 shaft is the upcast shaft. (6) The only evidence tendered regarding temperature related to 13th May 1912 (the day of the proof), when the manager found it 52½° at the mid-landing where Brown and his fellow-miners had been kept waiting, 53½° at Brown's working place, and 61° at No. 2 Pit bottom. There is no evidence as to the temperature at these places on 26th

Jan. 30, 1913. June 1911. (7) At this mid-landing of No. 1 shaft on 26th June 1911 a very strong current of air blew in on Brown and his fellow-miners who were waiting there to be raised. They had been sweating at their work (though their clothes were not wet from any other cause), and felt the down draught very cold, and complained of it at the time. After the men reached the surface Brown complained of feeling cold, his teeth were chattering, he complained of his feet being cold, and ran part of the road home to try to recover warmth. He remarked to a fellow-workman who accompanied him, 'I doubt I'm sent for.' (8) The next morning Brown went down the pit but he was unable to start work on account of illness, due to the chill incurred on the previous day. He returned home and went to bed, pneumonia supervened, and he died therefrom on 3rd July 1911."

Brown v.
John Watson,
Limited.

The case further stated:—"In these circumstances I found that the deceased John Brown died from the effects of injuries by accident received by him on said 26th June, while in the course of his employment with the appellants, and awarded compensation to the respondents."

The question of law was:—"Whether there was evidence upon which it could be competently found that the said John Brown sustained an accident arising out of and in the course of his employment on 26th June 1911?"

The case was heard before the Second Division on 30th January 1913.

Argued for the appellants;—There was no accident in this case. The current of air which blew in on Brown was normal and was designedly introduced into the mine. The wreck in the shaft was certainly an abnormal circumstance; but that could not be regarded as the accident causing Brown's death. This wreck was in the same position as the stoppage of the pump in *Drylie v. Alloa Coal Company, Limited*,¹ and there the Court held that the accident was not really that stoppage but the immersion of the miners in an unusual accumulation of water. Both that case and *Kelly v. Auchenlea Coal Company, Limited*,² were decided on the ground that the workman was exposed to certain exceptional circumstances. Here all that could be said was that the deceased, in obeying an order of the employers, was exposed to the ordinary conditions prevailing in the mine.

Argued for the respondent;—The circumstances of this case were identical with those of *Drylie's* case.¹ In both cases there was a breakdown in the machinery of the pit which disturbed the pit management; and in both cases the men had to leave the pit, and in doing so were kept waiting and suffered from exposure during that time. The only difference in the cases, viz., that in *Drylie*¹ the men were immersed in water while here they were immersed in cold air, was immaterial. The decision in *Drylie*,¹ therefore, ruled the present case. The accident here was the abnormal exposure of the deceased to the current of air in consequence of the wreck in the shaft. *M'Millan v. Singer Sewing Machine Company, Limited*,³ was distinguishable, because in that case there was no abnormal occurrence.

LORD JUSTICE-CLERK.—The case which has been referred to by counsel—the case of *Drylie*¹—is certainly the nearest to the one that is before us that can be referred to. But I think it is very clear that there is a marked

¹ *Supra*, p. 549.

² 1911 S. C. 864.

³ *Supra*, p. 346.

distinction between that case and the present. In both cases, undoubtedly, Jan. 30, 1913. something abnormal happened in the pit. In the one case what happened was that a pump broke down, and in the other case what happened was that a shaft got out of order. Now in *Drylie*,¹ as a consequence of the accident in the pit, a state of things was produced which was quite out of the ordinary working of the pit. There occurred an alarming accumulation of water, and that accumulation was obviously an abnormal thing, for although the pit was a wet one, that does not mean that water was allowed generally to accumulate so as to be dangerous. The accumulation of water caused alarm and induced the men who were working to quit their work and to go to the bottom of the pit, to be ready as soon as they could get into the cage to ascend to the surface; and while they were there the water, which was icy-cold, rose upon them up to their knees.

Brown v.
John Watson,
Limited.
Lord Justice-
Clerk.

That state of matters is quite different from the state of matters in the present case except in one particular element, namely, that in both cases the men who suffered had to stand in the pit for some time. But what appears to me to make the cases absolutely different is this, that in the one case the men were exposed to something which was entirely different from anything that they ever had to encounter in the pit before, whereas in this case there was nothing of that kind at all. There was no abnormality as regards the place at which they had to stand. The ventilation was working just as it usually worked, the air was coming down the shaft just as it usually came down, and there was nothing as regards the place where this man was standing which could be called an accident from any point of view. Is it to be said in these circumstances that the deceased has suffered from an accident because he caught a cold which ultimately developed into pneumonia, resulting in his death? I am quite unable to perceive how that can be held. It seems to me that the case is absolutely distinguished from that of *Drylie*¹; and therefore that the judgment of the arbitrator in this case was erroneous, and that we ought to answer the question accordingly.

LORD DUNDAS.—I agree. The question really comes to be whether or not this case is ruled by the case of *Drylie*,¹ which was decided last Saturday by a fuller bench than this. I have formed, with your Lordship, a clear opinion that the case is materially different from that of *Drylie*.¹ *Drylie's* case¹ was regarded by all the Judges as one lying very near the line of demarcation between liability and non-liability; but the majority of the Court refused to interfere with the arbitrator's decision, which put the case on the side inferring liability. The present case is, I think, plainly on the other side of the line. It was laid down quite clearly in *Drylie*,¹ as it had been in previous cases, that, if an applicant is to succeed, he must show, to start with, a definite accident of some sort, an occurrence involving something unusual, unexpected, and undesigned, with which the illness or death can be definitely connected. In *Drylie*¹ the majority of the Court thought that there was such an occurrence, namely, an unusual accumulation of ice-cold water at the pit bottom, in which, as an incident of his employment, the unfortunate *Drylie* found himself immersed up to

¹ *Supra*, p. 549.

Jan. 30, 1913. his knees, with the result that pneumonia and death followed. With regard to some observations made at the bar during the argument in this case, I should like to say that I did not consider that the breakdown of the pump in *Drylie's* case,¹ though it was a historical fact, explanatory of the unusual accumulation of water, was an essential point in the case. The accumulation of water might have arisen from some other cause. I find in the present case no proper analogue of any such occurrence. I cannot find here any accident. It looks to me very like the case of a man who, having got into a sweat in the course of his ordinary work—no uncommon occurrence—catches a cold which, unfortunately, develops into pneumonia, and he dies. At the most, it can be said that there was a wreck in one of the shafts—a fact, as it seems to me, of no particular importance in itself, and bearing no relation of physical causation to any injury the man sustained; that the men were ordered to leave the pit; and to leave it, instead of, as usual, by the upcast shaft, No. 2, by the downcast shaft, No. 1; that they had to wait at the mid-landing, while the men from the lower seam, who usually ascended by this shaft, were lifted up; and that Brown unfortunately caught a chill, which resulted disastrously. In all this, I cannot see any accident, within the meaning of the statute or the cases. The mere fact that the men were ordered to make their exit by one shaft instead of another will not do; and the surrounding facts, as your Lordship has pointed out, were normal, and not abnormal, so far as one can see. I think we must keep in view two things; first, that it is not every deviation from the normal routine of employment in a mine or elsewhere that will be sufficient to introduce the element of accident; and second, that an ordinary disease like pneumonia is not an accident, although it may arise from or be contracted by an accident. If one is to refer to cases, although I am not sure there is here much advantage in doing so, I should say that this case bears more resemblance to that of *M'Millan*² than it does to *Drylie*.¹ I confess the only hesitation I have felt about this matter is that one is differing from the conclusion of so experienced and able an arbitrator as Sheriff Shennan; but I am satisfied that his conclusion was not warranted by the facts found. Therefore, with your Lordship, I am for answering the question in the negative.

LORD SALVESSEN.—I am glad your Lordships have been able to reach the result which has just been expressed; because it indicates that the consequences of the decision of *Drylie's* case¹ are not so far reaching as I apprehended. At the same time I cannot see the distinction between this case and *Drylie's*¹ so clearly as your Lordships. Indeed I think there is a very close resemblance between the facts of the two cases.

In each case there was a breakdown of some machinery in the mine. In each case, as the result of that breakdown, the men required to leave the pit; and it makes no difference that in the one case they reached the pit bottom of their own accord, and that in the other the foreman, for the safety of the men, ordered them all out of the pit. In each case they were incidentally exposed to circumstances that were likely to produce chill;

¹ *Supra*, p. 549.

² *Supra*, p. 346.

and in each case one man suffered from chill, which afterwards developed Jan. 30, 1913. into pneumonia from which he died. I quite appreciate the distinction ^{Brown v.} that your Lordships have drawn—that the medium in which the man in ^{John Watson,} this case was immersed was a current of air, and in that of *Drylie*¹ gradually ^{Limited.} rising water. But in reality what caused the man's death was in each case Lord Salvesen. accidental exposure to cold. Indeed, in some respects, *Drylie's* case¹ is not so strong as the present; because I think a man is more likely to catch pneumonia from being detained for an hour and a half in a cold current of air than from standing twenty minutes even in what is described as ice-cold water up to his knees.

But I need scarcely say that there being, as your Lordships rule, a clear distinction between the two cases, I should be the last to desire to push *Drylie's* case¹ any further. I think it was Lord Dundas who said it was very near the line. I think it was across the line. He thought it was on the other side. But certainly I think this case is one in which it cannot be said in any popular sense that this man met with an accident; and on that ground I am clearly of opinion, with your Lordships, that we should reverse the determination of the Sheriff-substitute.

LORD GUTHRIE.—I am of the same opinion. Under the statute it is necessary for the applicant to show that the injury in question was a personal injury by accident. In this case it cannot be said that at the place where the man received the injury, which led to his death, anything happened of the nature of accident. It does not appear what the temperature was or what was the relation between it and the temperature at other places on the day in question. But it is not said that, however that stood, there was anything whatever at the place where he got the injury that was abnormal, unexpected, or likely to lead, in ordinary circumstances, to anything untoward.

It is said, however, by the applicant that there was an accident, because at the shaft there was a breakdown—what the case calls a wreck; but it is not said that that accident had any direct effect whatever as producing any change at the place where the man got the injury—no increase or change in the very strong current of air which led ultimately to pneumonia and death. In the end the necessary element of accident was attempted to be found in the fact that he was unexpectedly at this place and for an abnormal period. Now, it seems to me that such connection is not so direct as to bring the case within the scope of what Lord Macnaghten expressed when he said you must find the elements of something unexpected and untoward; it rather comes under the category of an event fairly incident to his employment.

It is admitted that, if the man had gone to the shaft in ordinary course, and had stood an hour and a half, in consequence of an order from one of his superiors, there would be no claim whatever; but it is said that, if that superior, having given an order that he should go to this particular place intending at once to relieve him, had forgotten that he gave the order, in consequence of which the man had remained there for an hour and a half, there would have been an accident. It seems to me that would be

¹ *Supra*, p. 549.

Jan. 30, 1913. extending the result of the *Drylie* decision¹ very considerably; and I think your Lordships are all of opinion that the Court in that case went about as far as it would be inclined to go. It seems to me in the case of *Drylie*¹ there were two elements which are wanting in the present case—the element of the place itself being in an abnormal condition, and also the element of the accident to the pump having been the direct cause which produced the abnormal condition in the place where the man stood and received the injury which led to his death.

I concur in thinking that this case is not within the rule of *Drylie*,¹ and that the arbitrator has come to a wrong decision.

THE COURT answered the question of law in the negative, recalled the award of the arbitrator, and remitted to him to dismiss the claim.

SIMPSON & MARWICK, W.S.—W. & J. BURNES, W.S.—Agents.

No. 80. JOHN W. M'CRINDLE AND ANOTHER (Ponton's Executors), Pursuers
(Appellants).—*Morison, K.C.—Wark.*
Jan. 31, 1913. ARCHIBALD C. PONTON, Defender (Respondent).—*Sol.-Gen. Anderson*
—*Hamilton.*

Ponton's
Executors v.
Ponton.

Sheriff—Jurisdiction—Reconvention—Sheriff Courts (Scotland) Act, 1907
(7 *Edw. VII. cap. 51*), sec. 6 (*h*)—*Foreigner suing as executor.*

The Sheriff Courts (Scotland) Act, 1907, sec. 6, enacts that "any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff . . . (*h*) where the party sued is the pursuer in any action pending within the jurisdiction against the party suing."

Held that the institution of an action in a Sheriff Court by a foreigner suing as an executor did not, under the section, give that Court jurisdiction in a counter action against him as an individual.

2D DIVISION.
Sheriff of the
Lothians and
Peebles.

JOHN W. M'CRINDLE, residing in England, and Archibald R. Maclean, residing at Edinburgh, as trustees and executors of the deceased Mrs Jane Ponton, who resided in England, brought an action in the Sheriff Court at Edinburgh against Archibald C. Ponton, residing at Tunbridge Wells. The pursuers' claim was for payment of sums due by the defender to Mrs Ponton, or to the pursuers as representing her.

The pursuers set forth that the defender was subject to the jurisdiction of the Court (1) *ex reconvention* by virtue of section 6 (*h*) of the Sheriff Courts (Scotland) Act, 1907*; and (2) by virtue of arrestments used to found jurisdiction. They averred—and the defender admitted—that an action was then depending in the same Court against them at the instance of the defender as sole surviving executor of Mungo Ponton (Mrs Ponton's husband) in which he sought decree for the delivery of certain furniture liferented by Mrs Ponton under her husband's will, or for payment of its value. With regard to the arrestments, parties were at issue as to whether any funds belonging to the defender had been attached.

The defender pleaded, *inter alia*;—(1) No jurisdiction.

¹ *Supra*, p. 549.

* Quoted in the rubric.

On 11th December 1911 the Sheriff-substitute (Guy) pronounced the following interlocutor:—"Sustains the first plea in law for the defender so far as directed to jurisdiction alleged to be founded on reconvention; *quoad ultra* and before further answer of said plea in law allows to both parties a proof of their averments relating to the question of jurisdiction so far as alleged to be founded upon arrestments *ad fundandam jurisdictionem*, and to each a conjunct probation."

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The pursuers appealed to the Sheriff (Maconochie) who, on 22nd December 1911, adhered, and remitted the cause to the Sheriff-substitute to proceed therein.*

After further procedure, in which it was admitted that nothing had been arrested to found jurisdiction, the Sheriff-substitute sustained the defender's first plea in law to the full extent and dismissed the action.

The pursuers appealed to the Court of Session, and the case was heard before the Second Division on 31st January 1913.

At the hearing the authorities noted below were referred to.¹

LORD JUSTICE-CLERK.—I am glad that we carried the debate so far and heard senior counsel, because Mr Morison has said as much as can be said in support of his view. He has not, however, altered the impression I had from the first. We now have it that the case is solely maintained on the Sheriff Courts Act, 1907, and it is said that the

* "NOTE.—I concur in the judgment of the Sheriff-substitute with regard to the question of reconvention. I think that the plea is bad on two grounds. (First) The action at the instance of the defender on which the plea is founded was one for delivery of furniture, and failing delivery for the value of the furniture whatever that might be. The present action is a pecuniary claim at the instance of the executors of a deceased person against the pursuer in the former action. I do not think that it can be said that those two claims arise *in eodem negotio*, or that they are *ejusdem generis*, and if that be so, it is settled law that the plea founded on reconvention fails—*Thompson v. Whitehead*, (1862) 24 D. 331. (Second) I think that the pursuer in the former action was suing in a totally different capacity—that of executor—from that in which he is being sued here, and that being so, I cannot hold that the jurisdiction can be upheld. How widely the two capacities differ from each other is shown by the cases of *Smith v. Stoddart*, 12 D. 1185, and *Turnbull v. Veitch*, 16 R. 1079, in which it was held that it was incompetent to amend a summons brought at the instance of a widow in her individual capacity to the effect of altering the instance so as to enable her to sue as executrix of her husband. In my opinion the jurisdiction could not have been sustained on the ground of reconvention before the passing of the Sheriff Courts Act, 1907, and I cannot hold that that Act has made any alteration on the law with regard to that matter."

¹ For the appellants.—*Macadam v. Macadam*, (1873) 11 Macph. 860; *Thompson v. Whitehead*, (1862) 24 D. 331; *Hurst, Nelson, & Co., Limited, v. Spenser Whatley, Limited*, 1912 S. C. 1041. For the respondent.—*Longworth v. Yelverton*, (1868) 7 Macph. 70, per Lord Kinloch, at p. 76; *Allan v. Wormser, Harris, & Co.*, (1894) 21 R. 866, per Lord Young, at p. 872; *Thompson v. Whitehead*, 24 D. 331; *Turnbull v. Veitch*, (1889) 16 R. 1079; *Smith v. Stoddart*, (1850) 12 D. 1185; *Graham Stewart on Diligence*, p. 107, and cases there cited; *Bell's Prins.* (10th ed.) sec. 573 (4); *Executors (Scotland) Act*, 1900 (63 and 64 Vict. cap. 55), secs. 6 and 7. Sec. 6 (d) of the Sheriff Courts (Scotland) Act, 1907, was also referred to.

Jan. 31, 1913. definition of "pursuer" * and the terms of subsection (h) of section 6

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make it perfectly plain that all the protection hitherto given to a party suing as executor in the only Court in which he can sue, as regards his personal estate, is gone. Now, in the first place, I should expect, if that were the intention of the Act, that it would be very clearly expressed, and not left to be inferred from the general language of the clause. The real question is—whatever the Act may say about a pursuer—Is the party who is suing the same party who is being sued as a defender in the other case? Now if he is not suing for himself, but in the exercise of an official duty to sue, his own *persona* is not involved. The fact that something may be decreed for against him as an individual, such as expenses, does not alter the case. Any decree against him on the merits of the case can only be against him in his fiduciary capacity. As regards his liabilities, his official position is quite different from his individual position, and when section 6 (h) speaks of a party suing, I take it that party means person *as* he sues, *e.g.*, as executor or trustee. In a case such as this the executor is not, as an individual, a party to the suit at all. If Mr Morison's view were sound, then, if a body of five or six trustees were under the necessity of suing here for something due to the trust-estate, each trustee would be liable to an action for his own personal debts. I do not think any expression in the Act leads to this result. A foreign defender owes no obedience to the Scottish Courts, unless he is found in the position of asking the Court to give him its services for his own ends. Here, on the contrary, he is only fulfilling a duty he is called on to perform, and can get no decree beneficial to himself, or such as will provide a money compensation in his own action. That being the state of matters, I can see nothing to indicate that the ordinary consequence has been changed in any way by the Act, and I cannot read those portions of sections 5 and 6 as necessarily implying any such result as is maintained by the pursuers.

LORD DUNDAS.—I agree. The first plea for the defender is stated in two words, "no jurisdiction." I should like to say that that is not a proper way of stating the plea. A plea in law ought to be a proposition in law. The two words "no jurisdiction" were here designed to support two different legal propositions, based upon separate grounds. I do not like such pleading.

The Sheriff-substitute has sustained the defender's first plea so far as directed to reconvention, and it is now admitted that the other branch of the plea is out of the case. The learned Sheriff on appeal adhered, and thought that the plea was bad on two grounds. I prefer not to proceed on the first of these grounds; as at present advised, I should be disposed to differ from the Sheriff in regard to it; but it is unnecessary to say more about that, because I entirely agree with the second reason which he gives. He says: "I think that the pursuer in the former action was suing in a

* The Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 3 (n) defines "Pursuer" as meaning and including "any person making a claim or demand, or seeking any warrant or order competent in the Sheriff Court."

totally different capacity—that of executor—from that in which he is being Jan. 31, 1913. sued here, and that being so, I cannot hold that the jurisdiction can be upheld.” I think this view is plainly right, apart from the Sheriff Courts ^{Pontons’} Executors v. Act, 1907; indeed, Mr Morison conceded that it was so according to the ^{Pontons’} law and practice before that Act, and based his argument on the Act Lord Dundas. alone. I do not think, however, that section 6 (h) has made any material alteration in the law upon the point we are dealing with. Reading the words according to their natural meaning it seems to me that “the party sued”—viz., Mr A. C. Ponton, an individual—is not “the pursuer in” the “action pending”—who is the executor of the deceased Mungo Ponton. The section, if it was intended to alter the law and practice, ought to (and presumably would) have made that plain, by using such words as “the party sued, in whatever capacity he is so sued.” I am not satisfied that the statute intended to make, or has made, the sweeping change Mr Morison maintains it has. On these short and simple grounds, I think we should affirm the interlocutors appealed against.

LORD SALVESSEN.—I am entirely of the same opinion on what forms the ratio of judgment in this case, viz., that it is not a ground of jurisdiction against an Englishman as an individual that he has, in a representative capacity, sued an action in a Sheriff Court of Scotland which is still in dependence. I think the reasons assigned by Lord Dundas are unanswerable, and I have nothing to add on that point.

I desire, however, to say with regard to the first ground on which the learned Sheriff has sustained the plea of no jurisdiction, that, as at present advised, I do not agree with him. I think, even under the law as we have to apply it in this Court as laid down in *Thompson v. Whitehead*,¹ and affirmed in *Hurst, Nelson, & Company, Limited, v. Spenser Whatley, Limited*,² the two claims here would be held to be *ejusdem generis* if the actions had been between the same parties. But, even if there had been any doubt on the matter, it is removed as regards actions in the Sheriff Court by section 6 (h) of the Sheriff Courts Act, 1907, which confers jurisdiction “where the party sued is the pursuer in any action pending within the jurisdiction against the party suing.” These words are so wide that they admit of no qualification, and amount to a practical abrogation of the restrictions affecting the jurisdiction *ex reconvensione* of the Court of Session as defined in *Thompson v. Whitehead*.¹ I think it right to make these observations for the guidance of the learned Sheriff as the question is very likely to arise on some future occasion.

LORD GUTHRIE.—I concur. As to the Sheriff’s first ground of decision, I think he was perhaps misled by the fact that the action in which Mr Ponton is pursuer is, in its present shape, not for delivery of furniture or for its value, but for payment of a sum of money from the executry estate. On the second ground, Mr Morison argued, in the first place, on what he maintained was the probable intention of the Sheriff Courts Act of 1907, viz., the removal of all former restrictions on jurisdiction founded *ex recon-*

¹ 24 D. 331.² 1912 S. C. 1041.

Jan. 31, 1913. *ventions*, and, in the second place, on the meaning of the words of section 6 (h) of the Act read in light of the interpretation clause. He said that it was clear that at least one restriction was swept away, viz., that the claims must be *in eodem negotio* or *ejusdem generis*. On that point, I do not think it necessary to express an opinion, because, even if he is right, it does not follow that all other restrictions are also swept away. It is still necessary to consider whether the requirement that the actions shall be between the same parties is also removed. As to this, Mr Morison was not able to suggest any reason to make his contention probable, or any principle for the rule for which he contends. In *Whitehead's case*,¹ the Lord Justice-Clerk enunciated a principle the justice of which is obvious, but which is now inapplicable if Mr Morison's contention be sound, namely, that the foreigner is not entitled to recover money in the Courts of this country from a subject of this country and refuse to furnish his antagonist with the means which may be necessary to enable him to pay his debt. The wording of the statute seems to me inconsistent with Mr Morison's contention. Taking the Act in its plain meaning, I am of opinion that here the "party suing" in the one action is not the "party sued" in the other, in the sense in which these words are used in section 6 (h) of the Act. Mr Morison pointed out that the earlier action was one in which Mr Ponton had an interest not only as an executor but also as an individual; but that is a mere accident, and even so, it might very well turn out that the whole executry estate was required for the payment of debts, and that in fact he had no individual interest at all.

THE COURT dismissed the appeal.

P. MORISON & SON, W.S.—J. S. MORTON, W.S.—Agents.

No. 81.

THE DARGAVIL COAL COMPANY, LIMITED, Appellants.—

Jan. 31, 1913.

Murray, K.C.—Hon. W. Watson.

Dargavil
Coal Co.,
Limited, v.
Inland
Revenue.

S. H. FRANCIS (Surveyor of Taxes), Respondent.—

Sol.-Gen. Anderson—J. A. T. Robertson.

Revenue—Income-tax—Profits of trade—Deductions—Hire of wagons with option of purchase—Deduction of part of payments representing hire.

Under a hire-purchase agreement, between a coal company and a wagon company, the latter agreed to let on hire to the former a number of wagons for a fixed period of years in return for an annual payment, an option being conferred on the coal company to purchase the wagons at the end of the period at a nominal price.

Held that the portion of the annual payments which represented the hire of wagons, but not the portion which represented the price of the option to purchase, fell to be allowed as a deduction in arriving at the assessable profits of the coal company for the purpose of income-tax.

Exchequer
Cause.
1ST DIVISION.

On 23rd December 1912 a case was stated for the opinion of the Court by the Commissioners of Income-tax at the request of the

Darngavil Coal Company, Limited, which had been assessed for Jan. 31, 1913. Income-tax, under Schedule D of the Income-tax Acts, in certain sums in respect of the profits of the business of the Company as coal-masters. The Company claimed deductions from the assessments in respect of payments made under certain agreements, in the circumstances set forth in the case as follows:—

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“(1) The appellant Company carry on the business of coalmasters, and in the course of such business they have to convey the coal from the collieries to their customers in railway wagons.

“(2) In order to obtain wagons for this purpose the appellant Company has from time to time entered into agreements in the form of the agreement between them and the Scottish Wagon Company, Limited, of which a copy is annexed hereto and forms part of the case.*

* The agreement was in the following terms:—

“I. The Wagon Company hereby agrees to let on hire to the lessees, and the lessees agree to take on hire from the Wagon Company 100 railway wagons . . . and that for the term of ten years from the 23rd day of February 1909.

“II. The lessees bind and oblige themselves and their successors whomsoever to pay to the Wagon Company the yearly sum of £801, 5s. sterling, without deduction, as rent or hire for the use of said wagons, and that by quarterly payments . . .

“III. The lessees hereby agree at their own expense to maintain the said wagons in good repair and working order throughout the said term of ten years, and if any accident or other damage shall happen to any of them during said term, the lessees agree to have the same repaired or rebuilt to the satisfaction of the Wagon Company, who shall neither be bound to repair or rebuild any of said wagons, nor to supply other wagons in lieu of any which may be damaged or rendered unfit for use. The wagons are to be at the risk of the lessees, who shall not be entitled to any deduction from the rent or hire in respect of damage to or destruction of wagons, and the lessees shall be bound to relieve the Wagon Company of all claims for damages or otherwise arising from or connected with the said wagons or their use.

“IV. The Wagon Company shall be entitled twice in every year during the said term of ten years to inspect the said wagons . . . and in case the Wagon Company shall find, upon such inspection, that any of the said wagons are not maintained in good repair and working order, or that any of them are deficient, they shall be entitled to require the lessees to do such repairs as are necessary . . .

“V. If any quarterly payment, or any part thereof, shall remain unpaid by the lessees for one month after the same shall become payable, the Wagon Company shall be entitled immediately thereafter to seize and take possession of all the said wagons . . .

“VI. Immediately on the expiration of the said term of ten years the lessees shall be bound, unless they shall exercise the option of purchasing the said wagons and shall pay the price thereof as aftermentioned, to deliver . . . the whole of the said wagons in good repair and condition (reasonable wear and tear only excepted) . . .

“VII. Instead of delivering up the said wagons to the Wagon Company at the expiration of the said term, as provided in article VI. hereof, the lessees shall have the option of purchasing the same from the Wagon Company at the price of one shilling sterling for each wagon . . . and upon . . . the price being paid and the whole quarterly payments before specified being also paid with any interest due . . . the said wagons shall become the property of the lessees . . .”

Jan. 31, 1913. " In particular, they have entered into the following agreements with the Scottish Wagon Company, Limited, viz. :—

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No.	Date.	No. of Wagons.	Period of Years.	Annual Payments.
1	19th Feb. 1902	50	7	£550. This agreement was duly carried through, and the wagons in due course became the property of the Company.
2	30th Aug. 1906	25	10	£223, 4s. 7d. This agreement is still running.
3	30th March 1909	100	10	£801, 5s. This agreement is still running.

" These agreements were in existence during the years on the profits of which the assessments under appeal fall to be computed.

" (4) The wagons comprised in the three agreements referred to above were all new at the date of the respective agreements, and they have not been the subject of any prior or subsequent agreement.

" (5) At the termination of the respective agreements the various wagons, the subject thereof, having regard to the average life and rate of depreciation applicable to such wagons had or will have a substantial value in excess of the one shilling referred to in clause VII. of the agreements.

" (6) In the appellant Company's own accounts the whole of the annual payments paid under the agreements have been treated as an expense of carrying on the business and have been debited to the wagon revenue account. . . . No portion of the said payments has been debited to capital, and there is no asset in the Company's balance-sheet in respect of the wagons to which the said agreements refer.

" (7) In the returns for income-tax assessment, however, the appellant Company have divided the said payments between revenue and capital, and have deducted as a trading expense that portion only of the annual payments which the Scottish Wagon Company, Limited, certified had been treated by them as revenue, and had entered into the computation of their profits for income-tax assessment. . . .

" (9) Prior to 29th May 1909, at which date the Secretary of Inland Revenue, Somerset House, London, issued to H.M. Surveyors of Taxes, the circular of which a copy was produced to the Commissioners, it was the practice of H.M. Surveyors of Taxes to allow to the taxpayer as a deduction in ascertaining profits chargeable under Schedule D of section 100 of the Income-Tax Act, 1842, that portion of the payments made under agreements similar to the one annexed hereto which the Wagon Finance Companies certified that they had treated as revenue, depreciation being allowable on that portion of the payments which had not been so treated as revenue. Subsequent, however, to that date, no such deduction in ascertaining profits has been admitted, the whole payments under the agreements having been regarded by the Crown as payments of capital which should be treated as part of the cost price to be taken into considera-

tion in calculating the annual allowance for wear and tear. The present appeal has been taken in consequence of the departure indicated in the circular from the practice which formerly prevailed." Jan. 31, 1913.

The Commissioners being of opinion that the transaction was a purchase by instalments, refused to allow the deductions. Darnagavil
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The case was heard before the First Division (without Lord Kinnear) on 31st January 1913.

Argued for the appellants;—(1) The agreement was purely one of hire,¹ and the yearly sums paid were purely rent, the wagons remaining the property of the Wagon Company until the option to purchase was exercised by the appellants. That being so, it followed that they were entitled to deduct the whole payments as a necessary expense of their business. (2) Alternatively, part of the yearly payments was in respect of hire, and only part in consideration of an option to purchase, and the appellants were at any rate entitled to deduct the former.

Argued for the respondent;—The appellants' agreement with the Wagon Company was not one for hire but for purchase by instalments, subject to a suspensive condition until all the instalments were paid. If, however, it was one for hire with an option to acquire the property, deductions should be allowed only for such part of the payments as represented the hire of the wagons.

LORD PRESIDENT.—This case raises a question under the Income-tax Acts as to the deductions which are to be allowed for necessary expenses before striking the profits of a coal company. The Company claims a deduction in respect of payments which were made by them to a wagon company under a hire and purchase agreement under which they get wagons. Hitherto there does not seem to have been any difficulty in adjusting this matter, because the practice of the Crown has been to split the payment,—to allow a deduction of such portion of it as they thought fairly represented the hire, and, on the other hand, not to allow any deduction for the portion that represented a payment towards the eventual purchase. But matters were altered by a circular which was sent by the Secretary of the Inland Revenue to surveyors of income-tax, and which gave instructions, in very dogmatic terms, that no deduction was to be allowed at all, because such instalments were in no part hire but were merely payments towards purchase. I think it is very much to be regretted that circulars of that sort should be sent forth without taking the advice of the law officers; and the proof of that has come in this case, where the law officers have found themselves practically unable to support the contention of the circular.

I think the case is too clear for argument. Here is a company which gets its wagons under what is known as a hire-purchase agreement. It pays so much a year. It undertakes to keep the wagons in repair. It pays

¹ *Helby v. Matthews*, [1895] A. C. 471, Lord Chancellor Herschell, at pp. 475-6 and 477-8, Lord Watson, at p. 479, as distinguished from *Lee v. Butler*, [1893] 2 Q. B. 318; *Yorkshire Railway Wagon Co. v. Maclure*, (1882) 21 Ch. D. 309; *Marston v. Kerr's Trustees*, (1879) 6 R. 898; *McEntire v. Crossley Brothers*, [1895] A. C. 457; *Cropper & Co. v. Donaldson*, (1880) 7 R. 1108; *Murdoch & Co., Limited, v. Greig*, (1889) 16 R. 396.

Jan. 31, 1913. so much a year for a period of years and at the end of that period of years it has an option, if it chooses, to make what is practically a nominal payment and then the wagons belong to it. It is perfectly clear, on the decided cases, that during the course of that period of years the wagons are the property of the wagon company and not of the coal company. But the coal company wishes to use them; and accordingly an extra payment is made in respect of that. No discrimination is made between the two kinds of payment; it is a slump sum that is paid. There are accordingly two things going on concurrently: there is the sale and purchase agreement on certain terms—not a sale at the moment, but an option to buy the wagons on certain terms at a future date—and, on the other hand, there is also a hiring agreement. It is clear that, so far as the coal company have the use of the wagons during that time, the hire is an expense which they are entitled to deduct, just as if they owned no wagons at all but simply hired them from day to day. It is equally clear that they could not claim to deduct the whole of what they paid to the wagon company, because a large portion of what they pay is really a payment for an option, at a future date, to get a wagon at a sum far under its real value.

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We have not before us in the case the materials for splitting up the payment and saying what is truly hire and what is truly payment towards eventual purchase. The practice in the past has been to deal with this upon the indication that is given by the way that the wagon company choose to treat these payments in their accounts. That was quite a fair basis, if the parties choose to adopt it; but it is obvious that what the wagon company choose to do in their accounts is not a real criterion in a question as to what is the true nature of the coal company's payments. The question, however, is merely an accountant's and an actuary's question, and I should hope that the parties will be able to agree. But I think the proper course for your Lordships is to remit to the Commissioners with an instruction that they are bound to allow as a deduction such portion of the yearly payments made by the coal company under these wagon agreements as represents the hire of wagons which are not yet their property, and that the Commissioners must take up the question of apportionment and decide it for themselves if the parties do not agree.

LORD JOHNSTON and LORD MACKENZIE concurred.

THE COURT pronounced the following interlocutor:—"Recall the determination of the Commissioners and remit to them to proceed in the case, with instructions that they are bound to allow as deduction that portion of the yearly payments made in respect of the wagon agreement referred to in the case which represents the consideration paid for being allowed to use the wagons which, under the contract, are not yet their property . . ."

MACPHERSON & MACKAY, S.S.C.—SIR PHILIP J. HAMILTON GRIERSON,
Solicitor of Inland Revenue—Agents.

DON BROTHERS, BUIST, & COMPANY, LIMITED, Pursuers (Reclaimers).— No. 82.
Sandeman, K.C.—Hon. W. Watson.

THE SCOTTISH INSURANCE COMMISSIONERS AND ANOTHER, Defenders Feb. 5, 1913.
 (Respondents).—*Sol.-Gen. Anderson.—T. G. Robertson.*

Insurance—National Insurance—Rates of contributions—Determination by Limited, v. Commissioners—Competency of reducing determination—Jurisdiction—Scottish Insurance Exclusion of jurisdiction by statutory remedy—National Insurance Act, 1911 (1 and 2 Geo. V. cap. 55), sec. 66 (1). Commis- sioners.

The National Insurance Act, 1911, enacts, by section 66 (1) (c), that questions as to the rates of contributions to be paid by an employer and his employee respectively shall be determined by the Commissioners. An appeal is provided with regard to certain determinations of the Commissioners, but not with regard to their determinations under section 66 (1) (c).

The Court *dismissed* an action for the reduction of a determination by the Commissioners under this subsection, *holding* that, in the absence of averments that they had acted *ultra vires*, the Court had no jurisdiction to interfere with their decision.

ON 29th October 1912 Don Brothers, Buist, & Company, Limited, 1st DIVISION.
 jute spinners, Dundee, brought an action against Jessie Anderson, Lord Hunter.
 and the Scottish Insurance Commissioners for reduction of a decision by the Commissioners as to the contributions payable under Part I. of the National Insurance Act, 1911,* by the pursuers and the defender Jessie Anderson respectively.

The pursuers averred;—(Cond. 1) "The pursuers are jute spinners and manufacturers in Dundee, and employ a large number of hands in connection with their business. The defender Jessie Anderson is one of the pursuers' employees." (Cond. 2) "The said Jessie Anderson is twenty-three years of age, and is a person employed by the pursuers within the meaning of Part I. of the National Insurance Act, 1911. By section 4 (1) of the Act it is provided that 'The contributions payable in respect of employed contributors shall be at the rate specified in Part I. of the Second Schedule to this Act (hereinafter referred to as the "employed rate"), and shall comprise contributions by the contributors and contributions by their employers at the rates specified in that part of that Schedule, and shall be payable at weekly or other prescribed intervals. . . . ' Section 4 (2) enacts that 'The employer shall, in the first instance, pay both the contributions payable by himself (in this Act referred to as the "employer's contributions"), and also on behalf of the employed contributor the contributions payable by such contributor, and shall be entitled to recover from the contributor by deduction from his wages or otherwise the amount of the contributions so paid by him on behalf of the contributor in accordance with the rules set out in the third Schedule to this Act.'" (Cond. 3) "Part I. of the Second Schedule of the Act settles the rates of contributions, and the proportions thereof payable respectively by the employer, the employee, or contributor, and out of moneys provided by Parliament. *Inter alia*, Part I. of said Schedule provides:—'Where the rate of remuneration exceeds 1s. 6d. but does not exceed 2s. a working day:—

* 1 and 2 Geo. V. cap. 55.

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sioners.

'To be paid by the employer . . .			a week.
	for women		4d.
do. contributor	"		1d.
do. out of monies			
provided by Parliament	"		1d.
Where the rate of remuneration exceeds 2s., but does not exceed 2s. 6d. a working day :—			

'To be paid by the employer . . .			a week.
	for women		3d.
do. contributor	"		3d.*"

(Cond. 4) "It is, *inter alia*, provided by section 66 of the said Act that if any question arises :—(b) As to the rate of contributions payable by or in respect of any insured person ; or (c) As to the rates of contributions payable in respect of an employed contributor by the employer and the contributor respectively :—the question shall be determined by the Insurance Commissioners in accordance with regulations made by them for that purpose" (Cond. 5) "Questions having arisen between the pursuers and the defender as to the rate of contribution to be paid by the pursuers in respect of the defender, and as to the proportion thereof recoverable by the pursuers from the defender under the Act, the pursuers on 6th July 1912 made application to the said Scottish Insurance Commissioners in terms of the regulations made by the said Commissioners dated 14th June 1912, with a view to the determination by the Commissioners of the said questions. The questions as put in the said application were in the terms following :—'Whether the value of stamp to be affixed by employer is 6d., and the amount recoverable from the worker 3d., as the rate of remuneration is 2s. 1½d. for a working day of ten hours, being the period of employment for each day except Saturday, fixed in accordance with the Factory and Workshop Act, 1901, section 24 (1).'" (Cond. 6) "The said Commissioners fixed a hearing on said application to take place at Dundee on 2nd October 1912. At said hearing the pursuers were represented, and the defender was present. Witnesses were examined, and it was proved by evidence which was not contradicted, and it is in accordance with fact, that the said defender's employment with the pursuers was liable to be terminated without previous notice by either party ; that when working full time the defender was employed for fifty-five hours in each week ; that the said full working week was made up of ten hours in each day of the week from Monday to Friday, and five hours on Saturday, being the statutory maximum, in terms of the Factory and Workshops Act, 1901 ; that the defender's remuneration in any one week depended upon the number of hours which she might work, and was calculated at the rate of 11s. 7d. for fifty-five hours ; that when the defender worked the full fifty-five hours in each week she was entitled to receive, in addition to the said 11s. 7d., a bonus of 3d. ; and that if the defender should be absent from her employment or not working during any part of any week, she was not entitled to the said bonus of 3d., and her remuneration for that week suffered a diminution calculated on the time during which she

* The provisions of this section are more fully stated in the opinion of the Lord Ordinary, *infra*.

might not be working at the said rate of 11s. 7d. for fifty-five hours." Feb. 5, 1913. (Cond. 7) "The said Commissioners, of 21st August 1912, issued a decision on the questions submitted by said application, by which they pretended to determine:—'That in respect of the employment by the applicants of Jessie Anderson, 17 Dallfield Walk, Dundee, the contributions payable under Part I. of the National Insurance Act are as follows:—4d. a week by the employer, and 1d. a week by the employee.' . . ." (Cond. 8) "It was proved to the said Commissioners, and is the fact, that the working day of the said Jessie Anderson in the pursuers' employment consists of 10 hours; and her remuneration for each such working day at the said rate of 11s. 7d. for 55 hours is in fact 2s. 1½d. By said Part I. of the Second Schedule to the Act the contributions in the case of a female employee whose rate of remuneration exceeds 2s., but does not exceed 2s. 6d. per working day, are fixed at 3d. to be paid by the employer and 3d. by the employee. The said decision of the Commissioners, which purports to decide that the contributions payable by the pursuers and defender are 4d. a week by the pursuers, and 1d. a week by the defender, is accordingly contrary to the express provisions of the statute, and is thus *ultra vires* of the Commissioners. Their good faith is not called in question. In these circumstances, the pursuers have been obliged to bring the present action."

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sioners.

The pursuers pleaded;—The rate of remuneration of the defender being 2s. 1½d. for each working day, and the contributions to National Health Insurance for a female employee where the working day's remuneration exceeds 2s. but does not exceed 2s. 6d. being fixed by the National Insurance Act at 3d. for the employer, and 3d. for the employee, the pretended finding of the Commissioners that the said contributions are 4d. a week by the pursuers and 1d. a week by the defender is contrary to the provisions of the statute, and should be set aside.

The defenders the Scottish Insurance Commissioners, who alone appeared to defend the action, pleaded, *inter alia*;—(1) The Commissioners having in good faith and *intra vires* determined the question raised by the pursuers under section 66, subsection (1) (c), of the Act, the Court has no jurisdiction to set aside the said determination, and the action should accordingly be dismissed.

On 13th December 1912 the Lord Ordinary (Hunter) sustained the first plea in law for the comparing defenders and dismissed the action.*

* "OPINION.—[After narrating the facts]—These Commissioners are a statutory body appointed under the Insurance Act, to whom very ample powers both of an administrative and of a judicial character are entrusted by the Legislature. *Inter alia*, section 66 (1) of the Act provides that 'If any question arises—

"(a) As to whether any employment or any class of employment is or will be employment within the meaning of this part of this Act, or as to whether a person is entitled to become a voluntary contributor; or

"(b) As to the rate of contributions payable by or in respect of any insured person; or

"(c) As to the rates of contributions payable in respect of an employed contributor by the employer and the contributor respectively; the question shall be determined by the Insurance Commissioners, in accordance with regulations made by them for the purpose.' In virtue of the proviso which follows, provision is made for appeal in special form so far

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sioners.

The pursuers reclaimed, and the case was heard before the First Division (without Lord Kinnear) on 5th February 1913.

Argued for the reclaimers;—Contributions payable by employers and employed contributors were to be determined according to rates of remuneration per "working day,"¹ and it was for the Court, and not for the Commissioners, to determine the legal question of what, in the sense of the statute, was a "working day." A working day in the present case was not a sixth part of the working hours of the week, because Saturday was only half a working day. The working day was truly a day of ten hours, and, as the remuneration for that period exceeded two shillings, the decision of the Commissioners was contrary to the rates prescribed by Part I. of the Second Schedule to the Act. As the Commissioners had gone outwith their province, and had in this way misinterpreted the provisions of the Act, their decision fell to be reduced.²

Counsel for the respondents were not called upon.

as a question under (a) is concerned; and the Commissioners may allow a question under (b) to be determined by an approved society. Nothing, however, is said in qualification of the absolute right of the Commissioners to decide a question under (c), and, as the decision now challenged was pronounced under that subsection, it is maintained in defence that the Court has no jurisdiction to set aside the determination of the Commissioners.

"The pursuers say :—[His Lordship then quoted the pursuers' averments, and continued]—

"It is not said that the Commissioners refused to hear any evidence or argument tendered to them, or that they did not act in good faith in determining the question submitted to them as they did. As I understand the pursuers' case, it is maintained that the Commissioners had to consider, first, what was an ordinary working day of the defender, and second, what remuneration she in fact received for such a day. So considered they say that the working day of the said defender was a day of 10 hours, and that her remuneration was 2s. 1½d. For the Commissioners to take any other view of the facts as proved was to act perversely and in excess of the powers entrusted to them by the statute.

"I do not find that the statute has prescribed any regulations for determining what in any particular case is the rate of remuneration per working day. It is obvious that where the employee works for different periods of time on different days and earns different sums in respect of each day's work, the rate of remuneration per working day will, or may have to, be arrived at by some system of averaging. It appears to me to be quite possible to construe the words of the statute in the case of the defender's employment by taking as her rate of remuneration per working day the amount which she earns upon an ordinary working day, or by taking the whole amount which she in fact earns during the 6 days which she works and dividing by 6. Now, it appears to me that, if two constructions of the language of Part I. in the Second Schedule are possible, the Legislature has entrusted the Commissioners with the duty of interpreting the language, and it is not for me to interfere even if I were of opinion that they had reached a wrong conclusion. In a recent case—*Board of Education v. Rice*, [1911] A. C. 179—the Lord Chancellor, at page 182, made, with reference to the powers of the Board of Education to determine questions under the Act, a number

¹ 1 and 2 Geo. V. cap. 55, Second Schedule, Part I.

² *Caledonian Railway Co. v. Glasgow Corporation*, (1905) 7 F. 1020, Lord President, at p. 1027; *The King v. Board of Education*, [1910] 2 K. B. 165, Farwell, L.J., at p. 177, *aff. sub nom.* *Board of Education v. Rice*, [1911] A. C. 179, Lord Chancellor (Loreburn), at pp. 181 and 185.

LORD PRESIDENT.—I confess I think this is an exceedingly plain case. Feb. 5, 1913.
 The National Insurance Act of 1911 provides for certain contributions being made by employers and employees, and those contributions vary according as the rate of remuneration exceeds eighteenpence and does not exceed two shillings a working day, or exceeds two shillings and does not exceed two shillings and sixpence. By section 66 of the Act it is provided that if any question arises—(a) and (b) I leave out—(c) “As to the rates of contributions payable in respect of an employed contributor by the employer and the contributor respectively; the question shall be determined by the Insurance Commissioners.” Then there is a proviso giving a certain limited appeal in the cases of (a) and (b), but not in the case of (c).

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 sioners.

Now, a question did arise between the pursuers in this action, who are jute spinners, and one of their hands as to whether the contributions should be in respect of remuneration at a rate between eighteenpence and two shillings or at a rate between two shillings and two shillings and sixpence; and accordingly the present pursuers made an application to the Commissioners with a view to the determination of the question which had arisen. The actual form of the question put to the Commissioners was, if I may say so, absolutely futile, because it contained its own answer and did not raise, in its terms, the question that had to be decided at all. It asked “whether the value of stamp to be affixed by employer is sixpence, and the amount recoverable from the worker threepence, as the rate of remuneration is 2s. 1½d. for a working day of ten hours.” Well, if that question is to be answered, it is really asking if two and two make four. But although the question was put in that futile form, there was no real doubt between the parties as to what their dispute was about, because they had a hearing before the Commissioners, and examined witnesses on both sides. In that inquiry they went into the whole question of how much the employee was paid, and how she was paid, in order to raise the real question, namely, what was the true meaning of “working day” in the Act of Parliament; the trouble being that the employee was employed for a ten hours’ day on five days of the week, and a five hours’ day on the sixth, and the real question between the parties being whether the rate of remuneration per working day was to be taken on what she got for a full working day of ten hours, or what she got upon what we may call the average working day, which day you arrive at by adding the five days at ten hours to the sixth day at five hours, and then dividing by six.

Now, upon that the Commissioners gave a determination that the work-

of remarks which appear to me to be applicable to the powers of the Commissioners under the Insurance Act. *Inter alia*, his Lordship said,—‘The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local Education Authority. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact.’ I do not see how I can decide in the pursuers’ favour without reviewing the determination of the Commissioners upon an actual difference which had arisen between the pursuers and the female defender under section 66 (1) (c) of the Insurance Act. As I hold I am not entitled to do so, I sustain the first plea for the Commissioners and dismiss the action.”

Feb. 5, 1913, ing day here gave a rate of remuneration at less than two shillings, and that in respect of that the employers had to contribute fourpence a week and the Don Brothers, Buist, & Co., Limited, v. Scottish Insurance Commissioners. employee a penny per week. In other words, they determined just the question that had arisen, in terms of the Act, "as to the rates of contributions payable in respect of an employed contributor by the employer and the contributor respectively." The Commissioners having done so, I am quite unable to see how this Court is entitled to touch their determination.

Ld. President. It may be very unfortunate that an appeal was not given upon this matter, because it may be that the Commissioners have taken a wrong view of how the working day ought to be struck, but it seems to me that, when the Act of Parliament said that they were to fix "the rates of contributions payable in respect of an employed contributor by the employer and the contributor respectively," it handed over to the Insurance Commissioners a question which may be of pure fact, but may be of fact and of law also in so far as a question of construction is always a question of law. In other words, I think it is exactly the same as if that determination had been on a question arising in a private contract, and referred to arbitration. This Court could not have interfered with the arbiter however grossly wrong they thought him. I have quoted again and again the case of *Holmes Oil Company v. Pumpherson Oil Company*,¹ which was a case of as wrong a determination by the arbiter as might well be, but the Court could not interfere.

Here, I think also we cannot interfere, because, if this is a question which is meant by the Act of Parliament to be determined by the Commissioners, undoubtedly they have not acted *ultra vires*. There is no complaint that they did not hear parties, or departed from the rules of justice in any way. Consequently, I think there is no real case made out for reduction of their award. I think, therefore, that the Lord Ordinary's judgment was right and ought to be adhered to.

LORD JOHNSTON.—This question raises, undoubtedly, a matter of wide application and of considerable importance to employers and employed, and it is unfortunate that, the question being one of the construction of a schedule which is made part of the statute, it is impossible to obtain the judgment upon that question of a judicial tribunal. What is meant by "a working day" is not a matter of the Commissioners' discretion, but of the Legislature's intention as disclosed by the provision of the schedule. It is difficult to understand why a question such as that should have been withheld from the Court, looking to the sort of question which is referred to it, namely, the question whether any employment, or any class of employment, is employment within the meaning of the Act. That does not seem to me to be so much a question of law as the question raised in this case. But I agree with your Lordship that the terms of the statute preclude that question being raised in the form in which it has been raised before this Court.

LORD MACKENZIE concurred.

THE COURT adhered.

ALEX. MORISON & Co., W.S.—JAMES WATT, W.S.—Agents.

¹ (1891) 18 R. (H. L.) 52.

MRS JANE HASTIE OR RITCHIE AND OTHERS, Pursuers (Respondents). No. 83.

—*Moncrieff, K.C.—Fenton.*

WILLIAM KERR, Defender (Appellant).—*Constable, K.C.—MacRobert.*

Feb. 7, 1913.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—*Ritchie v. Kerr.*
Injury by "accident"—Death due to heart failure.

In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator found that a farm labourer, apparently in good health, died suddenly while engaged, in the course of his ordinary work, in lifting baskets of corn to feed a bruising machine; that the cause of death was "failure of the heart"; and that "a contributing cause of the failure of the heart's action was the strain arising from the exertion made by the deceased in repeatedly stooping to fill the basket with corn and then lifting it when full up to the level of his shoulders in order to feed the bruiser."

Held that there were no facts stated from which the arbitrator could competently infer that the death was due to injury by accident within the meaning of the Workmen's Compensation Act, since there was no particular event or occurrence to which the death could be attributed.

Clover, Clayton, & Co., Limited, v. Hughes, [1910] A. C. 242, distinguished.

In an arbitration under the Workmen's Compensation Act, 1906, in the 2ND DIVISION. Sheriff Court at Wigtown between Mrs Jane Hastie or Ritchie and Sheriff of others, the widow and children of the deceased Thomas Ritchie, farm Dumfries and labourer, and William Kerr, farmer, the Sheriff-substitute (Watson) Galloway. awarded compensation, and at the request of the employer stated a case for appeal.

The case set forth the following facts as admitted or proved:—On 8th March 1912, shortly after his mid-day meal, Ritchie was engaged in defender's employment feeding corn into a bruising machine in the barn at Millisle. While so engaged he had repeatedly to shove a wooden basket into a heap of corn which was lying on the floor of the barn, lift the basket filled with corn on to the top of the bruising machine, which was 4 feet 6 inches from the ground, and then tilt over the basket so as to empty the corn into the hopper of the bruising machine. It was usual to bruise four bags of corn at a time, each containing 5 bushels, and the bruising of the 20 bushels usually took about half an hour, the bruising machine being fed continuously by the corn emptied into the hopper. The deceased began the operation of feeding the bruiser about 1.30 P.M., and there were then working along with him in the barn, but at different work, the witnesses Dalziel, Lockhart, and James Ritchie (son of deceased). After the deceased had been working at the bruiser for about a quarter of an hour, the witnesses Dalziel and James Ritchie both observed that he was holding up his left hand as a signal of distress, and at the same time lying upon, or leaning against, a full sack of corn that was at hand. These men, along with Lockhart, at once went to the assistance of the deceased, and did what they could to revive him. His breathing was laboured and wheezy, and he never spoke nor moved from the time he was observed to be holding up his hand until he died, which was about a quarter of an hour after. In the short time during which the deceased had worked at the bruiser he lifted at least 320 lbs. of corn into the hopper, filling the basket probably ten or eleven times, the weight of a basketful being 31 lbs. The deceased had frequently done the same work before, and nothing

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unusual or unexpected occurred in the course of his work that afternoon until the sudden attack of illness. The deceased was forty-seven years of age, and his height was something between 5 feet 6 inches and 5 feet 8 inches. He was apparently a strong and healthy man, and during the past fifteen years he had never been a day off work from illness nor required any medical attendance. His master (the defender) and his fellow-workers on the farm never knew him to be the worse of drink. The cause of his death was failure of the heart. There was no post-mortem examination of the internal organs, but the body was seen by Dr Welsh about forty minutes after death. The body was fairly well nourished, and gave no indication of any exhausting disease. A contributing cause of the failure of the heart's action was the strain arising from the exertion made by the deceased in repeatedly stooping to fill the basket with corn and then lifting it when full up to the level of his shoulders in order to feed the bruiser. On these facts, having in view the decision of the House of Lords in *Clover, Clayton, & Company*, [1910] A. C. 242, I deemed myself bound to find that the injury from which the deceased died was an injury by accident; and I further held that the accident was one arising out of and in the course of his employment with the defender. Accordingly I found the respondents entitled to compensation, and decerned against the appellant for the sum of £150, and also found him liable to the respondents in the expenses of the process."

The questions of law for the opinion of the Court were:—“(1) Whether the death of Thomas Ritchie was due to an injury by accident within the meaning of the Workmen's Compensation Act, 1906? (2) Whether the death of the said Thomas Ritchie was due to an injury by accident arising out of and in the course of his employment within the meaning of said Act?”

The case was heard before the Second Division (without the Lord Justice-Clerk) on 7th February 1913.

Argued for the appellant;—There was no evidence to support the arbitrator's finding. The case of *Clover, Clayton, & Company, Limited, v. Hughes*¹ was clearly different. In that case it was proved that the injury happened at a definite time and as the result of a specific act, namely, the screwing up of a nut. In this case nothing was proved except that the man died of heart disease while at his work. There was no evidence either of an “accident” or that the injury was the result of anything which arose out of his employment. The man was engaged at his usual work, and nothing untoward or unexpected had happened to him. There was a reference in the case to “the strain arising from the exertion,” but if this were intended to be a finding in fact that the work had strained his heart, there was nothing to support such an inference.²

¹ [1910] A. C. 242.

² *Coe v. Fife Coal Co., Limited*, 1909 S. C. 393; *Walker v. Hockney Brothers*, (1909) 2 Butterworth's W. C. C. 20; *Barnabas v. Bersham Colliery Co.*, (1910) 48 S. L. R. 727; *Hawkins v. Powells Tillery Steam Coal Co., Limited*, [1911] 1 K. B. 988; *Spence v. William Baird & Co., Limited*, 1912 S. C. 343; *Beaumont v. Underground Electric Railways Company of London, Limited*, (1912) 5 Butterworth's W. C. C. 247; *Farmer v. Stafford, Allen, & Sons, Limited*, (1911) 4 Butterworth's W. C. C. 223; *Ashley v. Lilleshall Co., Limited*, (1911) 5 Butterworth's W. C. C. 85; *Martin v. Manchester Corporation*, (1912) 5 Butterworth's W. C. C. 259. Lord Dundas referred to *Euman v. Dalziel & Co.*, *supra*, p. 246.

Argued for the respondents ;—There was a direct finding that a contributing cause of death was the strain arising from the exertion of the work. A strain was an “accident” within the meaning of the Act, because it was an untoward event, neither expected nor designed.¹ The case was ruled by the authority of *Clover, Clayton, & Company, Limited, v. Hughes*.² The strain was none the less an accident because it happened in the course of the man’s ordinary work.

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LORD DUNDAS.—In this stated case the question which we have to decide is whether, upon the facts found, there was sufficient to justify the learned arbitrator in holding that there was here personal injury by accident within the meaning of the Act. The deceased, Ritchie, was forty-seven years of age. He had the appearance of a strong and healthy man, and seems to have been of healthy habits. He was a farm-labourer employed by the defender. On 8th April 1912, shortly after his mid-day meal, he was engaged in his employment in feeding corn into a bruising machine in a barn. He had to shove a wooden basket into a heap of corn on the floor, lift the filled basket up four or five feet, and tilt the corn out of it into the hopper of the machine. He began the operation of feeding the bruiser about 1.30 P.M.; there were three men working in the same barn, but at different work, namely, Dalziel, Lockhart, and James Ritchie, a son of the deceased. After the deceased had been working at the bruiser for about a quarter of an hour, Dalziel and James Ritchie both observed that he was holding up his left hand as a signal of distress, and at the same time lying upon, or leaning against, a full sack of corn that was at hand. The men went to Ritchie and did what they could, but his breathing was laboured and wheezy, and he never spoke nor moved again, but died after about a quarter of an hour. The Sheriff-substitute found in fact that the deceased had frequently done the same work before, and that nothing unusual or unexpected occurred in the course of his work that afternoon until the sudden attack of illness. The cause of death was failure of the heart. There was, perhaps unfortunately for the respondents, no post-mortem examination of the body, although a doctor saw the man after he was dead. The body was fairly well nourished, and gave no indication of any exhausting disease.

After these findings in fact the Sheriff-substitute says: “A contributing cause of the failure of the heart’s action was the strain arising from the exertion made by the deceased in repeatedly stooping to fill the basket with corn and then lifting it when full up to the level of his shoulders in order to feed the bruiser.” I have some little difficulty in knowing what the Sheriff-substitute means when he alludes to “the strain arising from the exertion.” He has not up to that point alluded to any strain, and he has not told us of any violent exertion likely to have produced a strain. On the contrary, he has merely told us that this man was working in the usual routine of his not strenuous business, and that nothing unusual

¹ *Fenton v. J. Thorley & Co., Limited*, [1903] A. C. 443; *Stewart v. Wilsons and Clyde Coal Co., Limited*, (1902) 5 F. 120; *Ismay, Imrie, & Co. v. Williamson*, [1908] A. C. 437; *Borland v. Watson, Gow, & Co.*, 1912 S. C. 15.

² [1910] A. C. 242.

Feb. 7, 1913. occurred on the occasion. I cannot help thinking that one must rather regard the phrase used as meaning "a strain which must have arisen," or Ritchie v. Kerr. "a strain which I should think probably arose," or something of that nature; at all events, I cannot regard the words I have quoted as a finding Lord Dundas. in fact of any definite strain causing lesion to the heart, or causing the heart to give out. The Sheriff-substitute concludes the case by saying: "On these facts, having in view the decision of the House of Lords in *Clover, Clayton, & Company*,¹ I deemed myself bound to find that the injury from which the deceased died was an injury by accident, and I further held that the accident was one arising out of and in the course of his employment with the defender."

On a general purview of the facts I have summarised one is struck by this, that nowhere is there found any particular event or occurrence to which death can be attributed. On the contrary, one finds a course of ordinary labour (and, as I have said, not strenuous labour) being pursued until the distress signal by the man, the cause of which we do not know, was observed. There is no evidence of any lesion, and the Sheriff-substitute expressly negatives the suggestion of any unusual or unexpected occurrence in connection with the death. I certainly have no desire to renew the attempt to create a definition of "accident" in this perplexing statute; but I think I can say negatively, with a good deal of confidence, that here we have not the elements which have been held necessary for an "accident."

The learned Sheriff-substitute has frankly stated that the reason he came to his conclusion was that he deemed himself bound by the case of *Clover, Clayton, & Company*.¹ That case seems to me to be easily distinguishable from the present, and just on the point I have mentioned. Here there is not what there was there—a definite particular occurrence to which death could be attributed and was attributed. It was held there as matter of fact that the aneurism burst just after the turning of the spanner by the man. I think the case of *Beaumont*² has a good deal of resemblance to the present case. There the County Court Judge disbelieved the man, who said that he had sustained the injury to his heart on a certain particular occasion to which he deponed. There was, therefore, no particular occasion and no particular occurrence to which death could be attributed. The County Court Judge nevertheless held that he must have suffered a strain to which his work had contributed, and that it was an accident arising out of the employment. I think that is a good deal like what the Sheriff-substitute has done here; but the Court of Appeal had no difficulty in saying that that would not do, because it really must always be a matter of fact, or of legitimate inference from fact, whether the injury (or death) ensued from the accident with which it was said to be connected. And here, as I have said, I cannot find any particular event or occurrence of the nature of an accident.

The case of *Clover, Clayton, & Company*¹ being, as I think it is, distinguishable from the present case, the ground of the learned arbitrator's decision is gone; and one has the less difficulty in differing from him when one sees that the ground upon which he proceeded is, as I think, the

¹ [1910] A. C. 242.

² 5 Butterworth's W. C. C. 247.

erroneous application of a case which he thought bound him. I must say Feb. 7, 1913.
 that I consider there were no facts here from which the learned arbitrator Ritchie v.
 could competently find that Thomas Ritchie's death was due to injury by Kerr.
 accident within the meaning of the Workmen's Compensation Act; and I Lord Dundas.
 propose to your Lordships that we should so find in answer to the ques-
 tions, which are not well stated.

LORD SALVESEN.—I concur, though I should not have been sorry in this case if I could have reached the same conclusion as the Sheriff-substitute. There are some observations made by Lord Kinnear in the case of *Coe v. The Fife Coal Company*,¹ which are very apposite to the facts we have here, and practically decide the matter in favour of the employer. In dealing with the various definitions of the word "accident," which have emanated from the House of Lords, he says:—"It seems to me that all these interpretations of the word point to some particular event or occurrence which may happen at an ascertainable time, and which is to be distinguished from the necessary and ordinary effect upon a man's constitution of the work in which he is engaged day by day. So defined the word 'accident' seems to me to exclude the anticipated and necessary consequence of continuous labour." Now, in this case the arbitrator has not found any particular event or occurrence, happening at an ascertainable time, which could be called an accident. What happened was that a man engaged in his ordinary work—work which was not unusually hard or difficult—suddenly died from heart disease. It would be confounding effect with cause if we were to hold that the mere circumstance that a man when doing his ordinary work suddenly dies from heart disease necessarily infers that he has met with an accident. There is nothing in the decided cases to support such a view, and there are many which are substantially indistinguishable from the present upon the facts.

If one looks at the facts found in the case of *Coe*¹ one finds that they were very much more favourable to the claims of the workman than the facts here, although no doubt there is this distinction, that the arbitrator there had found in favour of the employer, whereas here, on what I agree with your Lordships in holding is a misreading of the *Clover, Clayton, & Company*² case, he has come to an opposite conclusion. I find nothing in his findings in fact which constitutes evidence of any "unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence," to adopt the language of Lord Shand in the case of *Fenton v. Thorley & Company*.³ I therefore agree with your Lordships in the result at which you have arrived.

LORD GUTHRIE.—I am of the same opinion. Both parties have founded upon statements in the arbitrator's findings, which they think are conclusive in their favour. The appellant founded on the statement that the deceased had frequently done the same work before, and that nothing unusual or unexpected occurred in the course of his work that afternoon until the sudden attack of illness. The respondents, on the other hand,

¹ 1909 S. C. 393.² [1910] A. C. 242.³ [1903] A. C. 443.

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founded on the statement that a contributing cause of the failure of the heart's action was the strain arising from the exertion made by the deceased, in repeatedly stooping to fill the basket with corn, and then lifting it, when full, up to the level of his shoulders in order to feed the bruiser.

The statement founded on by the appellant I do not think can be conclusive in view of several of the cases, and in particular the case of *Fenton*.¹ In that case Lord Macnaghten criticised adversely certain opinions which had been given in a Scottish case—*Stewart v. Wilsons and Clyde Coal Company*,² in which certain of the Judges had founded on the fact that the occurrence was fortuitous, as if that were conclusive proof that the occurrence was an accident. Lord Macnaghten pointed out that that was not a good ground of judgment, and that "what the miner did in replacing the hutch he certainly did deliberately and in the ordinary course of his work. There was nothing haphazard about it." In the case of *Fenton*,¹ what the man was doing was by no means an unusual act, and did not involve any unusual exertion, although it necessitated exertion greater than he might use in many parts of his work. But the result was that he ruptured himself, and the moment the act took place, he called out that he had "got a tear in his inside." Now here I do not find anything similar. We do not know exactly what happened, because the man was not in view of anybody at the time, and he said nothing; when he was seen he was lying against the side of the sack. There was no post-mortem examination to ascertain the condition of matters, and it seems to me that the facts themselves do not prove that what the respondents here found upon did actually take place—namely, that there was any strain of the heart whatever. The respondents, however, maintain that the Sheriff-substitute has so found; I agree with your Lordships that he has not so found. He has not found that there was a strain. What he has said is that a contributing cause of the failure of the heart's action was the strain arising from the exertion made by the deceased in repeatedly stooping. As Lord Dundas has pointed out, that is the first use of the word "strain"; and, as I read it, the Sheriff-substitute simply means that the man was exerting himself at the time, and that the consequence of his exertion, which he had been repeatedly making, was to produce the result that unfortunately happened. If the Sheriff-substitute had found, as the result of a post-mortem examination, that it appeared that the heart had been at that particular moment subjected to a special strain, the result might have been different. As the case stands, I agree with your Lordships in holding that the Sheriff-substitute has gone wrong, and that the case of *Clover, Clayton, & Company*³ does not rule this case.

THE COURT pronounced this interlocutor:—"Find in answer to the questions of law that there were no facts from which the arbitrator could competently infer that the death of Thomas Ritchie was due to injury by accident within the meaning of the Workmen's Compensation Act, 1906."

LANGLANDS & MACKAY, W.S.—BONAR, HUNTER, & JOHNSTONE, W.S.—Agents.

¹[1903] A. C. 443.

²5 F. 120.

³[1910] A. C. 242.

MRS HELEN CAVERS OR THOMSON, Pursuer (Respondent).—

Wilson, K.C.—D. Anderson.

MUTTER, HOWEY, & COMPANY, Defenders (Appellants).—

Moncrieff, K.C.—C. H. Brown.

No. 84.

Feb. 7, 1913.

Thomson v.
Mutter,
Howey, & Co.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule

(1) (a)—Where death "results" from the injury—Death from heart weakness set up by operation—Operation not confined to injury caused by accident—*Novus actus interveniens.*

A workman accidentally ruptured himself in the course of his employment and was obliged to undergo an operation for hernia. In the course of the operation he was discovered to be suffering also from another hernia of long standing, and both hernias were operated upon at the same time. He subsequently died, the cause of death being found to be heart weakness and degeneracy "set up by the strain of the operation." In defence to a claim for compensation the employers maintained that, death being due to an operation part of which only was rendered necessary by the accident, the operation was a *novus actus* intervening to break the chain of causation between the accident and the death.

Held that, on the facts stated, there was evidence to justify the arbitrator in finding that death was the result of the accident the workman had sustained in the course of his employment.

In an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Hawick between Mrs Helen Cavers or Thomson, widow of the deceased William Lockie Thomson, railway lorryman, and Mutter, Howey, & Company, railway contractors, the Sheriff-substitute (Baillie) awarded compensation, and at the request of the defenders stated a case for appeal.

The statements in the case, so far as relevant to the questions with which this report is concerned, were as follows:—"Evidence was led before me, and I have had the assistance of the medical referee with reference to the medical evidence. I held the following facts to be admitted or proved:—(1) The deceased William Lockie Thomson was a lorryman in the service of the appellants, and was sixty-four years of age. (2) On Thursday, 26th October 1911, he went to his work in good health, and on his last journey that day he was engaged at Weensland Mill in loading skips of yarn to his lorry. (3) On Monday, the 30th, he consulted Dr Hamilton, who found him to be suffering from sprain and injury to the abdominal muscles, and hernia, and in answer to Dr Hamilton's inquiries as to how it had happened, he informed him that he had slipped when catching or steadying a skip, but had not thought it was much. (4) Dr Hamilton was satisfied that a slip of this nature would be quite sufficient to produce a hernia. (5) Dr Hamilton sent him to bed, and on that and the following few days, he, and his son, Dr Oliver Hamilton, endeavoured to reduce the hernia, but though able to almost reduce it, found that it was impossible to retain it in this reduced position, and an operation was accordingly rendered necessary. (6) On 7th November Thomson was operated on in the Cottage Hospital at Hawick by Professor Alexis Thomson, and this operation disclosed the existence of a femoral hernia of recent origin (which was the cause of the trouble at the time), and also disclosed the

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existence of an inguinal hernia of long standing. (12) This inguinal hernia had been in existence for about twenty-four years, during which period Thomson had regularly worn a truss, and it had not in any way interfered with his work as a carter. Its existence did not indicate any constitutional predisposition to hernia, and the femoral hernia originated from a cause quite independent of it. (13) Both hernias were operated upon, and in the case of the inguinal hernia, adhesions were cut which were found to exist in the inguinal canal. (14) At the operation it was ascertained that the reason why the femoral hernia could not be absolutely reduced, or retained in a reduced condition, was that it was attached to a piece of omentum, the further end of which was itself tied down by adhesions in the inguinal canal, and, in consequence, prevented the femoral hernia being pushed sufficiently up to remain retained in the abdomen. (15) The operation was completely successful, and on 30th November Dr Hamilton reported in writing to appellants that Thomson had almost recovered, and that he anticipated he would be able to resume work in a few weeks. (16) Subsequent to 26th October, and prior to the operation, Thomson's heart had been repeatedly examined both by Dr Hamilton and Dr Oliver Hamilton, and it was found, so far as examination could disclose, to be in a perfectly healthy condition. (17) Thomson was confined to bed in the hospital for about a month. One day, subsequent to the operation, while in bed, he complained of palpitation of the heart, and on a later day, when getting out of bed, suffered from heart palpitation. (18) These palpitations were caused by heart weakness and heart degeneracy, and this heart weakness and heart degeneracy were set up by the strain of the operation. (19) This heart weakness and heart degeneracy gradually increased, and were the cause of death on 30th May 1912, Dr Hamilton certifying death to be due to strain of the abdominal muscles and heart failure. . . ."

"In these circumstances, I held—(1) That Thomson's death was the result of an accident, arising out of and in the course of his employment"

The questions of law for the opinion of the Court were, *inter alia*:—" (1) Whether there was evidence upon which it could competently be found that the said William Lockie Thomson sustained an accident arising out of and in the course of his employment on 26th October 1911, and that death was the result of said accident? (2) Whether the operation was a *novus actus interveniens* taking the case outside the Act?" The points raised by the other questions in the case were not insisted in by the appellants' counsel at the debate.

The case was heard before the Second Division (without the Lord Justice-Clerk) on 7th February 1913.

Argued for the appellants;—The arbitrator had found the cause of death to be heart weakness set up by the strain of "the operation." "The operation" was an ambiguous term, because in truth there were two operations, one on the old and one on the new hernia. There was no finding either (a) that the operation on the new hernia by itself would have caused death, or (b) that the operation on the old hernia was made necessary by the accident. There was thus a missing link in the chain connecting the death with the accident, namely, the absence of proof that death was due solely to the operation on the hernia which arose from the accident. The arbitrator had not excluded the possibility of the operation on the old hernia being a *novus actus*

interveniens, which would have been fatal to the claim.¹ Admittedly Feb. 7, 1913.
 the right to compensation was not extinguished merely by proof that Thomson v.
 the death was accelerated by a pre-existing disease.² On the other Mutter,
 hand, it was not enough for the arbitrator to find that, but for the Howey, & Co.
 accident, the death would not have occurred when it did,³ and on the
 facts stated, that was all he was entitled to find here. There was no
 evidence on which he could find affirmatively that the death was due
 to the accident. It was due to the effect of an operation, the neces-
 sity for which in part did and in part did not arise out of the acci-
 dent. Death or incapacity due to concurrent causes, one of which
 causes arose out of the accident while the other did not, was not a
 valid ground for granting compensation.⁴

Counsel for the respondent were not called upon.

LORD DUNDAS.—It is not necessary to call upon the respondent's counsel. The facts in the case are set forth at considerably greater length than is usual; but I am not at all complaining of that, because I think that the fulness and care with which the learned arbitrator has stated the facts are commendable, and not too frequent in practice. The sphere of decision has been narrowed by certain concessions made, no doubt wisely enough, by the appellants' counsel.—[His Lordship then referred to the questions which, by the appellants' concession, the Court was not called upon to answer.]

Then, as to the first question, an admission was also made, which one should notice at the outset. Counsel said that they did not wish now to contest that Thomson did sustain, on the date in question, an accident arising out of and in the course of his employment; and I have no doubt that admission was a well-considered one. Accordingly, the first question really reads:—"Whether there was evidence upon which it could competently be found that death was a result of said accident?" The second question, upon which the bulk of the argument turned, is:—"Whether the operation was a *novus actus interveniens* taking the case outside the Act?" It was further admitted at the bar that the accident caused a femoral hernia, which, as I understand, is a hernia very high up, close to (though not in) the groin. It was also matter of concession that the existence of this hernia necessitated an operation. We approach more controversial ground when we come to deal with what happened in the way of operation. That is set forth in finding 11 and in the following findings:—[His Lordship then quoted findings 11 to 14, *supra*]. It is further matter of admission that the strain of the operation—the appellants say there were two operations—caused heart weakness, and that the heart weakness resulted in death.

Now, that is the alleged chain of causation between the accident and the death; and it is said by the appellants that it is not complete, that there is a flaw in it, and that there was a *novus actus interveniens* in the shape of the operation. It is said that there is nothing to show us that the accident

¹ Dunham v. Clare, [1902] 2 K. B. 292, *per* Collins, M.R., at p. 296. Lord Dundas referred to Charles v. Walker, Limited, (1909) 2 Butterworth's W. C. C. 5.

² Golder v. Caledonian Railway Co., (1902) 5 F. 123.

³ Dunnigan v. Cavan & Lind, 1911 S. C. 579.

⁴ Hargreave v. Haughhead Coal Co., Limited, 1912 S. C. (H. L.) 70.

No. 85.

MARION MACLEOD, Pursuer.—*Sandeman, K.C.—MacRobert.*
 THE EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED,
 Defenders.—*G. Watt, K.C.—Macmillan, K.C.—Black.*

Feb. 7, 1913.

Macleod v.
 Edinburgh
 and District
 Tramways
 Co., Limited.

Reparation—Negligence—Contributory negligence—Accident—Proximate cause—Passenger stepping out from behind tramway car without looking.

Process—Jury trial—Motion for new trial—Entering judgment for party unsuccessful at trial—Jury Trials Amendment (Scotland) Act, 1910 (10 Edw. VII. and 1 Geo. V. cap. 31), sec. 2.

A passenger who had alighted from a northward bound car, and who had passed immediately behind it with the object of crossing to the farther side of the street, was knocked down and injured by a southward bound car at the moment when she reached the nearest rail of the line on which it was travelling. In an action for damages against the Tramway Company she admitted in evidence that she had not looked to see if any traffic was approaching from the north, but contended that the defenders were liable in respect that the driver of the southward bound car had neither sounded his bell nor slowed down in passing the stationary car, as he was bound to do.

The jury having returned a verdict for the pursuer, the Court set aside that verdict and assoilzied the defenders, *holding* that, even on the assumption that the driver was to blame as alleged, the pursuer's evidence showed that the accident was due to her own negligence in failing to take the ordinary precaution of looking for approaching traffic, it being clear that the southward bound car must have been so close to the pursuer when she stepped into the danger zone that neither sounding the bell nor slowing down could have prevented the accident.

Dublin, Wicklow, and Wexford Railway Co. v. Slattery, (1878) 3 App. Cas. 1155, distinguished.

1st DIVISION. ON 30th June 1911 Marion Macleod, a domestic servant in Edinburgh, brought an action against the Edinburgh and District Tramways Company, Limited, in which she claimed the sum of £1000 as damages in respect of personal injuries which she had sustained owing to the alleged fault of the defenders.

The following statements were made on record:—(Cond. 2) "On the forenoon of Sunday, 26th February 1911, the pursuer, who was on her way to the forenoon service at United Free St Columba's Church, Cambridge Street, Edinburgh, travelled by one of the defenders' cars from the corner of Merchiston Avenue and Polwarth Gardens to opposite the Caledonian Railway Goods Station in Lothian Road, where she got off. She then passed behind the car, and proceeded to cross the street towards the church, and, while so doing, was knocked down by a tramway car belonging to the defenders which was proceeding in a southerly direction, at full speed, i.e., about 12 miles an hour. The wheels of the car passed over the pursuer's left leg." (Cond. 4) "The said accident was due to the fault and negligence of the driver of the south-going car, for whom the defenders are responsible. The said car was not slowed down when passing the car by which the pursuer had travelled, although the driver saw, or ought to have seen, that the said car had stopped to let down passengers. Further, the driver of the said south-going car did not give any warning of his approach by ringing his bell or otherwise. It is the duty of the driver of a car, when passing another car which is stationary,

to slow down and ring his bell, to prevent any risk of accident to Feb. 7, 1913.
 persons who may be crossing the street behind the stationary car. By
 his failure to do this, the driver of the said south-going car caused the Macleod v. Edinburgh and District Tramways Co., Limited.
 said accident to the pursuer. The explanations and statement in
 answer, so far as not coinciding herewith, are denied." (Ans. 4) ". . .
 The accident was due to the fault and negligence of the pursuer her-
 self. . . . The driver of the south-going car, which was proceed-
 ing at a moderate speed, duly rang his bell when coming up to the
 car from which the pursuer had dismounted, but she took no notice
 either of this warning or of a warning addressed to her by the con-
 ductor of the car she had left. On the contrary, she rushed across
 the street without looking where she was going, and with complete
 disregard for her own safety. Had she attended to the warnings
 given, or taken reasonable care in crossing the road, the accident
 would not have occurred."

The defenders pleaded, *inter alia*;—(3) The accident to the pursuer
 having been caused, or materially contributed to, by her own fault or
 negligence, the defenders are entitled to absolvitor.

On 7th December 1911 the Lord Ordinary (Guthrie) approved of
 an issue in ordinary form for the trial of the cause.

The trial took place on 29th June 1912 before Lord Hunter and a jury.
 The jury found for the pursuer and assessed the damages at £350.

On 19th July 1912 the Court granted a rule on the pursuer to
 show cause why the verdict should not be set aside as being contrary
 to the evidence, and a new trial granted. The purport of the evidence,
 so far as material to this report, will be found set forth in the opinion
 of the Lord President, *infra*.

Counsel were heard on the rule before the First Division (without
 Lord Kinnear and with Lord Hunter) on 23rd January 1913.

Argued for the pursuer;—The pursuer was entitled to rely on the
 driver of the southward bound car giving warning of his approach by
 sounding his bell and slowing down as he passed the car from which
 she had alighted. There was admittedly a duty upon him to sound
 his bell in such circumstances. There was evidence in the case from
 which the jury were entitled to hold that as a fact the driver had
 omitted these necessary precautions, and that, had he not committed
 this fault, the accident would have been avoided. In these circum-
 stances the jury had found, and were justified in finding, that the
causa proxima of the accident was the fault of the driver, and that
 the pursuer had not contributed thereto by her negligence.¹

Argued for the defenders;—It was immaterial whether the driver
 of the southward bound car had or had not been guilty of negligence,
 as the pursuer's own evidence clearly disclosed a case of contributory
 negligence, in face of which she could not succeed.² It was her duty

¹ The following authorities were referred to:—Grant v. Caledonian Rail-
 way Co., (1870) 9 Macph. 258; Ramsay v. Andrew Thomson & Sons,
 (1881) 9 R. 140; Frasers v. Edinburgh Street Tramways Co., (1882) 10 R.
 264; Jardine v. Stonefield Laundry Co., (1887) 14 R. 839; Cass v. Edin-
 burgh and District Tramways Co., Limited, 1909 S. C. 1068; Campbell v.
 Train, 1910 S. C. 556. The Lord President referred to Dublin, Wicklow,
 and Wexford Railway Co. v. Slattery, (1878) 3 App. Cas. 1155.

² Frasers v. Edinburgh Street Tramways Co., 10 R. 264, *per* Lord Presi-
 dent Inglis, at pp. 266-7; Grant v. Caledonian Railway Co., 9 Macph. 258;
 Barnett v. Glasgow and South-Western Railway Co., (1891) 28 S. L. R. 339.

Feb. 7, 1913. on coming out from behind the stationary car to take the ordinary precaution for her own safety of looking to see whether any traffic was approaching,¹ and she had neglected to take this precaution. In the circumstances judgment should be entered for the defenders in pursuance of the provisions of section 2 * of the Jury Trials Amendment (Scotland) Act, 1910.

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At advising on 7th February 1913,—

LORD PRESIDENT.—I have come to the conclusion that this verdict cannot be allowed to stand, and I have come to that conclusion entirely upon the case made by the pursuer herself. The history of the accident is simple enough. The young lady was a passenger in a tramway car which was going north. In this country, when tramway cars meet, the right-hand side of one car is next the right-hand side of the other, and the cars are so arranged that the only exit for passengers is at the rear of the car and at the left side, the side next the pavement of the street. The pursuer's object was to go to a church which was situated almost directly opposite a tramway stopping-place. Accordingly she descended from the tramway car at that stopping-place. There was a controversy as to whether she descended before the car had actually stopped or not; but, as I have already said, I am taking the case entirely upon her own evidence and not upon the evidence of the other side, and accordingly I take it as proved that the car had stopped before she alighted. In order to get to her church she had to cross the street; that is, after getting out of the car she had to go across behind the rear of her own car, then cross the space between the two sets of tramway rails, which is called the four-foot way, and then cross the other tramway line and finally get over to the pavement on the other side. She proceeded to do so without stopping at all, and was knocked down by another car going in the opposite direction the moment that she arrived at the side of the rail upon which that car was travelling. Unfortunately her foot went under the car and she sustained a very serious injury. In one sense I regret the conclusion to which I have come. I think the pursuer was perfectly honest and frank, and indeed it is upon her own evidence that I think she loses her case. But, on the other hand, while one has that feeling of sympathy with the pursuer, the fact remains that it is not just to mulct the Tramway Company shareholders in damages where there is no legal ground for doing so.

Now, the reason that I have come to this conclusion is that I think it is clear, upon her own evidence, that it was the pursuer's own negligence that

¹ *Watson v. North British Railway Co.*, (1904) 7 F. 220; *Jardine v. Stonefield Laundry Co.*, 14 R. 839, *per* Lord President Inglis, at p. 840.

* The Jury Trials Amendment (Scotland) Act, 1910 (10 Edw. VII and 1 Geo. V. cap. 31), enacts:—Sec. 2. "If after hearing parties upon (a) a rule to show cause why a new trial should not be granted . . . on the ground that the verdict is contrary to evidence . . . the Court are unanimously of opinion that the verdict under review is contrary to evidence, and, further, that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, they shall be entitled to set aside the verdict and, in place of granting a new trial, to enter judgment for the party unsuccessful at the trial."

led to the accident. The only negligence that is alleged against the Tram- Feb. 7, 1913.
way Company is that the passing car did not ring its bell, as it ought to
have done, and did not slow down. There is, however, conflicting evidence ^{Macleod v. Edinburgh and District Tramways Co., Limited.}
about the bell, and therefore, although I for myself would have come to the
conclusion that the evidence that the bell was rung was better than the
evidence that it was not rung, still I do not go upon that, because the jury ^{Ld. President.}
were perfectly entitled to come to the conclusion that the bell was not
rung. I also think they were entitled to come to the conclusion that the
car was going at the ordinary pace of the cable. Of course with the cable
car it is not possible to have an unduly increased pace as it is with motors
and other vehicles, because naturally the car cannot go faster than the
uniform pace of the cable. But taking it that the car was passing at the
ordinary rate and that the bell did not ring, I think it is quite clear that
this accident could not possibly have happened if it had not been for the
carelessness of the pursuer herself. And I come to that conclusion from
these facts : first, that upon her own showing she passed out from the rear
of her own car over the little space which may be called the four-foot way
and into the danger zone without ever looking at all ; and second, that she
was knocked down at such a place as proves conclusively that the approach-
ing car must have been so close to her when she stepped into the danger
zone that no bell or anything else would have had the slightest effect.

If the case had been that she had nearly got across the track of the
approaching car, then I should have come to the conclusion that, whatever
I thought myself, the jury at least were entitled to say that if the car had
not been going at its ordinary pace, but had been going at a slower pace, as
it ought to have been, the accident might not have happened, and that
therefore the true cause of the accident was the negligence of the defenders.
But, struck as she is the moment she gets upon the other track, it is perfectly
clear that the car must have been so close upon her that nothing could
have saved her except that precaution which every pedestrian is bound to
take when, in broad daylight, he steps from behind one car and goes into
what he knows is the track of another, the precaution of looking whether
anything is coming. There is not the slightest difficulty in doing that. It
is not as if this accident had been one with a carriage, because a carriage
may go anywhere, and there is no place of absolute safety against a carriage
or a motor ; but against a tramway car there is a place of safety, you cannot
be run over by a tramway car unless you put yourself on the rails on which
that car runs, or, to be perfectly accurate, within the few inches that the
tramway car projects over the rails.

Now, that this is the state of the evidence is perfectly clear from what
the lady herself said. Having described how she crossed, she is asked,
"And you did not look for it?"—that is for the traffic going the other way.
And she replies, "Well, I had not time to look. . . . There was nothing
to prevent me standing behind the car or on the four-foot way to look and
see if the traffic was coming. . . . I never saw the car until I was actually
struck." "(Q.) So that you had not looked to see if traffic was coming,
but had walked on to the set of rails where the car was ; is that so?"
"(A.) Yes." Now, that is her own evidence, and then there is the evidence
of a very close eye-witness, Mr Murray, who was in the same car with her,

Feb. 7, 1913. descended at the same place, and was just behind her. He says this: "She just walked behind the car and struck the front corner of the south-going car. That is the corner next the inner rail. By the 'inner rail' I mean the centre track. Her leg was run over." And then again: " . . . she just walked straight behind the car, round the car, and the other car coming up caught her. She never hesitated from the time she started to walk till she was struck, and thus walked into the front corner." Then he describes how she was lying on the four-foot way, behind the car which had knocked her down, with her leg just over the rail.

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Under these circumstances I think the jury could only come to one conclusion, that it was the pursuer's own negligence that was the true cause of the accident, and I do not think that they were entitled to come to any other conclusion upon that evidence.

In these circumstances it would have been necessary, under our former practice, to grant a new trial; and I may say that the only case that has given me any cause for consideration in this matter is the well-known case of *Slattery*.¹ I have considered that case in all its bearings most carefully, and I think it would be possible, if it were necessary, to distinguish the case of *Slattery*¹ upon the ground that this accident happened in broad daylight and the accident in *Slattery*¹ at night; that ground of distinction would seem to be pointed at by some of Lord Cairns's remarks in the case. But the real distinction between this case and *Slattery*¹ seems to me to be this: in *Slattery's* case,¹ owing to what I may call peculiarities of Irish procedure, it was not open to their Lordships to grant a new trial, a situation which could not have arisen here, or, I believe, in England. As it was, the Judges in the minority thought the verdict ought to have been entered for the defendants, and every one of the Judges in the majority thought that the verdict was contrary to evidence, and indicated that if they could have given a new trial they would have done so. Now, all we could have done under our old practice would have been to grant a new trial, but we have got a new power under the Jury Trials Amendment (Scotland) Act, 1910—a power that I may say I think is most beneficent, because I cannot but feel that such a result as would have been reached in *Slattery*,¹ if the matter had been open, would have been most disastrous. According to Lord Cairns and the other Judges in the majority, they would have given a new trial and very likely the same verdict would have followed, and they would have had to go on giving new trial after new trial.

It was to avoid such a situation that the Act of Parliament was passed, and it only gives us power to enter judgment for the unsuccessful party when two conditions are fulfilled: first of all, when there is unanimity in the Court; and, secondly, when we are satisfied that there could really be no other evidence produced which could affect the result. Now, it is perfectly clear that there could be no other evidence produced which could affect the result in the case before your Lordships. We have had the evidence of the only two real eye-witnesses of the scene, and also one piece of hearsay evidence, that of the deceased cabman, which, I think, may be entirely disregarded. As I understand your Lordships are entirely of the same

¹ 3 App. Cas. 1155.

opinion as I am, I think the proper course will be to enter judgment for the Feb. 7, 1913. defendants.

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LORD JOHNSTON.—I entirely concur.

LORD MACKENZIE.—If the verdict is one which cannot from any reasonable point of view be reconciled with the weight of the evidence, it cannot stand. The question put to the jury was whether the pursuer was injured through the fault of the defenders, and this they have answered in the affirmative.

I regret to say that, in my opinion, the jury were not entitled to come to this conclusion. On her own evidence it clearly appears that the pursuer never looked before she attempted to cross the rails on which the tramway car that struck her was travelling. From the evidence of the passenger who followed her, she just walked behind the car she had left and struck the front corner of the south-going car. It is therefore clear that the pace at which that car was going is not of moment in this case. I say so, because I am of opinion that when the foot-passenger has a clear view he is entitled to rely upon the fact that the car is not going at an excessive speed. There is evidence that the driver of the south-going car failed to take the necessary precaution when passing the other car of sounding his bell. Though evidence upon a point of this kind is open to criticism, still the jury were entitled to believe it. Under certain circumstances this might raise a question which would properly be left to the jury, viz., whether the failure to sound the bell or the want of reasonable care on the part of the foot-passenger was the *causa causans* of the accident. Such a case is put by Lord Cairns, L.C., in *Dublin, Wicklow, and Wexford Railway Company v. Slattery*.¹ But in that case the accident happened not in the daytime but at night. Here it was daylight, and had the pursuer looked she would have seen the on-coming car. It was her unfortunate omission to do so that was the cause of the accident. The verdict, therefore, in my opinion, cannot stand.

LORD HUNTER concurred.

THE COURT set aside the verdict, and assoilzied the defenders.

M'LEOD & ROSE, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

¹ 3 App. Cas. 1155, at p. 1167.

No. 86.

ALEXANDER GOODALL, Pursuer (Reclaimers).—*Horne, K.C.—Macquisten.*

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Shaw.SIR ARCHIBALD M'INNES SHAW AND OTHERS (Members of the Licensing Court at Glasgow), Defenders (Respondents).—*Clyde, K.C.—Hon. W. Watson.*SIR ARCHIBALD M'INNES SHAW AND OTHERS (Members of the Licensing Appeal Court at Glasgow), Defenders (Respondents).—*Morison, K.C.—D. M. Wilson.**Public-house—Certificate—Renewal—Objections—Title to object—Objection by mandate—Averment that objections in reality those of mandatary—Competency of general objection that district over-licensed.**Public-house—Licensing authority—Discretion—District over-licensed—Mode of selecting certificates to be refused.*

A licence-holder, who had been refused a renewal of his certificate, brought an action for the reduction of the deliverance of the Licensing Court on the grounds (1) that the objections which had been taken to his certificate were not in reality the objections of the ostensible objectors, but those of a vigilance association (with no *locus standi*) to whose agent the objectors had been induced to give a mandate; (2) that no specific objection had been taken to his certificate, but merely a general objection that the district was over-licensed; (3) that the only objection to the pursuer's certificate being that general one, the magistrates, by the procedure which they had adopted at the Licensing Court, viz., first granting all the certificates which were not objected to by the agent, and only thereafter proceeding to consider those to which he had taken objection, had made it impossible for them to exercise a proper judicial discretion with regard to the renewal of the pursuer's certificate.

Held that none of the grounds of reduction were relevant; but *observed* with regard to number (3) that, had the Licensing Court resolved beforehand to reduce the licences in the district by a certain number, the result would have been different, seeing that in that case the magistrates would no longer have been able (as they were in the circumstances averred by the pursuer), to consider impartially and, if it seemed desirable, to renew all the licences objected to; *diss.* Lord Johnston, who was of opinion that the pursuer's third ground was relevant, in respect that justice could only be done by considering all the licences in the district, and thereafter deciding which fell to be disallowed.

Opinion (per the Lord President) that the method adopted by the magistrates was unfortunate, and that, if they thought the number of licences should be reduced, they should have obtained a report from a trustworthy source, and thereafter considered the questions raised by the report.

1ST DIVISION. ON 27th July 1911 Alexander Goodall, wine and spirit merchant, Glasgow, brought an action against (1) Sir Archibald M'Innes Shaw and others, being the whole members of the Licensing Court for the city of Glasgow, as such members and also as members of the Licensing Appeal Court for the city; (2) Sir Samuel Chisholm, Bart., LL.D., and others being, with the defenders first called, the whole members of the Licensing Appeal Court for the city of Glasgow; (3) Adam Whitson Myles, Town-clerk of Glasgow and Clerk to the Licensing Court; (4) Thomas Fleming Wilson, Clerk of the Peace for the county of the city of Glasgow and Clerk to the Licensing Appeal Court; and (5) John Brown and others, being the parties in whose names objections were lodged against the renewal of the pursuer's certificate

of licence for a public-house. The pursuer sought reduction of (1) a Feb. 7, 1913. deliverance of the Licensing Court refusing him a renewal of a licence for premises situated at 68 M'Alpine Street, Glasgow, for the year from 28th May 1911; (2) a deliverance of the Licensing Appeal Court refusing his appeal against the decision of the Licensing Court. Goodall v. Shaw.

The pursuer held a certificate of licence for a public-house for premises situated at 68 M'Alpine Street, Glasgow.* At the Licensing Court held at Glasgow in April 1911 objections to the renewal of the pursuer's certificate were lodged by Mr Robert Kyle, the paid solicitor of an association known as the Citizens' Vigilance Association, one of whose principal objects was to effect a reduction of the number of public-house licences in Glasgow. The objections were lodged in the names of the defenders John Brown and others, who were owners or occupiers of property in the neighbourhood of the pursuer's public-house,† and were in the following terms:—"To the Licensing Court of the city and royal burgh of Glasgow.—Glasgow, 5th April 1911.—John Brown, [here followed the names of the other objectors] who are owners or occupiers of property in the neighbourhood of the after-mentioned premises, do hereby give notice that they object to the granting of the renewal of the certificate of licence for a public-house applied for by Alexander Goodall for premises situated at 68 M'Alpine Street, Glasgow, for the ensuing year, commencing on 28th May next, in respect:—(1) There are more licensed premises in the neighbourhood where the said premises are situated than are necessary to meet the requirements of the inhabitants, as is shown by the following facts, viz.:—That there is in the Broomielaw ward, where the said premises are situated, one licence to every 92 persons, and that in the Brownfield area of the Broomielaw ward, in which the present premises are situated, excluding the main thoroughfare of Argyle Street, there are 14 licences, while for the supplies of the necessities of life to the inhabitants there are 3 grocers, 1 butcher, 2 bakers, and 3 dairies. (2) The population in the Broomielaw ward in 1905 was 7147, and in 1910 was 6460, showing a decrease of 687, and there has not been a proportionate reduction in the number of licences. (3) The physical, social, and moral tone of the district is very low, as is shown by the following facts, namely:—That the

* The history of the certificate was as follows:—On 9th April 1907 the Licensing Court granted Goodall a renewal of his certificate. On 8th May 1907 the Licensing Appeal Court recalled the judgment of the Licensing Court. Goodall then brought an action of reduction of the judgment of the Appeal Court in the Court of Session, in which he was successful (*Goodall v. Bilsland*, 1909 S. C. 1152). Thereafter in April 1908 his application for a new certificate was granted, and it was renewed annually until April 1911.

† The Licensing (Scotland) Act, 1903 (3 Edw. VII. cap. 25), enacts:—Sec. 19. "Any person or the agent of any person owning or occupying property in the neighbourhood of the house or premises in respect of which any certificate or renewal of any certificate shall be applied for, may object to the granting or renewal of such certificate by lodging at any time not less than five days before the general meeting of the Licensing Court, with the clerk to such Court, a notice in writing to that effect, signed by such person or his agent, specifying the grounds of such objection, which objection shall be heard at the then ensuing general meeting; and if such objection shall be considered of sufficient importance by the Court in such general meeting, and shall be proved to their satisfaction, the said certificate shall not be granted or renewed. . . ."

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death-rate in the Broomielaw ward in 1910 was 19·50 per 1000 of the population, as against 15·66 for the city generally; that the death-rate in the said Brownfield area was in the year 1909 26·8 per 1000 of the population, as compared with 17·95 for the city generally; that the death-rate among infants under one year in the Broomielaw ward for the year 1910 was 141 per 1000 births, as compared with 119 for the city generally; and that the percentage of irregularity in school attendance and of children requiring to be fed by the School Board is very high, and this condition of matters is largely due to the fact that there are more licences in the said ward than are meet and convenient. (4) In view of the facts above narrated it is not meet and convenient that this application should be granted. For ROBERT KYLE, Agent for Objectors, JOHN MACKAY Jun., Pror." On 12th April 1911 the Licensing Court refused to renew the certificate. The pursuer thereupon presented an appeal to the Licensing Appeal Court. On 9th May 1911 the Appeal Court refused the appeal. In the present action the pursuer sought to reduce these deliverances.

The pursuer averred, *inter alia*;—(Cond. 6) "For a number of years there has existed in Glasgow a society known as the Citizens' Vigilance Association. The sole or principal purpose of said Association is to oppose the granting and renewing of licences. For this purpose it has employed and employs law-agents and others, whose charges and expenses have been and are defrayed from its funds. The operations of the said Association are controlled, and the funds for carrying on its operations are provided, by the voluntary subscriptions of a few individuals holding extreme views on the liquor question, who believe, or profess to believe, that by obtaining a reduction in the number of licensed premises in the city, they are advancing the cause of temperance. In conducting their campaign against licences the practice of the said Association is for a committee thereof to take up, prior to each half-yearly Licensing Court, consideration of the whole licensed premises in the city; to select and decide on the licences to be objected to at the ensuing Court; and to instruct their salaried law-agent and other paid officials to take steps to obtain, from parties owning or occupying premises in the neighbourhood of the particular licences to be objected to, ostensible mandates or letters of authority in order to give the Association's said law-agent a colourable title to appear at the Licensing Courts and to press for the taking away of the licences. In pursuance of these instructions the said law-agent or others, acting for and on behalf of the said Association, then proceed to search for parties who, if they desired to object on their own account, would have the necessary statutory qualification. Having obtained the signatures of a few such persons who, in many cases, have no idea of the procedure to follow on their signature, or even of the purpose for which it is obtained, the said law-agent then prepares and lodges in their names written objections. These are not the objections of the persons who sign the mandates, but are in reality the objections of the said Association. Thereafter the law-agent of the Association takes complete charge of the proceedings, and conducts the same to their conclusion, solely at the expense and in the interests of the Association, and without further reference to the parties in whose names the objections are professed to be made, none of whom appear or give evidence at the Licensing Court. Said parties are never at any time or in any sense clients of the said law-agent. The said objections

are not in reality *bona fide* objections to the licences within the meaning of section 19 of the said statute, but in substance constitute an attempt by the said Association to acquire a right to object and prosecute objections to licences, which under the statute is a right personal to persons owning or occupying property in the neighbourhood of the licences to be objected to. The said Association are fully aware that they cannot competently obtain in their own names an assignation of the said personal right, but adopt the procedure above explained in order to evade the provisions of the statute, and thus carry on an organised and systematic attack on all or any licensed premises in any part of the city. In this manner the said Association has been in the practice of lodging objections to as many as 100 to 200 licences at each Licensing Court and carrying to the Appeal Court the deliverances of the Licensing Court in cases in which the licences are renewed." (Cond. 7) "The objections so lodged by the law-agent of the said Association are usually in a stereotyped form. Prior to about the year 1908 the practice of the Association was to state specific objections to specific licences. . . ." (Cond. 8) "Since about the year 1908, the practice of the said Association has been to limit their objections to general statements averring that there are too many licensed houses, and that a comparatively higher death-rate in the crowded and poorer districts of the city is in some unexplained way due to the large number of licences." (Cond. 9) "Prior to the Licensing Court for April 1911, the said Association procured, in the manner mentioned in article 6 of the condescendence, documents professing to be mandates in favour of the said Robert Kyle, and lodged objections to the renewal of 98 licences in the city, including that of the pursuer. In the Calton ward of the city there were 103 applications for renewals, and 35 of these were so objected to; in the Broomielaw district there were 67 applications, and 20 of these were objected to; and in the Cowcaddens district there were 113 applications, and 27 were so objected to. The other 16 objections were to licences in other parts of the city. The whole of said objections were substantially in similar terms to those stated in the four heads of objections against pursuer's licence, with the exception that in some of the cases a fifth head of objection was added, namely, that the applicant was interested in another licence or other licences, and could not therefore give that personal supervision to the licence objected to which the Court was entitled to demand. The names of the same parties were put forward as objectors to many of the licences. . . ." (Cond. 12) "At the said Licensing Court the total number of applications for licences amounted to 1631, of which 19 were for hotels, 1329 for public-houses, and 283 for grocers' licences. When the Court met on 11th April, the agent for the Vigilance Association appeared in support of the said 98 objections, and made a general statement to the Court, in the course of which he referred to the views which had been urged upon the Magistrates by . . . deputations, and he pressed for a large reduction in the number of licensed premises in the said three districts. Counsel for the applicants whose licences were objected to was then heard, and pointed out to the Court that, as was well known to them, the objections, although ostensibly in the names of the owners or occupiers of property in the district, were in reality the objections of the Vigilance Association, and maintained that these objections were incompetent and irrelevant, were not com-

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petently before, and ought not to be considered by, the Court. The Court refused to give effect to these contentions, and thereafter the various applicants for licences were called in their order. In every case in which no objections were lodged or taken, the renewal of the licence was immediately granted. In the cases in which objections had been lodged by the Vigilance Association as aforesaid, none of the nominal objectors in whose names objections were pretended to be taken appeared in Court, and no evidence of any kind was led on their behalf. In each case the Court reserved judgment. At the conclusion of the hearing on 11th April the members of the Court retired for a short interval, and on returning they announced that of the 35 licences in the Calton ward to which objections had been lodged by the Vigilance Association as aforesaid, they had sustained the objections to 12 licences, that 2 applications were continued till the following day, and that the remainder of the 35 had been granted. At the conclusion of the Court on 11th April there remained to be disposed of the said objections by the Vigilance Association to licences in the Broomielaw and Cowcaddens districts, and these, which included the pursuer's application, were continued till the next day. . . . (Cond. 13) "When the meeting of the Court was resumed on 12th April the procedure adopted was similar to that of the previous day. The individual cases objected to were dealt with separately, and again none of the nominal objectors appeared, and no evidence was submitted in support of the objections. At the conclusion of the hearing the members of the Court retired, and on returning announced that in the Broomielaw district 10 (including that of the pursuer) out of the 20 applications objected to had been refused, and 10 granted; that in the Cowcaddens district 3 out of 27 applications objected to had been refused and the remainder granted; and that the applications from the Calton district, which had been continued from the previous day, had been refused." (Cond. 14) "The pursuer, and a large number of other licence holders whose applications for renewal were refused as aforesaid, lodged appeals to the Licensing Appeal Court against the said refusals. . . . The Appeal Court met on 8th May 1911, and the law-agent for the Vigilance Association attended to oppose the appeals against the refusal of renewals by the Licensing Court. . . . A proportion of the appeals were dealt with on said 8th May, and at the conclusion of the sitting on that date the Court adjourned until the following day, when the remainder of the appeals were disposed of. . . ." (Cond. 15) ". . . Amongst other appeals refused by the Appeal Court on 9th May was that of the pursuer." (Cond. 16) ". . . The procedure adopted at the said Courts made it impossible for the members of these Courts to exercise a judicial or impartial discretion in disposing of the [objections]. As already explained, the objections were solely directed against an alleged excess of licensed premises in the district, and that question could only have been determined fairly and equitably, as between all the licence holders in the alleged congested district, if the Court had dealt with all the applications for licences in the district at the same time, and having in their discretion determined that a certain number of licences were to be taken away, had then decided, on a consideration of the merits of the whole applications, which of the competing applications should not be granted. Instead of so proceeding, the said Courts, as already explained, granted, without exception, and without consideration, every

licence to which no objections had been taken, and afterwards dealt Feb. 7, 1913. with the licences objected to. In other words, the Licensing Court, instead of themselves selecting from the whole applications the licences to be taken away, dealt only with the selection of the Vigilance Association and refused a certain number of these. As a result of their said proceedings the Court not only failed in their duty to exercise their discretion under the statute, but in substance delegated or surrendered the exercise of that discretion to the objectors, that is, in reality to the said Association. Their said proceedings were accordingly irregular and illegal and in violation of all rules of reason and justice, and contrary to the duties and powers conferred upon them by the licensing statute. The proceedings in the Licensing Appeal Court are also vitiated on the like grounds. . . .”

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Defences were lodged by (1) the members of the Licensing Court (other than Sir Archibald M'Innes Shaw) and the Clerk of the Court; and (2) the members of the Licensing Appeal Court (other than Sir Archibald M'Innes Shaw) and the Clerk of the Court.

The pursuer pleaded, *inter alia* ;—(1) The objections to the pursuer's application for a renewal of his licence certificate having been irrelevant and incompetent, *et separatim* not having been competently before the Court, the pursuer is entitled to decree in terms of the conclusions of the summons. (3) The said objections having been taken and insisted in for and on behalf of the said Citizens' Vigilance Association, and said Association having no right or title to appear as objectors to the renewal of pursuer's certificate, the pursuer is entitled to decree in terms of the conclusions of the summons. (4) The actings of the members of, and the proceedings of, said Licensing Courts, as condescended on, having been irregular and illegal, and contrary to the principles of reason and justice, the pursuer is entitled to decree as concluded for.

The defenders pleaded, *inter alia* ;—(2) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons, and the action should accordingly be dismissed.

On 14th March 1912 the Lord Ordinary (Skerrington) sustained the second plea in law for the defenders, and dismissed the action.*

* [There were also before his Lordship several other actions at the instance of other pursuers against the same defenders raising substantially the same questions.] “OPINION.—I have to dispose of a group of fifteen actions of reduction brought at the instance of wine and spirit merchants in Glasgow, who were refused a renewal of their licences for the year from 28th May 1911 by the Licensing Court or the Licensing Appeal Court for the city of Glasgow. In the meantime I shall confine myself to the action at the instance of Mr Goodall, who, a few years ago, successfully prosecuted a somewhat similar action, which is reported as *Goodall v. Bilsland*, 1909 S. C. 1152. It appears from the report of that case that on 9th April 1907 the Glasgow Licensing Court granted Mr Goodall a renewal of his licence for a public-house for premises at 68 M'Alpine Street, Glasgow. The renewal was granted in spite of the objections of certain owners or occupiers of property in the neighbourhood who had been induced to sign mandates in favour of a Mr Kyle, authorising him to sign, lodge, and support objections to the renewal of Mr Goodall's licence. Mr Kyle was the paid solicitor of the Citizens' Vigilance Association, one of whose principal objects was to effect a reduction of the number of public-house licences in Glasgow. Mr Kyle appealed to the Licensing Appeal Court on behalf of his nominal clients and obtained a judgment refusing the renewal of Mr Goodall's licence.

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The pursuer reclaimed, and the case was heard before the First Division (without Lord Kinnear) on 15th and 16th January 1913.

Argued for the reclaimer ;—(1) The objections which had been taken to the renewal of the pursuer's certificate were general objections, being founded on an alleged excess of licensed premises in the district in which the pursuer's public-house was situated, and were in no sense objections to the pursuer's house in particular. There was no suggestion that it was the pursuer's house which was the cause of the evils mentioned in the objections. Being general, the objections could not be competently stated by private objectors under section 19 of the Licensing (Scotland) Act, 1903.¹ That section and section 20 contemplated only particular objections against the granting or renewal of certificates in respect of individual public-houses. Since the attention of the Court had been focussed on individual public-houses, and not on the whole houses in the locality, the Court could

This latter judgment was set aside by the Court of Session upon the ground that the mandates in his favour did not authorise Mr Kyle to appeal from the Licensing Court to the Appeal Court, and also upon the separate ground that two members of the Appeal Court who voted had been absent from the bench for a substantial part of the hearing. Mr Goodall's licence was renewed in the years 1908-1910. In the present action he alleges that at the Licensing Court held in April 1911 he was again subjected to opposition nominally at the instance of neighbours who had granted mandates to Mr Kyle ; that the Licensing Court on 12th April refused to renew his licence ; and that on 9th May the Licensing Appeal Court refused his appeal. He asks for reduction of these judgments.

" I. The first ground of reduction is based upon the alleged actings of the Vigilance Association and of Mr Kyle in promoting and carrying to a successful conclusion the opposition to the renewal of the pursuer's licence. The pursuer's averments as regards this somewhat delicate matter are so framed that they could not be sent to proof as they stand. He has made voluminous averments in condescendences 6-8 as to the usual practice of the Vigilance Association in promoting opposition to licences, while his averments in condescendence 9 as to what the Association actually did in this particular case are wanting in necessary specification. This defect could be easily amended, but I do not invite the pursuer (and the fourteen pursuers in similar actions) to incur the expense of rewriting their pleadings, and of precognosing a number of witnesses. The pursuer's counsel explained that in the present action his client did not maintain (as he did in the former case, but unsuccessfully on the evidence) that the persons who signed the mandates in favour of Mr Kyle did not understand the meaning and effect of what they were doing. The pursuer's complaint, as explained by his counsel, is that the objections as framed and lodged by Mr Kyle on behalf of the objectors were the objections of the Vigilance Association and of no one else, in respect that the nominal objectors had not authorised him to state these particular objections, and did not in their own minds object to the renewal of the pursuer's licence upon the particular grounds stated by Mr Kyle. I find nothing in section 19 of the Act of 1903 which forbids an owner or occupier who objects to having a public-house in his vicinity from instructing his solicitor to search for and allege every objection which can be honestly stated, even though such objection may be unknown to his client. On the other hand, I have great sympathy with the view presented by the pursuer's counsel to the effect that section 19 was designed to protect the interests of individuals, and that it is contrary to the intention of the statute that temperance reformers disguised as neigh-

¹ 3 Edw. VII. cap. 25.

only refuse to renew the certificates for these individual houses if they did so on the ground of particular objections against them. (2) The objections which had been lodged against a renewal of the pursuer's certificate were not the objections of persons who had a right under the Act to object; they were the objections of an association which had no *locus standi*. Mr Kyle, who appeared as the agent of the nominal objectors, was not really their agent; his true clients were the Vigilance Association. The right to object to the grant or renewal of a licence was a personal franchise, and the mandate by the nominal objectors in favour of Mr Kyle was, in effect, an assignation of a personal franchise, and was an abuse of the statute and illegal. It was a device on the part of the Vigilance Association to acquire a right which the statute did not give them. The pursuer was ready to prove that Mr Kyle, in objecting to the renewal of the pursuer's licence, was really acting on behalf of the Vigilance Association, and

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bours should appear and object to the granting or renewal of particular licences. Such reformers have ample opportunity by way of deputations and otherwise of impressing on the Licensing Magistrates their views on the general temperance question, and particularly their opinion that a certain district is over-licensed. Accordingly, if the question had arisen for the first time, I should have given the pursuer an opportunity of amending his pleadings by alleging with proper specification that the mandates were not intended (as they profess) to constitute Mr Kyle the law-agent of the granters, but were intended to cover a secret and illegal assignation in his favour as agent of the Vigilance Association. In other words, they were mandates *in rem suam*, and were intended to confer upon Mr Kyle an irrevocable right to oppose the pursuer's licence in the interests and for the purposes of the Vigilance Association, and that in return for and in consideration of the expenses incurred and to be incurred by the Association in connection with the opposition. If the proceeding contemplated by the mandates had been an ordinary litigation which was to be carried on in name of the signatories, but in the interest of and by the Vigilance Association, these averments would not have affected the competency of the action, but would have been relevant merely to prove that the Association was the *dominus litis* and responsible for the expenses of a litigation in which it was truly the principal. The Vigilance Association, as assignee, might competently sue in name of its cedents. I should have thought, however, that in a question as to the valid exercise of a statutory privilege conferred upon certain specified classes of persons, the allegation was relevant that the right to object to a licence had been illegally transferred to a third party. I do not read the opinions of the Judges in the former case as expressing any different view of the law, but merely as declining to draw the inference in fact that the mandates were intended to accomplish more than their ostensible purpose—*per* Lord President, 1909 S. C., pp. 1165-7, *per* Lord Ordinary (Johnston), pp. 1173-4. Although, in the words of the Lord President, Mr Kyle 'acted entirely as if the litigation were his own,' his Lordship does not say that, in his opinion, the granters of the mandates so intended. It is, of course, open to the pursuer to ask the Court to draw a different inference from the facts in the present case; but as these facts seem to be substantially the same as in the former case, his prospect of success would probably not justify the expense of amending the record.

"II. [The second ground of reduction (the reception by the Magistrates of deputations composed of members of the Vigilance Committee) dealt with by the Lord Ordinary was not maintained in the Inner House, and is not reported.]

"III. The pursuer alleges (Cond. 16) that the objections to the renewal of his licence, which were framed and lodged by Mr Kyle on behalf of

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not of any persons having a right to object. (3) Where the only objections against the renewal of certain public-house certificates were objections founded on redundancy, every applicant for renewal must be heard before the case of any could be determined¹; and so the Licensing Court before refusing to renew the pursuer's certificate, in consequence of a general objection that the district in question was over-licensed and that a reduction of the number of licences was necessary in the public interest, ought to have taken into consideration the whole licences in the district and only thereafter decided which should be refused. The Magistrates had failed to do so, and, indeed, the procedure which they had adopted at the meeting of the Licensing Court had made it impossible for them to do so, and they had thus acted unfairly towards the pursuer, against whose conduct of the premises for which a renewal of certificate was refused there was no complaint or objection. Also, instead of themselves determining

certain neighbours 'were not competent or relevant objections within the meaning of section 19 of the statute, and in any event were not competently before the Court in respect that they were not specific objections to pursuer's licence, but general objections directed against alleged congestion of licensed premises in the district in which the pursuer's premises are situated.' The ground of reduction resolves into a criticism of the objections stated in the record, to which the pursuer's counsel proposes to apply a stricter standard of relevancy than is applied now to pleadings in the Court of Session. He pointed out that the first three paragraphs simply go to support the opening statement that 'there are more licensed premises in the neighbourhood where the said premises are situated than are necessary to meet the requirements of the inhabitants'; while the last paragraph states that 'in view of the facts above narrated, it is not meet and convenient that this application should be granted.' Logically there is here a *non sequitur*, because the pursuer's licensed house might be necessary for the accommodation of the public notwithstanding that the number of licensed houses in its neighbourhood was excessive. But I construe the objections as impliedly stating that the pursuer's licensed house was unnecessary owing to the number of similar houses available in the neighbourhood for the use of the public.

"IV. The next ground of reduction is founded upon the procedure adopted by the Licensing Courts in disposing of the applications for renewals of licences in the Broomielaw district where the pursuer's house is situated. The pursuer alleges that in every case in which no objection had been taken the renewal was immediately granted, 'without exception and without consideration' (Conds. 12 and 16); and that the Court reserved for subsequent consideration the applications to which objections, mostly on the ground of congestion, had been lodged. As it may be assumed that the policy of the Magistrates was to diminish the number of licensed houses, the victims of this policy fell, according to the procedure adopted, to be selected not from the whole body of licence holders in the district, but from a black list of which the Vigilance Association were truly the authors. Further, it was impossible for the Magistrates to 'exercise a judicial or impartial discretion in disposing of' these objections without considering at the same time the position and advantages or disadvantages of the whole licensed houses in the district. The pursuer's counsel based his argument principally upon the dicta of Lord Alverstone, C.J., and of Lawrence, J., in *Raven v. Southampton Justices*, [1904] 1 K. B. 430. This case was

¹ *Raven v. Southampton Justices*, [1904] 1 K. B. 430; *Rex v. Howard*, [1902] 2 K. B. 363; *Sharp v. Wakefield*, [1891] A. C. 173.

which licences should be renewed, and which reserved for consideration, with a view to the reduction of their number, the Magistrates had, in effect, allowed the Vigilance Association to do that for them, and so had failed to discharge the duty laid upon them by statute. The case of *Walsh v. Magistrates of Pollokshaws*¹ was distinguishable from the present. In that case there was a specific objection in addition to the general one, and the Magistrates were there acting in an administrative capacity under section 11 of the Act.

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Argued for the respondents the members of the Licensing Court;— (1) Section 19 of the Licensing (Scotland) Act, 1903, in no way limited the grounds of objection that might be put forward by private objectors. All that was necessary under that section was that the objections should be stated against a particular licence, and that had been done in the present case. The Magistrates were themselves acquainted with the locality, and were of opinion that there were too many public-houses; and that was sufficient to entitle them to reduce the number of licences. (2) The objectors here were occupiers of houses in the neighbourhood of the pursuer's premises, and so had a right to object.² There was nothing illegal in their employing as their agent the agent of the Vigilance Association.³ (3) In refusing to renew the pursuer's certificate the Magistrates had exercised their discretion judicially. The pursuer's own averments were inconsistent with his argument that the Magistrates had failed to do so. In determining which of the public-house certificates should be renewed and which refused, the Magistrates had taken into consideration the fact that the renewal of some had been objected to and the renewal of others had not. That was the principle of selection on which the Court had proceeded, and, in granting a renewal in the case of those certificates to which no objections had been taken, they had, in effect, determined that those certificates were "meet and convenient"⁴ to be renewed. With regard to the certificates objected to, which were held over, the Magistrates had retained their full discretion. It was still open to them to refuse or renew them all, and in point of fact many of them had been renewed. The Magistrates were entitled to make up their minds beforehand on the general question of whether or not in a particular ward there should be a reduction of licences, and they

commented upon by the Lord President in *Walsh's case*, 7 F. 1009, at pp. 1019-20, and is certainly not an authority in Scotland. While the dicta referred to are entitled to respect, there is also force in the reasoning of the dissenting Judge, Kennedy, J. I do not need to choose between these conflicting views, because I have no right and no duty to instruct the Licensing Courts as to the way in which they ought to exercise the discretionary powers committed to them by the statute. On this point it is sufficient to refer to the opinion of the Lord President in *Walsh's case* (7 F., pp. 1017-18), and to the authorities there cited. All I need say is that the procedure adopted does not strike me as being unjudicial and capricious. I therefore hold this ground of judgment to be irrelevant.

"The decision in *Goodall's case* rules all the other cases.—[His Lordship then referred to one or two special points in these cases.]

"I accordingly dismiss all the actions as irrelevant."

¹ (1905) 7 F. 1009, *aff.* 1907 S. C. (H. L.) 1.

² Licensing (Scotland) Act, 1903, section 19.

³ *Goodall v. Biland*, 1909 S. C. 1152, *per* the Lord President, at pp. 1164 *et seq.*, and Lord Johnston, at foot of p. 1173.

⁴ Licensing (Scotland) Act, 1903, section 11.

Feb. 7, 1913. were further entitled to select in that ward the area within which, if there was to be a reduction, that reduction should take place. Such selection was a question of administrative policy, and an applicant for the renewal of his certificate had no right to be heard on a general question of administrative policy.¹ That being so, the pursuer in the present case, while he was entitled to be heard in regard to his own particular licence, was not entitled to say, "You must not dispose of A's application until you have considered mine."

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Counsel for the respondents the members of the Licensing Appeal Court adopted the argument put forward on behalf of the members of the Licensing Court.

At advising on 7th February 1913,—

LORD PRESIDENT.—The pursuer in this case being, in 1911, the holder of a licence for a public-house situated at 68 M'Alpine Street, Glasgow, applied to the Licensing Court for a renewal, and that renewal was refused. He then appealed, and the judgment of the Licensing Court was affirmed. The present action is an action for reduction of this deliverance, and the Lord Ordinary has held that the action as laid is irrelevant, and has therefore dismissed it.

The matter arises out of circumstances which, in a certain aspect of them, have already been before this Court in a previous action at the instance of the same pursuer. There is a society in Glasgow called the Vigilance Association which tries to prevent the granting of certain licences. It goes round and finds objectors who, by their local position, have a *locus standi* under the statute; it assists those objectors, and, indeed, practically conducts their cases for them. In the present instance that procedure had been followed, and objections were put in at the instance of certain objectors who had allowed the agent for the Vigilance Association to conduct their cases. These objections, as stated, were entirely of the nature of general objections,—that is to say, the objectors did not make any particular complaint of the way in which the pursuer's public-house was conducted, or of the unfitness of the pursuer to conduct it; but they put forward, as forcibly as they could, the redundancy of licences in the neighbourhood and the inadvisability of those licences being kept at the same number, the *sequitur* being that the pursuer's licence ought to be refused. The agent for the Vigilance Association was heard upon these objections, and the first objection of the pursuer is that the voice that was heard in Court was truly the voice of the Vigilance Association and not of the particular objector. I do not wish to waste your Lordships' time by repeating what I said in the case of *Goodall v. Bilsland*.² I think it clearly follows from what I there said that, however much the true moving spirit may have been the Vigilance Association, and however much the oration of the agent for the objector may have been coloured by the views of the Society, there was nothing illegal about that, and if the objector chooses to employ the agent of the Vigilance Association as his agent and to allow

¹ *Walsh v. Magistrates of Pollokshaws*, 1907 S. C. (H. L.) 1, per Lord Davey, at p. 4.

² 1909 S. C. 1152.

him to conduct his case, that is not a ground for reducing the deliverance Feb. 7, 1913. that may be afterwards pronounced.

The case of insufficiency of mandate, which wrecked the proceedings in *Goodall v. Shaw*, the former case, is not really presented in this case. There is something Ld. President. said about the getting of the mandates, and so on. But the case was not pled in that way before the Lord Ordinary, and was not pled in that way before your Lordships. To sustain a case of that kind it would have been necessary to allege specifically that the mandates, in their terms, did not cover the appearance, and nothing of that sort has been urged.

But the next objection—and it is a more formidable one and has given me some anxiety, more especially as I know that there is a difference of opinion among us upon the subject—is founded on the way in which the Licensing Committee proceeded in this matter. The Vigilance Association had, I think I may say, found objectors in a certain number of cases, and in a certain number of cases they had not. Now, it is said—and this being upon relevancy, I must take it that the statement of the pursuer is true—it is said—[His Lordship read condescendences 12 and 13]. Upon that statement the pursuer argues thus. He says: "There was here no objection to me individually at all; the only objections were general objections founded upon the advisability of reducing the number of licences. And the licensing body so handed themselves over to the Vigilance Association that they took from them the position that licences to which they had not objected could safely be granted; and thus allowed them to select, so to speak, for the Court those licences against which it was proposed to execute the general purpose of reducing the licences." The pursuer says that by that method of proceeding the Magistrates never did, and never could, consider the case judicially, but assumed that the pursuer's licence was a proper one to be refused; first, because they had already granted *de plano* a large number of licences; and secondly, because, so far as the others were concerned, they had not made that selection by any consideration of their own, but simply had taken what is tantamount to a list handed in by the Vigilance Association.

I certainly am not without hesitation upon this matter, because I do think it was a very unfortunate method of proceeding. I cannot understand why the licensing body, who, I presume, want to act fairly as between all persons, if they are of opinion that there should be a reduction of licences in a certain district, should not themselves go into the matter by getting a report from the police or someone in whom they have trust; and then—directing their own minds to the questions raised in that report—avoid acting in such a manner as, at any rate, gives the appearance of being unduly influenced by the views of a set of persons who, although I am perfectly willing to give them credit for good motives, still have no real *locus standi* in the matter, and are not people whom one can believe to be very prone to act in a judicial spirit. But although I feel that very strongly, I do not think that what the licensing body did is sufficient to allow us, as a Court of law, to set aside their deliverance. Here again, I do not propose to make any general observations, because I said all I have to say in the case of *Walsh*,¹ and I

¹ 7 F. 1009, *aff.* 1907 S. C. (H. L.) 1.

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believe that what I said there was approved in the House of Lords. I cannot myself say that it was wrong for the Licensing Court, if they came to the conclusion that there were too many licences in the district, to say to themselves, "We will, in selecting those that are to be refused, be influenced by the fact that A, B, and C are objected to by their neighbours, and that D, E, and F are not." However much the Vigilance Association may have been the prime movers in the matter, still that is the eventual result. After all, the Vigilance Association were able to find the neighbours of A, B, and C who did put in objections, and it does not alter the situation that the objections of the neighbours of A, B, and C were not very spontaneous. So that I do not feel that the licensing body did anything wrong in saying, "When we consider this question we shall take it that, if any licences are to go, those had better go to which the neighbours object." Then you come to the next stage. The Licensing Court take up the objections and they hear the parties, and they take the cases into consideration. Now it seems to me that the licensing body had still kept it in their power to grant every one of those licences. Their hearing parties upon those cases to which objections were lodged did not prevent them granting one and all of them, and up to the last moment, until they pronounced judgment, they were able to select as they chose between them. Of course we cannot tell what were the precise reasons which led them to think that the pursuer's licence should be refused while somebody else's should not. But it has been held again and again that in this matter the Licensing Court are entitled to make use of their own knowledge. They are not bound to consider only what they hear in Court brought before them as evidence; and accordingly I think they were entitled to discriminate as they chose.

If there had been a general resolution by which the licensing body had bound themselves to reduce the licences by a certain number, then, I think, they would have put themselves into a position in which it would be impossible to do justice as between A, B, C, D, and so on, without considering each and every case. But they did not do that. They had heard depositions upon the matter, but there was nothing in their procedure up to this moment which prevented them granting every one of those licences if they chose.

Accordingly, on the whole matter, I think that no relevant case here has been made out against what the Court did. I have expressed myself as strongly as I am entitled to as to what I think ought fairly to be done when licences are to be refused upon the ground of numbers alone, because, although in one sense the question arises as a new one upon each particular person's application, still anyone with any common sense of fairness would feel that if there are twenty licences in a district which are to be reduced to fifteen, there ought to be consideration as to which five should be taken. On the whole matter I agree with the Lord Ordinary.

LORD JOHNSTON.—I regret that I am unable to arrive at the same conclusion as your Lordship and my brother Lord Mackenzie, as I think that the Lord Ordinary's judgment as regards the fourth head of his very lucid and exhaustive opinion is not well founded. The ground of my dissent may be shortly stated. I recognise that under the Licensing Act of 1903,

section 11, the Licensing Court at their general half-yearly meetings are Feb. 7, 1913. empowered to grant certificates for the keeping of public-houses for the Goodall v. ensuing term, "to such and so many persons as the Court then assembled Shaw. at such meeting shall think meet and convenient." The Court therefore Ld. Johnston. has conferred upon it a very wide discretion, but it is a discretion which, I think, it is now fully accepted, must be exercised fairly and reasonably, and not arbitrarily. It is a public fact that large capital is embarked in the licensed house business, and—while I am far from suggesting that the licence holder has any vested interest, far less any right of property, in his licence,—this publicly recognised fact calls for fair and reasonable, if not judicial in the higher sense, treatment of their business by the Licensing Court.

If I thought that the present was on all-fours with the case of *Walsh*¹ I should feel bound to concur with your Lordships. But I think that in its circumstances it is not *in pari casu* with that of *Walsh*,¹ and that it differs from it precisely in such a way as to lead to a different conclusion. I do not detain your Lordships by a comparison of the circumstances of the two cases. The distinction between them is at once apparent.

In this relation it is, I think, not without pertinence to advert to the different way in which applications for new certificates and for the renewal of old certificates is treated by the Act. I refer to sections 13 and 23 as compared with section 22.

Against the granting or renewing of any certificate objection may be taken, without notice, by any member of the Court or by certain public officials in the public interest (section 20); and also by any person or the agent of any person owning or occupying property in the neighbourhood of the premises for which a certificate or the renewal of a certificate is applied, but this only on notice, specifying the grounds of objection, and such objection shall be heard by the Court, and if it is considered by them of sufficient importance and proved to their satisfaction, the certificate shall not be granted or renewed (section 19). Though the last part of this clause is not repeated in section 20, I think that it is implied. Provision is also made for the obtaining and leading of evidence on behalf of any party interested in relation to applications for the granting and renewing of certificates (section 21).

Now, objection may be either general or particular, as, for instance, on the one hand, that a district or neighbourhood is over-supplied with public-houses, or, on the other, that an individual house is insanitary or ill-conducted in its construction, or that it has been badly conducted. It is rare that a purely general objection, as that there is a congestion of public-houses in a neighbourhood, is taken to an individual public-house, except in conjunction with a particular objection to that house. But I do not think that it is incompetent for such general objection only to be taken, or for it to be taken by a private objector under section 19. But I think that it is incumbent on the Court, if it is to act fairly and reasonably and not arbitrarily, to proceed somewhat differently in disposing of such general objection, and such general objection only, than where it is dealing with a particular objection. And the question in the present case is, whether the

¹ 7 F. 1009, *aff.* 1907 S. C. (H. L.) 1.

Feb. 7, 1913. Court has so dealt fairly and reasonably and not arbitrarily with this pursuer's licence. It has been subjected to a general objection only, and at the instance of private objectors, as disclosed in the notice of objection. Goodall v. Shaw. Nothing could be more general. The objection states merely that there are more licensed premises in the neighbourhood, where the said premises are situated, than are necessary to meet the requirements of the inhabitants, as is said to be shown by a comparison of the population with the number of public-houses, and by the fact of reduction in the population without a proportional reduction in the number of licences. And, further, reference is made to the low physical, social, and moral tone of the district, as proved by the high death-rate, and particularly the high infantile death-rate, and by the high percentage of irregularity in school attendance, and of the number of children requiring to be fed by the School Board. It may be true, and if the facts alleged are correct I think must almost be admitted to be true, that the district is over-licensed. But, then, why is this particular public-house, in preference to others, selected as one the licence of which is to be cancelled, it having subsisted for a great many years, and there being no particular objection stated to it in conjunction with this general objection? I do not suggest that the Licensing Court, if they are of opinion that a district is over-licensed, are not entitled under the Act to reduce the number of licences and to refuse any particular certificate without having in addition some particular objection which they can sustain, not as *per se* sufficient to justify them in refusing a renewal irrespective of the consideration of congestion, but as pointing to the propriety of selecting the individual house as the one to be suppressed where in their opinion there is congestion. I only maintain that in making their selection they must act fairly and reasonably and not arbitrarily. And if the statements in cond. 12 are proved, the Licensing Court in the present case, at their spring sitting in 1911, by their course of procedure precluded themselves, in my opinion, from acting fairly and reasonably, and did act arbitrarily.

The case as presented to this Court is mixed up with very lengthy averments as to the action of a certain body known in Glasgow as the Vigilance Association. There is no question that this Association instigated these general objections to the pursuer's and a number of other licences, and entirely controlled the objections in each case. But I put out of sight all these allegations as unnecessary for the pursuer's true case. Mr Kyle, the agent for the Vigilance Association, produced to the Court sufficient mandates to appear for the alleged nominal objectors, and for my purpose I assume that he was quite entitled to be heard, and was heard, on behalf of these individual objectors. Now, at the Licensing Court in question the total number of applications for licences amounted to 1631, the objections amounted to 98, and the objections were all supported by Mr Kyle, as agent for the nominal objectors, and were all, as alleged, substantially in the same terms as those which I have summarised above. The Court met on 11th April, and it is said that, after hearing and repelling objections to Mr Kyle's right to appear, they called the various applicants for licences in their order. In every case in which no objections were lodged or taken, it is alleged that the renewal of the licence was immediately granted. But in the cases in which objections had been lodged, and in which Mr

Kyle appeared for the objectors, without evidence led, the Court reserved Feb. 7, 1913. judgment. At the conclusion of the sitting of 11th April the Court, after retiring for consultation, are said to have announced that of thirty-five licences in the Calton ward, to which the above general objection had been lodged, they refused the renewal of twelve and granted the remainder, and then adjourned to the following day. It is then further alleged that on the 12th of April similar procedure was followed. The cases objected to were dealt with separately. None of the nominal objectors appeared personally, but Mr Kyle was heard, and at the conclusion of the hearing the Court, after consultation, announced that in the Broomielaw district they refused ten licences (including that of the pursuer) out of the twenty applications objected to, and granted the remaining ten.

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In so acting the Court did, as it appears to me, preclude themselves from judging fairly and reasonably, and did proceed arbitrarily. They had nothing before them but the alleged over-licensing of the district. If they were satisfied of this, they were bound to make a fair and reasonable selection of licences to be withdrawn, after a survey or consideration of the district or neighbourhood. By granting on 11th April all those licences to which no objection had been taken, they had precluded themselves from making such selection.

If they had made up their minds, on consideration of the general question prior to their sitting, that there ought to be a reduction in the number of licences, I do not think that inquiry could be demanded into the method they took to determine their selection of the licences to be cancelled, unless something very flagrantly partial could be alleged. The matter is one committed to their discretion. But when they had not, so far as appears *ex facie* of their proceedings, considered the general question, and had, on entering upon their duties, proceeded to grant renewals of the great majority of the licences brought before them, they had, I think, debarred themselves, in course of the sitting of the Court—for they could only then proceed to carry any determination on the general question into effect—from selecting from the licences left those which they would cancel. Whether they had or had not considered and come to any determination upon the general question, they had already surrendered to others the function of making a short list for them, and then they applied themselves solely to the consideration of the houses entered in that short list. This, in my opinion, was arbitrary and not fair and reasonable. For these reasons, while the record contains a large amount of matter which I may term surplusage, there is, in my opinion, in conds. 12 and 13 a relevant case stated for reduction of the deliverance or finding of a Licensing Court. If the proceedings of the Licensing Court were thus vitiated, I do not think that their deliverances could be set up by any affirmance of the Licensing Appeal Court, particularly if, as is alleged, Mr Kyle, representing the nominal objectors, stated to the Court that he had no specific objection against the character of any of the applicants, and that his objections were entirely on the ground of congestion of licences.

LORD MACKENZIE.—I agree with your Lordship in the chair.

The only ground of reduction in regard to which I desire to say anything

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is that founded upon the procedure followed at the Licensing Court. The pursuer's averments on this point are contained in articles 12 and 16 of the condescendence, which may be summarised thus :—The Licensing Court refused to renew Goodall's licence in consequence of a general objection that there were more licensed premises in the neighbourhood than were necessary to meet the requirements of the inhabitants. Before coming to this conclusion it was necessary for the Court to take into consideration the position of the whole licences in the neighbourhood. This, however, they could not do, because all the licences to which no objection had been stated were immediately granted, and it was only thereafter that the Magistrates proceeded to deal with the licences which had been placed on a black list by the Vigilance Association, by means of objections taken under section 19 of the 1903 Act; therefore the Court had debarred itself from exercising a judicial discretion.

Now, no doubt, the objection as stated involves a *non sequitur*. The fact that there are too many licences in the district is not *per se* a reason why the licence of A should be taken away. On the other hand, I do not think that the fact of the objection being stated in these terms makes the procedure invalid. If the true question was whether in the public interest the licence of A should go, the form of the objection is not material, provided the pursuer cannot aver facts which show that it was not possible that the true question was considered and decided. The grounds upon which the Licensing Court may proceed in coming to a conclusion are pointed out by the Lord President in the case of *Walsh*.¹

It is evident from the terms of cond. 12 that if, after the whole cases had been called, and parties had been heard in those where there were objections, avizandum had been made with all the cases, the pursuer could not have said anything against the procedure. The averments in cond. 16 could not have been made. As the averments stand in cond. 12 I think they lack one essential element to make them relevant. There is no averment that when the Licensing Court came to deal with Goodall's licence they had as a Court prejudged the question whether there should be any reduction of licences on the ground of redundancy. The fact that a large number of unopposed licences had previously been granted did not debar the Court from exercising a judicial discretion when they came to those that were objected to. From the figures given it appears that a large proportion of the licences objected to were granted. In these circumstances I agree with the view taken by the Lord Ordinary.

As regards the English cases of *Raven*² and *Howard*,³ these were decisions under a different statute.

I desire to say in addition to what the Lord President has already said that in dealing with the question of the redundancy of licences, it is most desirable that the Licensing Court should proceed so as to avoid any appearance of unfairness.

THE COURT adhered.

ALEX. MORISON & Co., W.S.—CAMPBELL & SMITH, S.S.C.—
CARMICHAEL & MILLER, W.S.—Agents.

¹ 7 F. 1009, *aff.* 1907 S. C. (H. L.) 1.

² [1904] 1 K. B. 430.

³ [1902] 2 K. B. 363.

ROBERT BARCLAY PEARSON AND OTHERS (William Burton Stewart's Marriage-contract Trustees), Petitioners.—*Hon. W. Watson.* No. 87.

Feb. 7, 1913.

Trust—Trustees—Resignation—New trustees—Appointment of Canadian trust company as trustees. Stewart's Trustees.

The trustees acting under a Scotch antenuptial contract of marriage and an English marriage-settlement, made on the marriage of a Scotsman to an Englishwoman, were the same parties, viz., the spouses themselves, who had left Scotland and settled in Canada, and two other persons who resided in England. The trustees presented a petition to the Court to appoint as trustees, in place of the petitioners, a Canadian trust company incorporated by special Act of Parliament of the Dominion, and having power, *inter alia*, to undertake the office of trustee; and to authorise the petitioners to transfer the trust funds to the company and to resign. The company entered into a formal obligation, in the event of their appointment, to submit to the jurisdiction of the Court of Session in all matters relating to the trust and to obey all orders of the Court thereanent, and assigned the chambers of a firm of Glasgow writers as their domicile of citation.

The Court *refused* the prayer of the petition.

Simpson's Trustees, 1907 S. C. 87, *distinguished* and *doubted*.

ON 19th July 1912 a petition was presented by the trustees acting 1ST DIVISION. under two deeds granted in contemplation of the marriage, which was afterwards solemnised, between William Burton Stewart and Rachel Westmacott, craving for the appointment of new trustees under each deed, and for authority to assign the trust funds and to resign.

The deeds in question were:—(1) An antenuptial contract of marriage in Scotch form entered into between the said William Burton Stewart, of the first part, and the said Rachel Westmacott, afterwards Stewart, with consent of her father, Percy Graham Buchanan Westmacott, of Rosemount, Sunninghill, Berkshire, of the second part, dated 10th April, and registered in the Books of Council and Session 4th May 1899, and (2) a deed of settlement in English form entered into between the said Percy Graham Buchanan Westmacott, of the first part, the said William Burton Stewart, of the second part, the said Rachel Westmacott, afterwards Stewart, of the third part, and John Westmacott, Robert Barclay Pearson, the said William Burton Stewart, and Rachel Westmacott, afterwards Stewart (together therein called the trustees), of the fourth part, dated 10th April 1899. The trustees appointed under both these deeds were the same, viz.:—the petitioners, who were Robert Barclay Pearson, sometime advocate, Edinburgh, now of No. 6 Austin Friars, London; John Westmacott of Woodlands, Mitcham, in the county of Surrey, stockbroker; and the said William Burton Stewart and Rachel Westmacott or Stewart.

The antenuptial contract of marriage dealt with property placed in trust by the husband, who was a domiciled Scotsman. Its main provisions concerned a sum of £25,000 which he bound himself to assign and convey to the trustees to be held on certain trusts for the benefit of the spouses and their issue. It contained a declaration that the trusts thereby constituted should be construed and administered according to the law of Scotland and that the rights of parties should be regulated thereby. The deed of settlement dealt with a sum of £8500 which Percy Graham Buchanan Westmacott, Mrs

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Burton Stewart's father, covenanted to pay to the trustees, to be held on certain other trusts for the benefit of the spouses and their issue.

There were two children of the marriage.

It was stated in the petition:—"That the said Mr and Mrs William Burton Stewart, who, at the date of their marriage, were respectively domiciled in Scotland and England, now reside in Canada, and have residences in Vancouver and Montreal, Mr William Burton Stewart being managing director of Norton, Griffiths, & Company, Limited, engineers and public works contractors in these two cities. Mr Stewart, by letter dated 29th June 1912, herewith produced, intimated to the petitioners that he fully intends to remain in Canada and establish his permanent home and residence there, although his intention might in the future be somewhat altered by the course of his business. Mr and Mrs Stewart state in the said letter that at present they are definitely resident in Canada, and that in all probability they will remain there permanently. That in said letter Mr and Mrs Stewart also state that they find it inconvenient to have their marriage trust administered by trustees (of whose number they themselves form two) resident in England; and that they desire their marriage-trust investments and affairs as well as their own to be attended to in Canada where they reside. They moreover state that, as it would be more satisfactory to them and be in the interests and for the benefit of themselves and their two children that their marriage trustees should reside in Canada, they accordingly desire that the trust funds should be transferred to and invested in Canada, where trust securities yielding a higher rate of interest than similar securities in this country are in ordinary course obtainable, and that the petitioners should resign the office of trustees. With this view Mr and Mrs Stewart therefore asked the petitioners to crave the Court to (1) appoint as their new trustees, under the said antenuptial contract of marriage and deed of settlement, The Prudential Trust Company, Limited (of Canada), a strong trust company, incorporated by special Act of the Parliament of the Dominion of Canada, whose head office is in Montreal, and who are licensed in the provinces of Quebec and British Columbia, and others, to execute the business that can be done by a trust company, and also authorised to undertake *inter alia* the office of trustee, and who are in the opinion of Mr and Mrs Stewart fit and proper persons to be appointed trustees, and (2) authorise the petitioners to assign, transfer, and make over the existing trust securities and investments, or to realise the same and pay over the proceeds thereof to the said company, and thereafter to resign the office of trustee. That the petitioners have asked the said company to state in writing their willingness to be appointed a trustee under the said antenuptial contract of marriage and deed of settlement, and to grant their obligation that, should they be appointed trustees thereunder, they will submit themselves to the jurisdiction of the Court in all matters relating to the trust, and the obligation when received will be produced in the course of these proceedings."

On 1st August 1912 the Lord Ordinary officiating on the Bills (Lord Kinneir) remitted to Mr Keith R. Maitland, W.S., to inquire into the circumstances set forth in the petition and to report.

On 10th January 1913 Mr Keith Maitland submitted his report. This report contained the following passages:—

"Certain particulars as to the financial position and the powers of

the said Prudential Trust Company, Limited (of which the said Wil-
 liam Burton Stewart is a director) are given in the petition, and there
 has been produced in process a copy of the prospectus of the said
 company. The petitioners say that 'the said company is, so far as is
 known to the petitioners, a fit and proper person to be appointed
 trustee.'

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"Since the presentation of the petition there has been lodged in process a formal obligation, dated 29th July 1912, executed by the said Prudential Trust Company, Limited, under which the said company consent to act as trustee under the said antenuptial deeds, and in the event of being appointed 'bind and oblige ourselves to submit to the jurisdiction of the said Court (Court of Session) in all matters relating to the trust created by the said antenuptial contract of marriage and deed of settlement, and to obey all orders of the said Court made upon us thereanent, and for that purpose we assign the chambers of Messrs Watt, Son, & Company, writers, 183 St Vincent Street, Glasgow, as our domicile of citation.' There have also been produced (1) a notarially certified extract from the minute-books of the said company of a meeting of the board of directors, held on 13th December 1912, under which Farquhar Robertson and B. Hal Brown, two of the directors, and James Elmsly, the secretary of the company, are authorised, *inter alia*, to sign all deeds and instruments which the company in its capacity as trustee may require to sign, and to submit to the jurisdiction of the Court of Session in all matters relating to the trust; and (2) a print of the Act of Incorporation of the company, which contains, *inter alia*, the following clauses." The reporter here quoted certain sections from the Act of Incorporation of the company.*

The report proceeded:—

"It is necessary for the petitioners to obtain the authority of the Court to enable them to carry out the course proposed, and there is precedent for an application of the kind so far as relating to a Scotch marriage-contract trust. In the case of *Simpson's Trustees* (reported in 1907 Session Cases on page 88) authority was granted to the trustees under a Scotch antenuptial contract of marriage to resign, and the Court appointed certain individuals resident in Canada to be trustees, subject to their granting an obligation to submit to the jurisdiction of the Court of Session very much in the same terms as the

* The sections quoted by the reporter were to the following effect:—

The company were authorised (section 8) (a) to receive money in trust for the purposes specified in the Act and to invest the same, and "(b) to accept and execute all such trusts of every description and nature as are entrusted to it by any Government or person, or committed or transferred to it by any order, judgment, or decree of any Court in Canada or elsewhere; execute the offices of executor, administrator, trustee. . . ." (Section 9) to invest trust moneys in certain specified investments and, *inter alia*, "(c) in such securities as are authorised by the terms of the trust"; and to hold securities of any other kind which formed part of any estate coming into their hands, subject to the trusts and legal obligations attached thereto. It was provided (section 10) that moneys and securities of any such trust should always be kept distinct from those of the company and in separate accounts; (section 11) that trust property should not be liable for the debts of the company; (section 13) that accounts should be rendered of any trust to which the company was appointed trustee by the Court from time to time as the Court should direct; (section 16) that an annual statement of the company's accounts should be given to the Minister of Finance.

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obligation which has been produced in the present process, and also authorised the trust funds to be transferred to Canada. In the present case it may be noted that under the investment clauses in both deeds the present trustees have full powers of investment in colonial securities.

"The reporter has, however, considerable difficulty in the present case upon two points.

"The first is with regard to the trust created by the deed of settlement. This deed, as before stated, is in English form, and it appears to the reporter that the law of England might require to be invoked in order to regulate the carrying out of the trust. The trustees under the two deeds are the same, but the trust funds are distinct, and the provisions in the two deeds regarding the disposal of the respective trust funds are different. They constitute in effect separate trusts, and the funds have been kept separate. The ultimate beneficiaries under the deed of settlement will in certain events require to be ascertained according to English law. The reporter is in these circumstances doubtful as to the power of the Scotch Courts to alter the administration of the trust created by the deed of settlement, and he thinks it proper to bring the point before your Lordships.

"The second point arises in connection with the appointment, suggested by the petitioners, of the Prudential Trust Company, Limited, as trustee. So far as the information before the reporter goes, the company would appear to be financially sound, but, on the information at his disposal, he does not feel himself in a position to state any definite opinion on this subject. As regards its powers, the reporter has examined the Act of Incorporation, of which a print has been lodged in process, and he refers to the clauses therein, which are quoted above, which show that under its Act it is authorised to act as a trustee on estates either under deeds or under appointment by any Court. So far as the reporter is aware, however, there is no precedent in Scotland for the appointment by the Court of an incorporated company as trustee under a private trust. There is no recognition of such a principle under the Trusts Acts, and it seems to the reporter that in a Scotch trust to be administered in Scotland such an appointment may be incompetent, although the principle of an incorporated company acting as trustee is recognised in England and also in Canada. The point is one which the reporter also thinks it necessary to bring before your Lordships.

"Apart from these points which the reporter has thought it necessary to bring before your Lordships, the reporter has no further remarks to make. The procedure has been properly carried out, and the only objections to the granting of the prayer of the petition seem to be those stated."

Counsel were heard before the First Division (consisting of the Lord President, Lord Dundas, and Lord Johnston) on 21st January 1913.

Argued for the petitioners;—There was no distinction in principle between this case and that of *Simpson's Trustees*,¹ where individuals in Canada were appointed to be trustees under a Scotch antenuptial contract of marriage in circumstances precisely similar to those of the present application. Indeed the appointment of a corporation as trustee was preferable, in the interests of the beneficiaries, to the appointment of individuals. As regarded the doubt raised by the

¹ 1907 S. C. 87.

reporter as to the English trust, it was clear that the two trusts created by the two deeds were really one and indivisible. The intention of parties was that they should be administered together, and, according to the express provision of the antenuptial contract, in Scotland. In these circumstances, the fact that ultimately the rules of English law might have to be invoked in order to carry out the purposes of the settlement did not make the settlement an English trust, and did not affect the power of this Court to deal with the united trusts which fell to be administered within its jurisdiction. The cases of *Brockie*,¹ *Allan's Trustees*,² and *Carruthers' Trustees*,³ in which the Court had refused to deal with English trusts, were distinguishable from the present. These cases concerned trusts which were English in every respect, except that part of the trust-estate consisted of heritable property in Scotland.

Feb. 7, 1913.
Stewart's
Trustees.

At advising on 7th February 1913,—

LORD PRESIDENT.—This is a petition by the marriage-contract trustees of Mr and Mrs Burton Stewart, in which they ask your Lordships to appoint as new trustees a corporate company in Canada, to empower the petitioners to assign the trust funds to the said company, and to permit them, the petitioners, to resign office.

Mr Burton Stewart at the time of his marriage was a domiciled Scotsman. Mrs Burton Stewart was an English lady, and when they married two deeds were executed. One was an antenuptial marriage-contract in ordinary Scotch form, under which the husband settled certain funds, the other was a deed of settlement in English form, by which the lady's father put in trust certain funds; but the trustees under the two deeds were the same, and the trust has been executed as one trust, although in one sense it really consists of two. The spouses have now gone to Canada, Mr Burton Stewart having secured a position in that country, and the reason for the petition is brought out by a letter addressed by the spouses to the trustees, in which, after stating that they intend to remain in Canada, they say this: "My wife and I find it inconvenient to have our marriage trust administered by trustees (of whom you will remember we are two) resident in England, and we would like our marriage-trust investments and affairs, as well as our own, to be attended to in Canada, where we reside." They then ask the trustees to crave the Court to appoint as new trustees "the Prudential Trust Company, Limited (of Canada), a strong trust company incorporated by special Act of the Parliament of the Dominion of Canada, whose head office is in Montreal," and to authorise the transfer of the trust funds to them. The Trust Company has lodged in process a document by which they consent, in the event of your Lordships granting the prayer of the petition, to bind themselves to submit to the jurisdiction of the Court of Session "in all matters relating to the trust created by the said antenuptial contract of marriage and deed of settlement," and they have assigned the chambers of certain gentlemen, who are writers in Glasgow, as their domicile of citation.

Your Lordships remitted the petition to Mr Keith Maitland, Writer to

¹ (1875) 2 R. 923.

² (1896) 24 R. 238 and 718.

³ (1896) 24 R. 238.

Feb. 7, 1913.

Stewart's
Trustees.

Ld. President.

the Signet, and we have his report before us. He brings to your Lordships' notice the difficulties which he feels in the case, and the two difficulties are, first, the appointment of the Prudential Trust Company, Limited, as trustee; and, second, the fact that there are, as I have already said, really two trusts, one of which is English. The learned reporter cites the case of *Simpson's Trustees*,¹ in which the Judges of the Second Division authorised trustees in a Scotch antenuptial contract of marriage to resign, and appointed certain individuals resident in Canada to be trustees, subject to their granting an obligation to submit to the jurisdiction of the Court of Session, as is here proposed. He also points out that, so far as he knows, the Court has never yet appointed an incorporated company as trustee, although he believes that that is done in England and also in Canada.

Now, in the case of *Simpson's Trustees*¹ no opinions are given, and speaking for myself, I wish to say that I should like to reserve my opinion as to whether what was there done was within the proper power of the Court. But assuming that it was, I think the present case goes a good deal further. After all the whole idea of this Court having jurisdiction over a trust is to enable it to vindicate the interests of the beneficiaries if the necessity should arise. There are minor beneficiaries in existence here, because the spouses have children; and although one would be very anxious to do what the spouses desire, I have come clearly to be of opinion that the prayer of the petition cannot be granted. Even assuming *Simpson's Trustees*¹ to be a decision which one would repeat, I think the present application if granted would go a step further, because in that case the Court appointed individual gentlemen, who not only gave an undertaking as is proposed in this case, but who, of course, if they ever were in Scotland, could at least be made subject to the power of the Court. It seems to me that an incorporated company in Canada is absolutely beyond the power of the Court, and equally obviously it will never come to Scotland. So that, although I do not doubt the good faith of the company in executing and lodging in process the document referred to, that document is after all only worth the paper that it is written upon, and if the governing body of the company changed—as it will change in time to come—and if the successors of the present directors thought it convenient to disregard the obligation, there would be no possibility of this Court enforcing it.

To my mind that would be enough; but I think there is also an insuperable difficulty connected with this double trust. There is no question that the Court in England would have jurisdiction to inquire into the proper administration of the English settlement, and I think that the Court in England would be surprised if, upon proceeding to inquire into the conduct of the trustees, it was told that the Court in Scotland had transferred the whole trust administration to Canada. I do not think that we should be entitled to do such a thing, and thereby hamper the Court in the other part of the United Kingdom.

Upon the whole matter, although I regret not being able to comply with the view of the trustees and of the spouses, which, I have no doubt, is

¹ 1907 S. C. 87.

founded upon considerations of convenience and not upon any idea of Feb. 7, 1913. escaping from the jurisdiction of the Court, I have come to the conclusion that the petition cannot be granted.

Stewart's
Trustees.

LORD JOHNSTON.—I agree. Even if the case of *Simpson's Trustees*¹ were given the fullest effect as an authority I should consider that this application is one that for reasons peculiar to itself could not possibly be granted. But I desire to associate myself with what your Lordship has said, and to reserve my opinion as to the course taken in *Simpson's* case.¹ Taking the case as it stands in the reports, I do not think that the question as now before us was fully before their Lordships of the other Division, and I think that the matter ought to be reconsidered, if such a case again comes before the Court.

The Lord President intimated that LORD DUNDAS, who was absent at advising, concurred.

LORD MACKENZIE was present in Court when the case was advised.

THE COURT refused the prayer of the petition.

DUNDAS & WILSON, C.S., Agents:

JOHN O'NEILL, Appellant.—*Sandeman, K.C.—Morton.*

JOHN BROWN & COMPANY, LIMITED, Respondents.—

A. O. M. Mackenzie, K.C.—Keith.

No. 88.

Feb. 8, 1913.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule O'Neill v.
(1) (b)—Where incapacity "results" from the injury—Refusal to undergo John Brown &
surgical operation. Co., Limited.

A workman accidentally injured in the foot and thereby incapacitated, refused to undergo a simple operation which, it was reasonably certain, would have cured him. In so refusing he acted on the advice of his own doctors, who were of opinion that the proposed operation, though devoid of danger, would be useless.

In an application for review of a payment of compensation which he was receiving, held that he was precluded by his refusal from claiming a continuance of the compensation.

IN an application for review of a weekly payment under the Work-2D DIVISION.
men's Compensation Act, 1906, which was being made to John O'Neill, Sheriff of Stir-
labourer, Yoker, by John Brown & Company, Limited, shipbuilders, ling, Dum-
Clydebank, the Sheriff-substitute at Dumbarton (Macdiarmid) reduced barton, and
the compensation to 1d. per week, and at the request of the workman Clackmannan.
stated a case for appeal.

The case set forth:—

"This is an arbitration under the Workmen's Compensation Act, 1906, in which the respondents, by minute of review lodged on 28th August 1912, craved the Court to review and end a weekly payment of 14s. 6d. to which the appellant was entitled under an agreement entered into between appellant and respondents—a memorandum of which was recorded in the books of the Court on 16th June 1911—in respect that the appellant refused to undergo a simple operation

¹ 1907 S. C. 87.

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O'Neill v.

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Co., Limited.

which would bring his incapacity to an end, or at least greatly lessen the same.

"On 10th September 1912 the appellant lodged a note of defence in which he set forth that acting on the advice of his doctors he refused to undergo the said operation, and pleaded that in the whole circumstances his refusal was reasonable.

"On 31st October proof was led before me, when the following facts were established:—(1) That on 22nd December 1910 the appellant, who is a labourer, was injured by accident arising out of and in the course of his employment with the respondents. (2) That said accident was caused by a steel plate falling upon the appellant's left foot. (3) That as a result of his injuries the appellant was totally incapacitated. (4) That the respondents agreed to pay him compensation at the rate of 14s. 6d. per week, being 50 per cent of his average weekly earnings at the date of the accident, and that a memorandum of said agreement was recorded in the books of this Court on 16th June 1911. (5) That the appellant was still totally incapacitated and that the respondents were still paying him compensation at the aforesaid rate. (6) That as a result of the said accident it was found necessary to have the second and third toes of the appellant's left foot partially amputated, and that this was done in the Western Infirmary, Glasgow, in January 1911. (7) That the mutilated stumps of the said second and third toes were tightly wedged in a scar of rigid unhealthy skin binding the first and third toes together, with the result that the appellant was unable to use the said foot without pain. (8) That the appellant complained of pain both in the toes and in the arch of the foot. (9) That there was no objective sign of injury localised in the arch of the foot. (10) That the condition of the said toes was in itself sufficient to account for any pain the appellant felt in the arch of the foot. (11) That the appellant had been examined by three duly qualified medical men on behalf of the respondents. (12) That they advise that the removal of the said stumps would cure the pain in the foot and restore to the appellant his former wage-earning capacity. (13) That it was admitted by all the medical men in the case that the operation was an exceedingly simple one, and attended by no appreciable risk or danger to an ordinary healthy person. (14) That the appellant was well and strong and would have been willing to undergo the said operation but for the advice of his doctors. (15) That the appellant had on his own behalf been examined by two duly qualified medical men, who advised him not to undergo the said operation as it would not lessen his incapacity in any way. (16) That it was reasonably certain that were the appellant to undergo the said operation the pain in his foot would be removed and his former wage-earning capacity restored to him.

"On these facts I found that the appellant's present incapacity was fairly to be ascribed to his refusal to undergo the proposed operation, and that he was not entitled so to refuse. I therefore (on the suggestion of the agent for the respondents), in order to keep matters open, reduced the compensation payable by the respondents to the appellant to 1d. per week, and found no expenses due to or by either party."

The question of law for the opinion of the Court was:—"Whether the appellant by his refusal to undergo the said operation is precluded from insisting on payment of compensation in terms of the aforesaid memorandum of agreement?"

The case was heard before the Second Division (without the Lord Justice-Clerk) on 7th and 8th February 1913.

Argued for the appellant;—The arbitrator had misdirected himself. He had considered the question to be whether the operation would cure the injury, and because, on the evidence, he thought it would do so, he had penalised the workman for refusing to undergo it. This was an erroneous view of the law. The true question was whether the workman's refusal was unreasonable or not. In the present case it was not unreasonable. The man had in good faith followed the advice of his own doctors, and no man who did that could be held to have acted unreasonably.¹ The cases where there was no division of medical opinion fell into a different category.²

Argued for the respondents;—The general rule was that when the continuance of incapacity was due to refusal to undergo proper treatment, the compensation fell to be ended.³ If, as in the cases of *Sweeney*⁴ and *Tutton*⁵ cited for the appellant, the operation involved risk to life or would entail extraordinary suffering, then the workman would be justified in refusing to submit to it. But no such case could be suggested here. The only excuse alleged was the advice of the workman's doctors, who were sceptical as to the usefulness of the operation, though they agreed that it would do no harm. It could not be stated as a general proposition that no man acted unreasonably who followed the advice of his doctor, for his doctor might give him unreasonable advice, and the paradox would follow that the man would be acting reasonably in doing an unreasonable thing. In all the circumstances, the arbitrator had come to a right conclusion.

LORD DUNDAS.—In this case the employers asked the Court to end a weekly payment of 14s. 6d., to which the appellant was entitled under an agreement of which a memorandum was recorded, in respect that the appellant has, they allege, refused to undergo a simple operation which would bring his incapacity to an end, or, at least, greatly lessen it. The defence, expressed in a note lodged by the appellant, was that, acting on the advice of his doctors, he refused to undergo the operation, and he pleaded that in the whole circumstances his refusal was reasonable.

The material facts are few and simple. On 22nd December 1910 the appellant was injured by accident arising out of and in the course of his employment with the respondents. The injury was to his left foot, and he was totally incapacitated. An agreed-on rate of compensation was thereafter paid and has been continued. As a result of the accident the appellant had to have the second and third toes partially amputated, and that was done in January 1911. It is found that he was examined by three duly qualified medical men on behalf of the respondents, and they advised that the removal of the stumps would cure the pain which still continued and restore

¹ *Sweeney v. Pumpherston Oil Co., Limited*, (1903) 5 F. 972; *Tutton v. Owners of s.s. "Majestic,"* [1909] 2 K. B. 54; *Paddington Borough Council v. Stack*, (1909) 2 Butterworth's W. C. C. 402.

² *Donnelly v. Baird & Co., Limited*, 1908 S. C. 536, *per* Lord Ardwall and Lord Dundas, at p. 544.

³ *Donnelly v. Baird & Co., Limited*, 1908 S. C. 536; *Warncken v. R. Moreland & Son, Limited*, [1909] 1 K. B. 184.

⁴ 5 F. 972.

⁵ [1909] 2 K. B. 54.

Feb. 8, 1913. to the appellant his former wage-earning capacity. The 13th finding is very important: "That it was admitted by all the medical men," that is to say, O'Neill v. John Brown & Co., Limited. the medical men on both sides, "that the operation was an exceedingly simple one and attended by no appreciable risk or danger to an ordinary healthy person." Lord Dundas. It is further found that the appellant was well and strong, and would have been willing to undergo the operation but for the advice of his doctors, and that the appellant had on his own behalf been examined by two duly qualified medical men who advised him not to undergo the operation as it would not lessen his incapacity in any way. I pause for a moment to point out that the ground apparently upon which these two medical men were against the operation had nothing to do with the risk or pain involved, because they were of the body of medical men referred to who agreed that the operation was an exceedingly simple one, with no appreciable risk or danger, but their view was that it would not be of any use. It appears, therefore, that, even if the operation failed to do good, it could scarcely, on these facts, do harm; the *status quo* would be maintained. The Sheriff-substitute goes on to find: "(16) That it was reasonably certain that were the appellant to undergo the said operation the pain in his foot would be removed and his former wage-earning capacity restored to him." I take that to be a pronouncement by the Sheriff-substitute upon the proof led, amounting to as confident a pronouncement as any Judge could safely make upon medical testimony before him. The arbitrator's conclusion upon these facts is this—he finds that the incapacity was fairly to be ascribed to the appellant's refusal to undergo the proposed operation, and that he was not entitled so to refuse. Therefore, on the suggestion of the respondents' agent, in order to keep the matter open, he reduced the compensation to the traditional penny. We are now asked to decide whether the appellant by his refusal to undergo the operation is precluded from insisting on payment of compensation in terms of the aforesaid memorandum of agreement.

The problem therefore comes to be, is the appellant's refusal to undergo this operation an unreasonable one? or, it might be put, is the appellant's incapacity really owing to his original accident, or to an unreasonable refusal on his part to undergo the operation? Obviously, I think, all cases of this sort fall to be determined upon their circumstances—each one upon its own individual circumstances—and, indeed, the necessary introduction of the word "reasonable" seems to make that very clear, because a refusal may be perfectly reasonable in one set of circumstances, and perfectly unreasonable in another set of circumstances.

The case of *Sweeney*¹ was, I think, a very peculiar one, and depended upon its own very peculiar circumstances, which were not at all like those here before us. It is enough to point out by way of distinction that the operation there in question is described as "an important minor operation," and further, that the eminent Professor, whose opinion carried weight with the Court, seems to have thought that the man was mending, and might have recovered without any operation at all. Then the case of *Tutton*² was referred to. That was a case where it is clear that the operation would have involved a very grave amount of risk to the patient, because, according to the

¹ 5 F. 972.

² [1909] 2 K. B. 54.

evidence, which the Court believed, of his own doctor, he had to face either Feb. 8, 1913. a very serious operation without an anæsthetic, or a very grave risk of suc- O'Neill v. cumbing under the influence of an anæsthetic. He was suffering from Bright's John Brown & disease. I have no difficulty at all in agreeing with the good sense of Co., Limited. the decision of the learned English Judges in *Tutton's case*.¹ It seems to Lord Dundas. me to throw very little light on the problem before us on the facts, but I must say I do not think it bears out the proposition asserted by Mr Sandeman and his learned junior, to the effect that, if a man *in bona fide* refuses to undergo an operation upon the advice of a qualified medical practitioner, that must be taken as a complete answer to any suggestion that he is unreasonable in refusing to undergo it. I do not think that the cases, of which there are a good many, at all support the view that a mere difference of medical opinion upon a question of this sort can be held to import that the refusal to undergo an operation is reasonable. It seems to me that, if any such doctrine were to be laid down, this part of the Act would really become a dead letter, because in the wide world of medicine I should think that it would almost always be possible to obtain a perfectly genuine, though eccentric, opinion from some qualified medical man to any effect, within limits, that might be desired.

I have made these general observations because of the arguments that were submitted to us. But on the facts of this case I confess I have no doubt that we ought not to interfere with the decision of the learned arbitrator. We must remember that all the medical men agreed—so that there can be no question about it—that there was no appreciable risk or danger about this operation; and that the man is a strong and healthy man, and would have been quite willing to undergo it except for the advice of the two medical men who advised the contrary. As I said before, their advice to the contrary was not owing to any risk or danger, but merely because they took the more pessimistic view that no good was likely to come of the operation; although, as I have said, no material harm could come of it at the very worst. Then we have the finding of the Sheriff-substitute, sitting as a Judge upon all the views that he had before him, which affirms in as strong language as he could safely use, the reasonable certainty that, as the result of the operation, the man's wage-earning capacity would be restored.

If one considers the combined effect of these facts I cannot say that I think the conclusion which the learned arbitrator came to—that the appellant's present incapacity was fairly to be ascribed to his refusal to undergo the operation, and that he was not entitled so to refuse, that is to say that the refusal was unreasonable,—is one which we are entitled to disturb. Indeed, if it were necessary to do so, I should be prepared to say that I think the arbitrator's decision was quite right. I am for answering the question put to us in the affirmative.

LORD SALVESEN.—I concur. It must always be a question of the circumstances disclosed in the evidence whether a man who refuses to submit to an operation has acted reasonably in so refusing. The appellant contends that it is enough to demonstrate the reasonableness of his course, that he

¹ [1909] 2 K. B. 54.

Feb. 8, 1913. has acted in accordance with the advice of one or more medical men, who
O'Neill v. have examined him, and who have come to the conclusion (as the two
John Brown & medical men who examined the appellant on his behalf did) that the opera-
Co., Limited. tion suggested would not lessen his incapacity. If that were the law the
Lord Salvesen. duty of an arbitrator would be a very simple one. He would only require
to find in fact that one or more medical men, who had examined the work-
man on his own behalf, had advised that an operation should not be under-
gone, and, therefore, to find in law that the refusal to undergo the operation
was not unreasonable. I should be very slow to affirm that as a general
proposition.

If we do not take that view, then the circumstances here amply support
the conclusion at which the Sheriff-substitute has arrived, because his last
finding in fact is that it was reasonably certain that were the appellant to
undergo the said operation the pain in his foot would be removed and his
former wage-earning capacity restored to him. I cannot, as a matter of
common sense, come to any other conclusion than that a man acts unreason-
ably, who, in view of the reasonable certainty of the operation curing him,
and of the fact that it is a simple one unattended by risk or serious suffer-
ing, declines to submit to that operation. Accordingly, I am of opinion
not merely that there was evidence to support the conclusion at which the
learned Sheriff-substitute arrived, but also that it was the right conclusion.

LORD GUTHRIE.—I am of the same opinion. I think this is a case where
it is perhaps unfortunate that the learned arbitrator did not sit with a
medical assessor. No doubt had the question been anticipated that would
have been arranged; but we have the arbitrator's decision, if not strictly
speaking his finding, to the effect that by the proposed operation two
things would result—the pain in the appellant's foot would be removed
and his former wage-earning capacity restored to him. I assume that the
only possible cure of this man's foot is by the proposed operation.

Now the cases show that that is not conclusive. You may have all the
doctors agreeing in the view that an operation would effect a cure, but there
are certainly two exceptional cases in either of which the workman's refusal
to undergo the operation, which would effect the cure, is held not to be un-
reasonable. In the first place, if a medical man, on his behalf, thinks, as
apparently in *Sweeney's case*¹ Professor Annandale did, that a cure could be
effected without an operation, then, the refusal to undergo the operation
might not be unreasonable. In the second place, as appears from *Tutton's*
case,² if the cure can only be effected at the cost of substantial risk or sub-
stantial suffering, then again, the workman's refusal is not considered un-
reasonable.

Here we have neither of these elements. Nobody says that there is any
other way of restoring this man from total incapacity to complete recovery
except by operation; and all the medical men agree that there is neither
substantial risk nor prospect of substantial suffering. It seems to me that
in ordinary life the appellant would be considered unreasonable by reason-
able people; and, accordingly, the arbitrator's finding is justified when he

¹ 5 F. 972.

² [1909] 2 K. B. 54.

says that the appellant's present incapacity was fairly to be ascribed to his Feb. 8, 1913. refusal to undergo the proposed operation, and that he was not entitled so to refuse.

O'Neill v.
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Co., Limited.

THE COURT answered the question of law in the affirmative.

HUME M'GREGOR & Co., S.S.C.—AULD & MACDONALD, W.S.—Agents.

CHARLES KENNEDY, Appellant.—*Crabb Watt, K.C.—J. A. Christie.* No. 89.

WILLIAM DIXON, LIMITED, Respondents.—*Horne, K.C.—Strain.* Feb. 18, 1913.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule (15)—Medical referee—Ambiguous report—Competency of arbitrator sending report back to medical referee for explanation. Kennedy v. William Dixon, Limited.

The report of a medical referee, to whom a remit has been made under the Workmen's Compensation Act, 1906, First Schedule (15), may competently be sent back to him by the arbitrator for explanation, if it is ambiguous or unintelligible.

IN an application for review of a weekly payment under the Workmen's Compensation Act, 1906, which was being made to Charles Kennedy, miner, Wishaw, by William Dixon, Limited, coalmasters, Holytown, the Sheriff-substitute at Hamilton (Shennan) ended the compensation, and at the request of the workman stated a case for appeal.

2D DIVISION.
Sheriff of
Lanarkshire.

The case set forth:—

"I heard parties on the 29th November 1912, when the following facts were admitted:—(1) The appellant, on or about 22nd December 1911, received injury to his right eye in the course of his employment as a miner with the respondents at their Carfin Colliery. . . . (3) Parties lodged a joint minute upon 9th November 1912 in the following terms:—'In respect that the said Charles Kennedy, on or about 22nd December 1911, received an injury to his right eye while in the course of his employment with the defenders at their Carfin Colliery, and by agreement between the parties was paid compensation under the Workmen's Compensation Act, 1906, and in respect the defenders now aver pursuer has so far recovered from his injury as to be fit for light work, which contention pursuer denies, and the parties being at variance and no agreement being likely to be arrived at: Therefore the said Charles Kennedy and the said William Dixon, Limited, crave the Court, in terms of section 15 of the First Schedule to the Workmen's Compensation Act, 1906,* to refer the matter to the medical referee, being an eye specialist, including in such refer-

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule, enacts:—" (15) . . . In the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment, the [Sheriff-clerk], on application being made to the Court by both parties, may, on payment by the applicants of such fee not exceeding one pound as may be prescribed, refer the matter to a medical referee.

"The medical referee to whom the matter is so referred shall, in accordance with regulations made by the Secretary of State, give a certificate as to the condition of the workman and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and that certificate shall be conclusive evidence as to the matter so certified. . . ."

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Limited.

ence the question whether any incapacity from which the said Charles Kennedy may now suffer is due to said accident.' (4) The reference was sent by the Sheriff-clerk on 12th November 1912 to Dr Freeland Fergus, Glasgow, being a medical referee under said Act, who reported on 18th November 1912 as follows:—'I hereby certify as follows:— 1. The said Charles Kennedy is now recovered from a serious injury to the right eye which has completely and permanently deprived him of the use of the eye. The injured organ is now quite quiet, and there is no pain even on deep pressure, and his condition is such that he is fit for any work which can be done on the surface by a man with one eye. 2. The incapacity of the said Charles Kennedy is not now due to the accident, although it has been so probably till now. There is a distinct colour scotoma present which I believe is due to his use of strong tobacco.'

"I was of opinion that, this being a reference by agreement under Schedule I. (15) of the Workmen's Compensation Act, 1906, the second answer by the medical referee was conclusive on the question of the cause of the appellant's existing incapacity, and that I was bound to end the appellant's compensation. While my impression from reading the combined findings was that possibly the medical referee intended by the second answer merely to find that the physiological effects of the accident had ceased and determined, I was of opinion that, looking to the absolute terms of the second finding, I was not entitled to submit it to construction. Further, I was of opinion that in the case of such a reference I had no power to send the report back to the medical referee for explanation. Accordingly, on 5th December 1912, I ended the compensation as from 18th November 1912."

In addition to two questions, with which this report is not concerned, the following question was stated for the opinion of the Court:—"(3) Had I power to send the report back to the medical referee for explanation?"

The case was heard before the Second Division on 18th February 1913.

LORD DUNDAS.—[After dealing with questions (1) and (2)]—I should like to add a single word—though it is not necessary to do so, looking to the way in which the case is to be disposed of—in regard to the third question put to us. The learned arbitrator expresses the opinion that in the case of a reference like this he had no power to send the report back to the medical referee for explanation. I do not agree with that view. Where the report of a referee is unintelligible to the arbitrator, or ambiguous or open to construction, I can see nothing to prevent him sending back the report for an explanation as to its meaning.

LORD SALVESSEN.— . . . I entirely agree with what Lord Dundas has said, and I think it is quite necessary that we should express our opinion because of the view which the Sheriff-substitute has taken. I cannot lend any countenance to the view that when there is a living man who has given a report and there seems to be great difficulty in getting at his meaning, one should be compelled to solve that difficulty on a construction of the language he has used, when the readiest method of getting at his meaning is to ask the man himself. I therefore disagree with the learned

Sheriff in holding that his hands are tied by the statute, or by any other consideration, from asking the medical referee what he meant if there is an obvious ambiguity in his report.

Feb. 18, 1913.
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William
Dixon,
Limited.

LORD GUTHRIE.— . . . I agree also in the view expressed by Lord Dundas and by Lord Salvesen that the Sheriff was wrong in thinking that, the medical referee's findings being ambiguous, he was not entitled to send them back to ascertain exactly what was meant.

The LORD JUSTICE-CLERK concurred.

THE COURT answered the third question of law in the affirmative.

ST CLAIR SWANSON & MANSON, W.S.—W. & J. BURNES, W.S.—Agents.

THE BRITISH ASSETS TRUST, LIMITED, Petitioners.—*Lord Kinross*. No. 90.

Company—Reorganisation of share capital—Process—Petition—Advertisement—Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), sec. 45. Feb. 19, 1913.

In a petition, under sec. 45 of the Companies (Consolidation) Act, 1908, for confirmation by the Court of special resolutions passed by a limited company for reorganisation of its share capital, the Court ordered intimation of the petition without advertisement.

British Assets
Trust,
Limited.

ON 18th February 1913 the British Assets Trust, Limited, Edinburgh, presented a petition to the Court for an order, in terms of the Companies (Consolidation) Act, 1908,¹ section 45, confirming certain special resolutions of the Company reorganising its share capital by dividing it into shares of different classes. In the prayer of the petition the petitioners craved the Court "to appoint this petition to be intimated on the walls and in the minute-book in common form, and to allow all persons having interest to lodge answers hereto, if so advised, within eight days after such intimation, or to grant such other order for service or intimation as to your Lordships may seem expedient. . . ."

When the case appeared in the Single Bills of the First Division on 19th February 1913, counsel for the petitioners cited *In re Ashanti Development, Limited*,² and the recent case of *Munro & Company, Limited*,³ in the Second Division, and submitted that, the matter being merely a domestic one and not affecting the creditors of the company, intimation on the walls and in the minute-book was sufficient, and that advertisement of the petition was not required.

THE COURT (consisting of the Lord President, Lord Johnston, and Lord Mackenzie), without delivering opinions, ordered intimation, without advertisement, as craved.

GUILD & SHEPHERD, W.S., Agents.

¹ 8 Edw. VII. cap. 69.

² 1911 W. N. 144.

³ *Supra*, p. 456.

No. 91. JAMES SMITH, Pursuer (Respondent).—*Moncrieff, K.C.—Wilton.*

Feb. 21, 1913. THE FIFE COAL COMPANY, LIMITED, Defenders (Appellants).—*Horne, K.C.—Strain.*

Smith v. Fife Coal Co., Limited. *Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—Accident arising out of and in the course of the employment—Breach of rule—Miner doing shot-firer's work contrary to rule.*

The use of explosives in a mine was regulated by statutory rules, which provided that every charge should be fired by a specially appointed shot-firer, and that, where the firing was done by electricity, it was the duty of the shot-firer himself to connect the charge with the cable, and thereafter to connect the cable with the firing apparatus, after seeing that all persons in the vicinity had taken shelter.

A duly appointed shot-firer was in the habit of getting the miners to connect the charges with the cable, and on one occasion he handed the cable to a miner for the purpose of having it so connected, and, without waiting till this had been done and without ascertaining that all persons in the vicinity had taken shelter, coupled the cable to the firing apparatus. He then fired the shot, and the miner, who had attached the cable to the charge and had not had time to retire to a place of safety, was seriously and permanently disabled by the explosion.

Held that the accident to the miner would not have happened but for his undertaking a duty which he was neither engaged nor entitled to perform, and accordingly that it did not arise out of and in the course of his employment.

2D DIVISION. IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Dunfermline between James Smith, miner, Kelty, and the Fife Coal Company, Limited, the Sheriff-substitute (Umpferston) awarded compensation, and at the request of the employers stated a case for appeal.

The case set forth:—

"1. The respondent was a miner in Benarty Pit which belongs to the appellants, and the Explosives in Coal Mines Order of 21st February 1910, made by the Secretary of State for the Home Department, under section 6 of the Coal Mines Act, 1896, applied to the pit at the date of the accident aftermentioned, and was duly posted at the pit-head. Said Order provides, *inter alia*, as follows:—(a) Every charge shall be fired by a competent person (hereinafter called the shot-firer) appointed in writing for this duty by the owner, agent, or manager of the mine, and not being a person whose wages depend on the amount of mineral to be gotten. (b) Every charge of the explosive shall be placed in a properly drilled shot hole, and shall have sufficient stemming, and each such charge shall consist of a cartridge or cartridges of not more than one description of explosive. . . . (d) No charge shall be fired except by means of an efficient electrical apparatus so enclosed as to afford reasonable security against the ignition of inflammable gas, or by a permitted igniter-fuse, as hereinafter defined. (e) Where the charge is fired by an electrical apparatus the shot-firer shall not use a cable for the purpose which is less than 20 yards in length. He shall himself couple up the cable to the charge, and shall do so before coupling the cable to the firing apparatus. He shall also himself couple the cable to the firing apparatus. Before doing so, he shall see that all persons in the vicinity have taken proper shelter. Should the charge miss fire, he shall immediately disconnect the cable from the firing apparatus. . . .

"In terms of section 2 (a) of said Order the appellants had duly appointed a man called Robert Howard to act as one of the shot-firers in the section in which pursuer worked, and at the time of the said accident Howard was so acting. The pursuer was not authorised to act as shot-firer. The shots in this pit were fired by the shot-firers by means of an electrical apparatus.

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"2. The method of firing a shot is (1) to place the detonator in the hole prepared by the miner, and to stem it; (2) to connect the detonator wire to the cable; (3) to connect the cable to the electric battery; and (4) to turn the handle on the battery. The placing of the detonator in the hole and stemming of the charge are always done by the miner, not by the shot-firer. The rest of the operation is, under the Explosives in Coal Mines Order above mentioned, the duty of the shot-firer. It was part of the respondent's duty to bore a hole for each shot and to charge the shot hole and stem the shot, and under section 2 (c) of said Order it is the duty of the shot-firer to couple up the cable (which conveys the electric current) to the charge, and to do this before coupling the said cable to the firing apparatus. It is also his duty to himself couple the cable to the firing apparatus, and before doing so to see that all persons in the vicinity have taken proper shelter.

"3. Three or four days after the respondent commenced work in the section, Howard showed the respondent how to connect the detonator wire (which is a short wire running down the middle of the shot and projecting a short distance beyond the shot hole) to the cable, and asked him to do this part of the work. From that time until the date of the accident the respondent was in the habit of making this connection after the charge was stemmed, and this practice was common, but not universal, among the miners in that section during Howard's shift, although no such practice was proved so far as the other shot-firers in the pit were concerned, and the practice was unknown to the management. The rest of the work was done by the shot-firer. The shot-firer was, in virtue of his appointment, the person in charge of the shot-firing operations, subject to the provisions of the foresaid Order and also of the Special Rules under the Coal Mines Regulation Act of 1887, which were in force in said pit at the time of the accident.

"4. There was evidence to the effect that other miners had themselves fired shots in Howard's absence, but if they did, this also was unknown to the management, and respondent never fired a shot himself. The respondent was requested by Howard on one occasion to fire a shot himself, but he did not do so.

"5. On 28th June 1912 the respondent had prepared a hole for blasting (which preparation was part of his duties), and sent for Howard, who brought the detonator and firing equipment. Howard did not go forward to the face, but remained at a point about 30 feet therefrom round a corner from and out of sight of the point where the shot was. He gave the detonator and the end of the cable to the respondent and proceeded to get ready the rest of the apparatus and repair some damage which had been done to the cable. He did not ask the respondent to connect the shot with the cable, but the purpose of his giving respondent the detonator and cable was that the respondent might so connect the shot, and the respondent assumed that Howard desired him to do this.

"6. The respondent put the charge in the hole, stemmed it, then

Feb. 21, 1913. connected the wire of the shot to the cable, and was proceeding to go to a place of safety when the charge was fired by Howard, and the respondent was seriously and permanently injured, his left arm as a result having to be amputated below the elbow.

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"7. The connecting of the detonator wire with the cable took less than a minute, and the respondent had just turned to go when the charge was fired by the shot-firer. The latter, who was at the other end of the cable about 30 feet away, heard a shout, 'Right: fire away,' which he thought came from the respondent, but it was in fact from a neighbouring miner, and was addressed to that miner's drawer, who had informed him that a shot was to be fired in their vicinity. The rapidity with which the explosion followed the connecting of the cable to the detonator wire showed that the cable had been connected to the battery before it was connected to the charge.

"8. The respondent stated that he was unaware of said order of 21st February 1910, and that if he had thought it was a breach of rule to connect the shot with the cable he would not have done it. It was proved that a miner may have duties to perform in his working-place after he has stemmed a charge, such as collecting his graith or setting a prop, although this was not the reason for the respondent being at the place.

"9. The whole work of firing a shot takes about five or six minutes. In this section nine or ten shots per day were fired on an average. On the day of the accident only three shots were fired.

"10. The respondent was entitled to be at his working-place at the moment when Howard fired the shot, and the cause of the accident was Howard's connecting the cable to the battery before the cable was connected to the charge, and before seeing that all persons in the vicinity had taken proper shelter (which act was in breach of said Explosives in Coal Mines Order), and firing the shot without ascertaining that all persons in the vicinity had taken proper shelter. The act of Howard in allowing the respondent to connect the cable to the charge was also a breach of said Order, and the respondent was not acting in the course of his employment in doing so, but this was not the cause of the accident, although the shot would not have gone off unless the cable had been connected to the charge either by the respondent or Howard.

"On the foregoing facts I found that the pursuer sustained personal injury by accident arising out of and in the course of his employment with the defenders and appellants, and that the respondent was entitled to compensation at the rate of 20s. per week with expenses of process."

The question of law for the opinion of the Court was:—"Whether there was evidence upon which it could be competently found that the respondent sustained an accident arising out of and in the course of his employment on 28th June 1912?"

The case was heard before the Second Division (without the Lord Justice-Clerk) on 6th February 1913.

Argued for the appellants;—There was a vital distinction between "the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment."¹ In the first case the accident,

¹ Barnes v. Nunnery Colliery Co., Limited, [1912] A. C. 44, *per* Lord Atkinson, at p. 49.

notwithstanding the misconduct, might still arise out of the employ- Feb. 21, 1913.
ment¹; in the second case, it could never arise out of the employ-
ment, for the man was not doing what he was employed to do.² *Smith v. Fife*
The only exception was the case of an emergency, which was not *Coal Co., Limited.*
suggested in the present case. The pursuer was a miner, and at the
time of the accident he was not "doing what a man so employed
may reasonably do."³ He was in breach of the rule which limited
the sphere of his employment, and he was doing the work not of a
miner but of a shot-firer. The pursuer's knowledge of the rule was
immaterial,⁴ and in any case there was no finding in fact that he was
in ignorance of it. It was equally irrelevant to argue that the
proximate cause of the accident was the negligence of the shot-firer.
Considerations which might affect a question of liability at common
law had no place in a claim for compensation under the Workmen's
Compensation Act. It was enough that the pursuer's act was one
link in the chain of causation which led to the accident.⁵

Argued for the respondent;—The arbitrator had found that the
accident arose out of and in the course of the employment. This
was a finding in fact which should not be disturbed unless there was
no evidence to support it.⁶ This could not be said in the present
instance. The foundation of the case against the pursuer was the
breach of the statutory order. But that order was addressed not to
him but to his employers, and they could have been held criminally
liable for its infringement.⁷ In any event, disobedience to an order
did not necessarily take a workman outwith the sphere of his
employment.⁸ *Kerr v. William Baird & Company, Limited*,⁹ was
distinguishable. In that case the sole cause of the accident was the
workman's disobedience. In the present case the proximate cause
of the accident was the fault of the shot-firer in coupling the cable
to the battery before it was attached to the charge and in firing the
shot without making sure that there was no person in the vicinity. If
the accident could have been avoided by care on the part of the
shot-firer, it was no answer to say that the pursuer also was to blame¹⁰;
and the responsibility of the defenders was not thereby diminished.¹¹

¹ *Conway v. Pumpherston Oil Co., Limited*, [1911] S. C. 660.

² *Kerr v. William Baird & Co., Limited*, 1911 S. C. 701; *M'Allan v. Perthshire County Council*, Western District, (1906) 8 F. 783; *Lowe v. Pearson*, (1899) 1 Q. B. 261.

³ *Moore v. Manchester Liners, Limited*, [1910] A. C. 498, *per Lord Chancellor Loreburn*, at p. 500.

⁴ *Dobson v. United Collieries, Limited*, (1905) 8 F. 241.

⁵ *Dunham v. Clare*, [1902] 2 K. B. 292, *per Collins, M.R.*, at p. 296.

⁶ *Kane v. Merry & Cunningham, Limited*, 1911 S. C. 533; *MacKinnon v. Miller*, 1909 S. C. 373; *Barnes v. Nunnery Colliery Co., Limited*, [1912] A. C. 44.

⁷ *Coal Mines Regulation Act*, 1887 (50 and 51 Vict. cap. 58), sec. 50.

⁸ *Conway v. Pumpherston Oil Co., Limited*, 1911 S. C. 660; *Harding v. The Brynddu Colliery Co., Limited*, [1911] 2 K. B. 747; *Mawdsley v. West Leigh Colliery Co., Limited*, [1911] 5 Butterworth's W. C. C. 80.

⁹ 1911 S. C. 701.

¹⁰ *Radley v. London and North-Western Railway Co.*, (1876) 1 App. Cas. 754, *per Lord Penzance*, at p. 759; *Watkins v. Naval Colliery Co. (1897)*, *Limited*, [1912] A. C. 693.

¹¹ *Black v. Fife Coal Co., Limited*, 1909 S. C. 152, *rev.* 1912 S. C. (H. L.) 33; *Bett v. Dalmeny Oil Co., Limited*, (1905) 7 F. 787.

Feb. 21, 1913. Even assuming that the pursuer was acting outwith his employment when he was attaching the cable to the charge, that operation was completed when the shot was fired and at that moment the pursuer was entitled to be at his working-place and had therefore resumed his employment.

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At advising on 21st February 1913,—

LORD DUNDAS.—On 28th June 1912 the respondent, a miner in the appellants' employment, met with a serious personal injury by accident in their Benarty Pit, owing to the discharge of a blasting shot when he was in its immediate vicinity. We have to determine whether or not the accident arose out of and in the course of the respondent's employment. The learned arbitrator has decided in the affirmative. I have come to the conclusion that his decision cannot be supported.

The Explosives Order of 21st February 1910, which is partially printed in the case, applied to Benarty Pit at the date in question, and was duly posted at the pithead. [His Lordship then narrated the material terms of the Order, and the circumstances in which the accident took place.] The arbitrator finds that the cause of the accident was the shot-firer Howard's conduct in firing the shot under the circumstances mentioned in breach of the Order. He further finds that "the act of Howard in allowing the respondent to connect the cable to the charge was also a breach of said Order, and the respondent was not acting in the course of his employment in doing so, but this was not the cause of the accident, although the shot would not have gone off unless the cable had been connected to the charge either by the respondent or Howard."

I think the learned arbitrator has fallen into error in finding upon these facts that the accident arose out of and in the course of the respondent's employment. He seems to me to have approached the matter from a wrong standpoint; and to have decided it having regard to the common law rules of liability and contributory negligence, which are, I think, wholly beside this question under the Workmen's Compensation Act.

It appears to me that what we have to decide is whether or not this accident occurred in the respondent's "sphere of employment," to use a phrase common in recent cases; and that, if it did not, he cannot recover compensation under the Act. It has often been laid down that it is not every breach of a master's order that will, so to speak, put a servant outside the sphere of his employment (*e.g.*, *Whitehead*,¹ approved in *Conway*²). It is clear that a master may competently prescribe the sphere of his workmen's employment, and limit it by way of restrictive orders; and the Court must in each case distinguish, upon the facts, between something done by a workman entirely outside that sphere, and something done within it, though contrary to order and even (it may be) amounting to serious and wilful misconduct. A workman does not cease to be in the course of his employment merely because he acts negligently or recklessly in the performance of his work (*e.g.*, *Durham*³). But if he travels outside the sphere

¹ [1901] 2 K. B. 48, *per* Collins, L.J., at p. 51.

² 1911 S. C. 660, *per* Lord Dunedin, at p. 665.

³ (1898) 1 F. 279.

of his employment without an order, or in violation of an order, he will not recover compensation, unless indeed a case of necessity or great emergency is made out, when a reasonable extension of his duties may sometimes be inferred. If the workman, acting within the sphere of his employment, violates an order, the master may be liable in compensation; but if he arrogates to himself the functions of some other servant whose duties are different from his own (*e.g.*, *Kerr*¹), or travels into some territory with which he has nothing to do (*e.g.*, *O'Brien*²), the result is otherwise. One must in each case consider whether, when the accident occurred, the injured man was "doing what a man so employed may reasonably do, within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing" (*per* Lord Loreburn, L.C., in *Moore*.³)

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In the present case the respondent, in coupling the charge to the cable, was directly violating the Order posted up at the pithead. The arbitrator says the respondent stated that he was unaware of it; but this is not a finding in fact of the man's ignorance, and one need not therefore decide whether such a finding would have been relevant for consideration. But the respondent was not only acting in breach of an order; he was doing something which he was never employed or paid to do, and which another person, whose position rendered him competent for the appointment, was employed and paid to do. I can see no ground for holding that the accident arose out of and in the course of the respondent's employment. I think that, upon the learned arbitrator's findings, one is constrained to the opposite conclusion.

I do not propose to deal in detail with former decisions; but there are passages in the opinions of noble and learned Lords in the recent case of *Barnes*⁴ which I think may usefully be cited. The Lord Chancellor (Loreburn) (at p. 47), after observing that "the question whether or not an injury by accident arose out of the employment is quite different from whether there has or has not been misconduct," pointed out that the Court could not deny the workman compensation "on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do, and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." Lord Atkinson (at p. 49) emphasised the necessity of drawing a distinction "between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment." Lord Mersey (at p. 51) pointed out that the workman, when riding in a tub against orders, "was not only violating the conditions of his employment, but was engaged in an act quite outside its scope. . . . He was not doing a permitted act carelessly, but he was doing an act which he was prohibited from doing at all." The case of *Kerr*¹ comes pretty close to the present upon its facts, involving as it did a disobedience to the Explosives Order, 1910. I think one may fairly apply to this respondent what Lord

¹ 1911 S. C. 701.

² [1910] A. C., at pp. 500, 501.

³ 1908 S. C. 1258.

⁴ [1912] A. C. 44.

Feb. 21, 1913. Dunedin said in regard to the workman in that case: "He was arrogating to himself duties which he was neither engaged, nor entitled, to perform. . . . He started upon an operation which was outside the scope of his employment."

Lord Dundas. As already observed, I think the arbitrator has gone astray by regarding the matter as if we were here in a common law action by the respondent for damages against his employers. Counsel who sought to support the award pressed upon our attention the doctrine of cases like *Radley*¹ and *Carse*,² to the effect that a pursuer, though himself guilty of contributory negligence, may yet recover damages if the defender could, in the result, by ordinary care and diligence, have avoided the accident. They also referred us to *Black*,³ *David*,⁴ and *Watkins*,⁵ which dealt with the question of an employer's liability in damages for negligence upon a breach of a statutory rule or order affecting him. I do not think either category of cases has any application here. We are not in the region of fault or negligence. We are considering, under the Workmen's Compensation Act, whether or not there was evidence to show that this accident arose out of and in the course of the respondent's employment. For the reasons I have stated, I am of opinion that there was not; and I am for answering the question of law put to us in the negative.

LORD SALVESEN.—The question in this case is whether the respondent, who was employed as a miner by the appellants, sustained an accident arising out of and in the course of his employment. That he met with an accident in the course of his employment I assume, although this is by no means plain, and the sole question is whether that accident arose out of his employment. The accident consisted in the workman being struck by some material which was dislodged by a cartridge shot fired by a man called Howard, who was shot-firer in that part of the pit where the respondent worked. The shot was deliberately fired by Howard by means of an electric apparatus which had been connected with the cartridge; and but for the presence of the respondent in too close proximity the explosion was a perfectly safe and proper operation.

[After summarising the statements in the case, his Lordship continued]—It is manifest from this statement of facts that the accident to the respondent would not have happened but for his undertaking a duty which, under the regulations, was exclusively to be performed by the shot-firer. Howard's action in turning the handle of the battery would have been harmless but for the respondent's act in coupling up the cable with the detonator. It was accordingly argued by the appellants that the accident which happened to the respondent was due to his having done work that was outside the scope of his employment and prohibited by the regulations, and did not therefore arise out of his employment. It is equally true, however, that the respondent's act in coupling up the cable to the detonator would not have produced any accident but for Howard's firing the shot without having seen that all persons in the vicinity had taken shelter.

¹ 1 App. Cas. 754.

² 22 R. 475.

³ 1912 S. C. (H. L.) 33.

⁴ [1910] A. C. 74.

⁵ [1912] A. C. 693.

On these facts I have come to the conclusion, differing from the arbitra- Feb. 21, 1913.
 tor, that the accident did not arise out of the respondent's employment. It
 is extremely important that the statutory regulations should be enforced—
 not merely against the shot-firer, but against all the other persons in the Smith v. Fife
 pit. The respondent must be taken to have known that he was prohibited Coal Co.,
 from connecting the detonator with the cable; and it is certain that if he Limited.
 had respected this prohibition the accident would not have occurred. The
 lax system which Howard had introduced was only possible through the
 respondent and the other miners conniving at Howard's breach of duty.
 Had Howard performed the work allotted to him in the order prescribed in
 the regulations, he would first have done any repairs that were necessary to
 the cable, and then proceeded to connect the cable with the detonator. If,
 as presumably would be the case, the respondent was then at his working
 place, Howard would have ordered him to take shelter, and only then pro-
 ceeded to the battery and connected it with the cable. Thereafter he was
 at liberty to fire the shot, there being apparently no other persons who were
 exposed to danger at that part of the pit. Had the shot been fired just at
 the moment when the respondent was effecting the connection, it would
 scarcely be maintained that the accident was not due to his act in so con-
 necting it; and I can see no reason for making a distinction because of the
 fact that the connection had been actually completed the moment before
 and the respondent was just on the point of proceeding to shelter. His
 presence there at the time was due solely to his performing a duty which was
 expressly laid upon the shot-firer, and which for his protection the regula-
 tions prohibited him from discharging.

The cases cited at the discussion appear to me to justify the conclusion
 at which I have arrived. In *Kerr v. William Baird & Company, Limited*,¹
 the miner who was injured had no doubt taken it upon himself to prepare
 and fire the shot; but the explosion occurred at the precise moment that it
 did, not by his immediate act, but because he had already unintentionally
 started the chemical action of the fuse. The Lord President said: "It is
 quite clear that this man met his death because he started upon an opera-
 tion which was outside the scope of his employment." In *Barnes v. The*
*Nunnery Colliery Company*² a boy in the colliery met his death from riding
 in an empty tub to his work, instead of walking as he ought to have done.
 Boys were expressly prohibited from riding to their work. It was held that
 there was no evidence to justify the finding that the accident arose out of
 the deceased's employment; for his death was caused by an added peril to
 which by his own conduct he exposed himself. Lord Loreburn said: "If
 the thing he does imprudently or disobediently is different in kind from
 anything he was required or expected to do, and also is put outside the
 range of his service by a genuine prohibition, then I should say that the
 accidental injury did not arise out of his employment"; and Lord Mersey
 said: "He was not doing any permitted act carelessly, but he was doing an
 act which he was prohibited from doing at all." I think these observations
 apply to the present case.

The decision in the case of *M'Allan v. Perthshire County Council*³ is also

¹ 1911 S. C. 701.

² [1912] A. C. 44.

³ 8 F. 783.

Feb. 21, 1913. in point. There, as here, the workman who was injured had taken upon himself, for the purpose of obliging his fellow servant, a part of that servant's duties and was injured while doing so. We were referred by the respondent to the case of *Conway*¹; but on its facts that case is clearly distinguishable from the present. The workman no doubt was doing a prohibited thing; but it was in the course of performing his ordinary duties. The Lord President thus summed up the facts: "The man here was fetching a pick for the work on which he was engaged. Doubtless in fetching the pick he controverted an order . . . but I think that was only disobedience and nothing more, and the mere fact that he went into the upset does not take him out of the sphere of his employment." The decision in *Harding v. Brynddu Colliery Company, Limited*,² proceeded on the same lines, and was held to be really indistinguishable from that of *Conway*.¹

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Certain authorities were referred to by the junior counsel for the respondent in support of a collateral contention that the employer here would be liable at common law to the injured workman. That is, however, not the question before us; and I need only say in passing that I do not think the cases cited go very far in that direction. I have accordingly come to be of opinion that the question of law falls to be answered in the negative.

LORD GUTHRIE.—I am of the same opinion. The essential facts are, first, that the respondent was in the place where he was injured at the time when he was injured, because, immediately before, he had been doing work which was the proper work of another employee, and which the respondent, under the Secretary of State's Order of 21st February 1910 (duly posted at the pithead), was expressly prohibited from doing; second, that the conduct of the respondent on the occasion in question was not authorised by the management of the pit, and his practice of doing similar work to that which he had been doing immediately before the accident was unknown to the management; and, third, that no emergency had arisen, in consequence of which the respondent's disobedience to the provisions of the Secretary of State's said Order might not have prejudiced his rights under the Workmen's Compensation Act.

In these circumstances, it seems to me clear that this is not a case of accident to a workman arising out of acts done by him in the course of his duty. In such a case, on the authorities to which your Lordships have referred, the fact that such acts have been performed in disobedience to orders may not disentitle the workman to the benefits of the Act. Instead of such a case, the accident here arose out of actings outside the sphere of the workman's employment. Under the cases quoted, such actings prevent the workman from successfully maintaining that he has sustained an injury arising out of and in the course of his employment.

The Sheriff holds that while the respondent, in connecting the cable with the detonator, was not acting in the course of his employment in doing so, this was not the cause of the accident. Apparently he thinks that the respondent, having completed the operation which took him out of the course of his employment, had again resumed the course of his

¹ 1911 S. C. 660.

² [1911] 2 K. B. 747.

employment in the few seconds that elapsed before Howard turned the handle and the explosion occurred. It does not appear to me that this finding can be sustained on the facts as stated, whatever might have been the case had a considerable time elapsed between the respondent's act and the explosion.

Feb. 21, 1913.
 Smith v. Fife
 Coal Co.,
 Limited.

Lord Guthrie.

But the respondent argued that if the Sheriff's ground of judgment was wrong, and if the respondent's act was the cause of the accident, the accident still arose out of and in the course of his employment, because he was entitled, as a condition of his employment, to assume that no explosive would be fired until he was out of the zone of danger. This contention seems to me inconsistent with the case of *Kerr v. William Baird & Company, Limited*.¹ On the whole matter, I think the question must be answered in the negative.

THE COURT answered the question of law in the negative, recalled the award of the arbitrator, and remitted to him to dismiss the claim.

D. R. TULLO, S.S.C.—WALLACE & BEGG, W.S.—Agents.

JAMES ANDERSON AND OTHERS (Representing the Heritors of the Parish of Rutherglen), Petitioners.—*Blackburn, K.C.*—*D. P. Fleming.*

No. 92.

Feb. 21, 1913.

THE REVEREND GEORGE SIMPSON YUILLE (Minister of the Parish of Rutherglen), Respondent.—*Crabb Watt, K.C.*—*Hunter.*

Heritors of
 Rutherglen.

Church—Manse—Glebe—Transportation of manse—Sale of old site—Presumption that manse built on manse ground and not on glebe.

A petition was presented by the heritors of a burghal landward parish for transportation of the manse to a new site, and for authority to sell the old site. The latter part of the prayer was opposed by the minister, who maintained that, as the manse had occupied the site for many years before the right of a parish minister to half an acre of ground, over and above his glebe, as a site for his manse was recognised, the presumption was that the manse must have been built upon glebe, and accordingly that its site remained glebe land and could not be sold by the heritors.

Held that, in the absence of any evidence to the contrary, it must be presumed that the ground on which the manse stood was dedicated as manse ground, and as such was something other than glebe; and prayer of the petition *granted*.

ON 26th October 1912 the members of the Superintending Committee of the heritors of the parish of Rutherglen presented a petition for the transportation of the manse of that parish and for authority, on the completion of the new manse, to sell the site of the old manse and offices and garden, and to apply the funds *pro tanto* towards the expense of buying the new site and garden, and of erecting the new manse and offices.

It was stated in the petition:—"The present manse of the parish of Rutherglen, offices and garden, containing 2958½ square yards or thereby, have been the manse, offices, and garden for the minister of the parish of Rutherglen for several hundreds of years. The glebe,

Teind Court.

¹ 1911 S. C. 701.

Feb. 21, 1913. Heritors of Rutherglen. arable and grass, of Rutherglen consists of—(1) a piece of ground situated beside Rutherglen Burn at some distance from the manse, and extending to 4 acres 2 roods or thereby, and (2) another piece of ground lying in the immediate vicinity of the manse, and extending to 1 acre 1 rood or thereby.”

It was further stated that the heritors had resolved that the existing manse and its site were unsuitable for a minister's residence, and the steps were detailed by which the heritors had resolved to acquire a new site and to erect a new manse thereon. It was narrated, *inter alia*, that in an appeal to the Lord Ordinary on Teinds (Ormidale) from a decision of the Sheriff in an application under the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, the Lord Ordinary, on 19th July 1912, in respect of a joint minute for the minister and the heritors, pronounced an interlocutor designing and setting apart a certain site for the new manse and garden, and approving of certain plans, which had been prepared and approved by the minister for its construction.

Answers to the petition for transportation and sale were lodged for the Rev. George Simpson Yuille, B.D., the minister, in which it was stated :—

“ The glebe of the parish of Rutherglen, together with the minister's grass consists of (1) a piece of ground which lies on the west side of the Rutherglen Burn at some distance from the manse and extends to 4 acres 2 roods or thereby ; (2) a piece of ground on the east side of the said burn which extends to 1 acre 1 rood or thereby ; and (3) a piece of ground which extends to 2 roods 17 poles 24 $\frac{3}{4}$ square yards or thereby, and is contiguous to the piece of ground second above mentioned.

“ The manse of the parish of Rutherglen, with its offices and garden, is situated on, and completely covers, the piece of ground third above mentioned. The description of this piece of ground contained in the petition is accurate. It is admitted that the said manse has occupied its present site for a long period. The said site was occupied by the said manse many years before the right of a parish minister to half an acre of ground over and above his glebe as a site for his manse came into existence. In any event, the said site was so occupied long before the said right was recognised. Further, Rutherglen is, and has been for several centuries, a royal burgh. The right of the minister of a royal burgh, which, like Rutherglen, is partly landward, to a manse, was not decided till the beginning of the nineteenth century. In a number of cases during the eighteenth century the Court rejected claims to manses by ministers of royal burghs in this position. The right of the minister of any royal burgh, whether partly landward or not, to half an acre of ground over and above his glebe as the site for his manse, could not therefore have been recognised prior to the beginning of the eighteenth century. The manse of the parish of Rutherglen, in accordance with the views prevailing at the time it was built, was erected upon the glebe, and the site it now occupies is part of the said glebe. . . .

“ The respondent does not oppose the prayer of the petition in so far as it [craves for transportation and erection of the new manse]. The respondent, however, submits that the prayer of the petition, with the exception of the craves above mentioned, should be refused, with expenses, in respect (1) that the petitioners' averments are irrelevant and insufficient to support said prayer ; (2) that the owner-

ship of the present site of the said manse, offices, and garden is in dispute, and that it is incompetent to try that question in this process; and (3) that in any event the said present site is part of the glebe of the parish of Rutherglen, and does not therefore belong to the heritors, or any of them. Feb. 21, 1913.
Heritors of
Rutherglen.

"Alternatively, the prayer of the petition should be granted to the extent only of the craves above mentioned, and *quoad ultra* the petition should be sisted that the petitioners may, if so advised, bring an action of declarator to establish their right to the said present site."

Counsel for the parties were heard before the Teind Court (consisting of the Lord President, Lord Johnston, Lord Mackenzie, Lord Ormisdale, and Lord Hunter) on 24th January 1913.

Argued for the petitioners;—It must be presumed, in the absence of evidence to the contrary, that this manse was in the ordinary position of a manse, and was built on manse ground; and indeed there was no relevant averment to the contrary. The right of the minister of a burghal landward parish to a manse was now clearly established, and there was no suggestion either in the statutes regulating this right,¹ or in the decided cases,² that the ground for the manse should be, or was ever as a matter of practice, taken from the glebe. It was suggested that, as this manse had been erected long before the right of the minister of a burghal landward parish to a manse was finally established, it had presumably been built by the minister himself, and accordingly built on the only land available to him, namely, the glebe. But there was no presumption to this effect; and that such was not the case here was emphasised by the fact that Rutherglen had been cited as a typical instance of a manse for which the heritors were responsible,³ and for which they continued to admit responsibility.⁴ As to the extent of the glebe, whatever was its present acreage, it appeared that 2 acres had been added to it in 1667, bringing its total area as at that date up to 5 acres, and this measurement did not include the manse, which then occupied its present site.⁵ Even assuming that the manse was built upon the glebe the site had now become manse ground, and could not revert to glebe until it had been re-designated by the Court. If the glebe was too small the minister's remedy was to apply to the Court to have an additional designation.⁶ The respondent's alternative contention that the petitioners should establish their right in an action of declarator was not well founded. The whole questions raised in this petition could competently be decided in the Teind Court, as the jurisdiction of the Court of Session, sitting as the Teind Court, was in no way restricted, but included the original jurisdiction of the Court of Session in civil causes.⁷

Argued for the respondent;—If, as the respondent contended, the

¹ Acts 1644, cap. 31, 1649, cap. 45, and 1663, cap. 21; Duncan's Parochial Law, (1903 edition) pp. 362-363, and 366-371.

² Minister and Heritors of Dunfermline, (1805) M. "Manse," Appx. 1, *aff'd.* (1812) 5 Pat. 593; Magistrates of Ayr v. Auld, (1825) 4 S. 99, *rev.* (1827) 2 W. & S. 600.

³ Connell's Parochial Law, p. 261.

⁴ Fairie v. Leitch, F. C., Feb. 2, 1813.

⁵ New Statistical Account, vol. vi. p. 395.

⁶ Gloag, (1873) 1 R. 187.

⁷ Presbytery of Stirling v. Heritors of Larbert and Dunipace, (1900) 2 F. 562; Connell's Parochial Law, p. 229.

Feb. 21, 1913.

Heritors of
Rutherglen.

manse was built on glebe, the site, when the manse was transported, must revert to glebe, and could not be disposed of by the heritors in this process. There was a strong presumption in the circumstances that the manse here had been built upon the glebe. It was admitted that the manse occupied its present site before 1778, at which date the right of the minister to an extra half acre for manse site was first recognised.¹ The measurements stated in the petition showed that the combined areas of the existing glebe and manse site did not amount to the acreage to which the minister was in law entitled as glebe and minister's grass. The inference, therefore, was that the manse had been built upon part of the glebe. It was not disputed that the Court of Teinds had jurisdiction to decide the question which was here raised,² but it could not competently be disposed of in a summary petition. The question must be settled in an action of declarator or some other competent process.

At advising on 21st February 1913,—

LORD PRESIDENT.—This is a petition for the transportation of the manse of the parish of Rutherglen and for authority to sell the old manse. The only point that is raised before your Lordships is raised by the minister upon the last branch of the crave, namely, that for authority to sell the old manse. It has been argued to your Lordships that it must be presumed that the existing manse is built upon the glebe and that, if that is so, it would be improper that the site of the manse should be sold, but that it should remain part of the glebe.

I do not think that that argument can be sustained, because it is really based upon nothing but mere speculation. The parties have supplied us with all that they know about the history of the manse ; and all that we know is that it is an old manse—what was its origin no one can tell. Now it may be that the manse has come down from pre-Reformation times, it may be that it was originally erected in terms of the various statutes which gave ministers a right to call upon heritors for a manse ; but where nothing is known of the origin of the manse it must be presumed that the ground on which the manse stands is dedicated as manse ground, and that as manse ground it is something other than glebe.

Where in modern times a manse has to be rebuilt, and it is more convenient that the new manse should be built upon the glebe, and where, with the consent of those representing the benefice, it is built upon the glebe, then I can understand that, inasmuch as so much glebe has been taken up by the new manse, it would only be equitable that the ground cleared by taking away the old manse should be given to the glebe. But where you merely find a manse standing, and know nothing about its past history, then I take it that the ground on which the manse stands is manse ground, and separate from the glebe ground. Inasmuch as the heritors here have found a new site, it is only right and just that they should be allowed to dispose of the old one. They were not bound to find a new site for the manse ; they might have rebuilt it upon the old site. But in the circumstances of this

¹ Grierson v. Ewart, (1778) 2 Hailes, 799 ; Clark v. Ramsay, (1621) M. 5144 ; Kerse v. Reid, (1626) M. 5132.

² Presbytery of Stirling v. Heritors of Larbert and Dunipace, 2 F. 562.

case it was thought expedient to build the manse elsewhere. The heritors Feb. 21, 1913. have had to find a site elsewhere, and have, with the consent of all parties, Heritors of built the new manse upon it. I think they are entitled to the site that has Rutherglen. been rendered free.

Ld. President.

That, I think, is obviously the view which the Court held in the case of *Gloag*.¹ The report of that case bears² that "The Court were doubtful whether authority could be granted to feu the site of the old manse, offices, and garden, without a designation thereof as glebe." That clearly points to the opinion held by the Court that manse ground was one thing and that glebe was another.

Accordingly, upon the whole matter, I think that the crave of the petition as lodged is correct and ought to be granted. I may say that, if one had to guess, I think it is very likely that this never was glebe ground at all, because it seems to be upon the other side of the water from the glebe. But I do not go upon that, because that also is mere speculation. I go upon the simple point that if one knows nothing about the origin of the manse, manse ground is manse ground and not glebe ground.

LORD JOHNSTON.—I agree with your Lordship. I think it is quite clear that, where nothing is known or can be ascertained as to the history of the site of a manse, it must be presumed that the ground of that site, wherever it came from, was dedicated to the purposes of a manse, and must be dealt with as such in any case, such as we have before us, where it is desired to transport the manse from one site to another.

LORD MACKENZIE, LORD ORMDALE, and LORD HUNTER concurred.

THE COURT granted the prayer of the petition.

H. B. & F. J. DEWAR, W.S.—LAING & MOTHERWELL, W.S.—Agents.

WILLIAM THOMAS MACKIE, Pursuer.—*A. M. Stuart.*

DUNCAN DAVIDSON, Defender.—*Lippe.*

No. 93.

Feb. 25, 1913.

Process—Removal to Court of Session for jury trial—Refusal to remit back to Sheriff—Averments of substantial damage—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 30. Mackie v. Davidson.

A Sheriff Court action for £300 as damages for injury to the pursuer's person and property having been remitted to the Court of Session under sec. 30 of the Sheriff Courts (Scotland) Act, 1907, the Court refused to exercise the power given by that section of remitting the case back to the Sheriff, as the record disclosed that the alleged injuries were of a serious nature, and that the pursuer's claim was substantial.

Barclay v. Smith & Co., supra, p. 473, distinguished.

ON 18th November 1912 William Thomas Mackie, commercial traveller, Aberdeen, brought an action in the Sheriff Court there against Duncan Davidson, Banchory. The pursuer's claim was for £300 as damages for injuries to his person, motor cycle, and clothes, caused, on 5th October 1912, by the defender's motor car running him down while he was cycling along a public highway. 2D DIVISION.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

¹ (1873) 1 R. 187.

² *Ibid.*, at p. 188.

Feb. 25, 1913.

Mackie v.
Davidson.

The pursuer averred, *inter alia* :—(Cond. 4) "As the result of the pursuer being run down as aforesaid he sustained severe injury, and his motor cycle, of the value of £40, was completely destroyed and his clothing ruined. He was knocked insensible, and did not recover consciousness until after he had been conveyed to the Aberdeen Royal Infirmary. The front of the motor car struck him a severe blow on the head, causing a wound of several inches in length. He was thrown to the ground with great violence and sustained numerous bruises on the arms, legs, and body. The wound on his forehead will leave a large permanent disfigurement. The result of the said accident will probably leave a permanent defect upon his nervous system. He still suffers from violent nervous headaches due to the injury to his head as aforesaid. He has not yet recovered from the injuries he received." (Cond. 6) "Pursuer has suffered severe nervous shock. In the course of his work as a commercial traveller he has to be continually calling at farms scattered over a wide area, and also to make journeys through the crowded streets of towns. It is necessary to enable him to overtake his work to use a motor cycle and to be able to ride it through traffic. The result of the said accident and shock sustained by pursuer is that he will be unable for a long time to ride a motor cycle, and it is doubtful if he will ever be able to ride it where there is any traffic, and he will thus be seriously handicapped in carrying on his business." (Cond. 7) "For the loss of the cycle, damage to clothing, expenses of medical attendance, loss of commissions, additional travelling expenses caused through being unable to use a motor cycle, and physical injuries above mentioned, the sum sued for is reasonable in amount."

The case was remitted to the Court of Session, at the instance of the pursuer, in terms of section 30 * of the Sheriff Courts (Scotland) Act, 1907. On the case appearing, on 25th February 1913, in the Single Bills of the Second Division (without Lord Dundas) counsel for the defender moved that, in view of the slight nature of the injuries averred, the case should be remitted back to the Sheriff, and cited the undernoted authorities.¹

LORD JUSTICE-CLERK.—It is a question of circumstances in each case whether an action shall be sent back to the Sheriff Court for disposal or shall be continued in this Court; and it is impossible to draw any sharp line between those cases which should be sent back and those which should not. Among the cases in the reports there is none at all similar to the present. In *Macnab v. Fyfe*,² which was referred to, the averments were that the pursuer had "sustained severe and extensive bruising," and had been totally incapacitated for work. In *Barclay v. Smith & Company*³ it was averred that the "pursuer had received numerous and severe bruises on the body, arms, and legs," and that his bicycle and his clothing were destroyed. But these cases seem to me to be not on all fours with the present case. Here there was injury to the pursuer's head, and it was so severe an injury that he was taken in an unconscious state to the hospital

* Quoted *supra*, p. 474, footnote.

¹ *Barclay v. Smith & Co.*, *supra*, p. 473; *M'Nab v. Fyfe*, (1904) 6 F. 925.

² 6 F. 925.

³ *Supra*, p. 473.

and only recovered consciousness after a considerable interval. That was Feb. 25, 1913. not surprising, for it is averred that the blow which he had received caused a very severe wound to his forehead—a wound which necessarily required careful surgical treatment. These averments would, in my opinion, be sufficient to make it very doubtful whether this was a case that should be sent back.

Mackie v.
Davidson.
Lord Justice-
Clerk.

But there is also the averment that the wound will cause a "large permanent disfigurement." We must remember that the pursuer was not, as in the other cases I have referred to, a person in a position in which his external appearance was of no importance as affecting his occupation. He was a commercial traveller. Now, it is common knowledge that anything that injures the appearance of a commercial traveller affects his position in two respects—first, it is not so likely that he will be employed as a traveller, for those who employ travellers select their men to some extent for their appearance; and secondly, and ancillary to that, he might not be so effective as a traveller when he presented himself to those with whom he wished to do business. We know quite well that very slight disfigurement may make a difference in such a case. It may be quite unreasonable, nevertheless it is the fact.

Again, it is averred that the pursuer suffered a nervous shock; and it is also averred that he, in the course of his business, has to use a motor cycle in order to accomplish his work as a commercial traveller. In former days such work was done without a motor cycle. Nowadays competition is so keen that it is necessary to accomplish as many visits as possible in a short time, and the question whether a man who has suffered from nervous shock and who will take some time to recover can ride a motor cycle is one which might be taken into consideration by a jury. And then it is a further fact here that the pursuer's motor cycle has been destroyed, and that the value of the cycle was £40.

On these grounds I have come to the conclusion that this is not one of the cases which we should refuse to send to a jury.

LORD SALVESSEN.—I am entirely of the same opinion. I think the power we have to send back to the Sheriff Court for proof a case which the pursuer has appealed for jury trial is a power which we should exercise with the greatest possible caution. It should be exercised only in cases where it appears upon the face of the record that the action is one of a trivial character, or, for some other reason, is not suited for determination by a jury in this Court.

Here, I think, the pursuer's claim is a substantial one. I can imagine that there may be serious injury resulting from a shock such as the pursuer received, rendering him unconscious at the time and disfiguring him, probably for life, and that altogether apart from the loss of property, which, I think, may fairly be assessed at something like £50; because he says his clothing was ruined as well as his motor cycle, and that he also incurred medical expenses.

I should like to repeat what I said to Mr Lippe during the course of the debate, viz., that I think it would be very unfortunate indeed for defenders in such actions if we were to exercise the power we undoubtedly have in

Feb. 25, 1913. too generous a way. The result would be that a pursuer who desired to submit the assessment of his claim to a jury would simply proceed at once in the Supreme Court. If his claim were for more than £50 it would be a competent action in the Supreme Court, and if the action was one for personal injury the pursuer would be entitled to lay it before a jury. As matters stand, it is often very convenient that the early procedure should take place in the Sheriff Court, where it can be more cheaply carried through, for it is only when it has been ascertained that there is to be no settlement of the claim that there need be an appeal to this Court in order that a jury may be summoned to determine the question of liability and assess the damages. Accordingly I think it would be very unfortunate if we took the suggestion of Mr Lippe and remitted this case to the Sheriff Court. He says it would be as well tried by the Sheriff. I should be slow to differ from him; but the pursuer has a right to have his claim assessed by a jury. A jury may or may not be more generous than the Sheriff-substitute would be; but the pursuer presumably thinks they would be, and accordingly he prefers that they should be his tribunal rather than the local Judge. We are not entitled to deprive the pursuer of that option in this case, and I am very clearly of opinion that we should not accede to the motion for the defender.

LORD GUTHRIE.—I am of the same opinion. I do not think the case is ruled either by the case of *Barclay*¹ or by the case of *Macnab*.² It seems to me that the particulars your Lordships have mentioned differentiate the case from these.

THE COURT refused the motion.

BALFOUR & MANSON, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 94.

Feb. 28, 1913. (*Poor*) ISABELLA WILLIAMSON, Pursuer (Appellant).—*Fenton*.
JAMES M'CLELLAND, Defender (Respondent).—*J. A. T. Robertson*.

Williamson v. M'Clelland. *Parent and Child—Filiation—Period of Gestation*.

In an action of filiation and aliment, where 306 days had elapsed between the last act of intercourse between the parties and the birth of the child, *held* that that was not an impossible period of gestation, and decree *granted*.

1ST DIVISION. ON 19th July 1911 Isabella Williamson, Ayr, brought an action of filiation and aliment in the Sheriff Court at Glasgow against James M'Clelland, Glasgow.

The proof led in the case disclosed that the pursuer's child was born on 19th May 1911, and that the last proved act of intercourse between the pursuer and the defender was on 17th July 1910. The evidence is further narrated in the opinion of the Sheriff.

On 8th December 1911 the Sheriff-substitute (Boyd) decerned against the defender as craved.

¹ *Supra*, p. 473.

² 6 F. 925

The defender appealed, and on 29th February 1912 the Sheriff (Millar) recalled the interlocutor of the Sheriff-substitute, and assoilzied the defender from the conclusions of the action.*

Feb. 28, 1913.
Williamson v.
M'Clelland.

The pursuer appealed to the Court of Session, and the case was heard before the First Division (without Lord Johnston) on 26th February 1913.¹

At advising on 28th February 1913,—

LORD PRESIDENT.—In this case I have come to the conclusion that the interlocutor of the Sheriff-substitute is right. There is no question as to the fact of connection between the pursuer and the defender; the proof of that is so overwhelming that it cannot be controverted, and both Sheriffs have taken that view of it. The only difficulty arises from the circumstance

* "NOTE.—After reading the proof I think it is proved that the defender had sexual intercourse with the pursuer on 16th July 1910, and it is admitted that no intercourse with him took place after the following day—Sunday, 17th July. The child was born on 19th May 1911, which is 306 days after the date of the intercourse proved. The question is, Has the pursuer made out her case?

"There are no authorities, medical or legal, which lay down that such a long period of gestation is impossible. The only witness called in this case upon this question was Dr M'Kenna, who said that during his practice he had never known of so long a period, although, from his reading of medical authorities, he thought it was quite possible. The period is so prolonged and exceptional that it lays the duty upon the Court of examining carefully the facts of the case.

"The pursuer, who is now thirty-one years of age, says that she knew the defender—a lad who is now twenty-one—in the year 1908, when he was staying in Ayr for a short time on business, but there was no great intimacy till June 1910. She met him in Ayr on 2nd June, when he accompanied her to her mother's house, and subsequently left Ayr, promising to return in a fortnight. He returned on the 11th of June, when they went out together to a place called the Belmont Crossings, where there was a seat, and they sat down, when she allowed him to have connection with her. The seat is on the public road, and they were observed by some cyclists who were passing. The defender made a second visit to the pursuer's mother's house on the 2nd of July, and the following evening they took the car to Prestwick, and again had connection at the side of the road. Thereafter he again returned on the 16th of July, and stayed in the mother's house from Saturday till Monday. The pursuer's account of what took place during that visit is a scandalous story of gross immorality. The question, therefore, is whether a woman of her character, according to her own account, is more likely to have had connection with some other man subsequently, or that the period of gestation of her child was so prolonged as it must have been if her story is true. I think the first alternative is the more probable. That view is supported by the fact that a similar consideration was entertained by the Court in the case of *Boyd v. Kerr*, 5 D. 1213, by Lord Mackenzie and Lord Jeffrey; and by Lord Deas in *Gibson v. M'Fagan*, 1 R. 853, in the fourth circumstance which he says supports his view. I am therefore of opinion that the pursuer has failed to prove her case, and that the defender should be assoilzied."

¹ At the discussion the following authorities were referred to:—Taylor, Medical Jurisprudence, (6th ed.) ii. 43, 56, 59, 60, 93; *Boyd v. Kerr*, (1843) 5 D. 1213; *Gibson v. M'Fagan*, (1874) 1 R. 853; *Cook v. Rattray*, (1880) 8 R. 217; *Whyte v. Whyte*, (1884) 11 R. 710; *Innes v. Innes*, (1837) 2 Sh. & M'L. 417, Cottenham, L.C., at p. 447.

Feb. 28, 1913. that it is necessary to hold that an unusually long period of gestation elapsed if the birth of the child is to be referred to the last proved act of Williamson v M'Clelland. connection. That period was one of 306 days.

Ld. President. There is only one witness examined in the case upon this matter—Dr M'Kenna—and I think the result of his evidence fairly comes to this, that he is unable to say that the period is so long as to make the paternity of the defender an impossibility. On a matter like this I think it would be unfortunate if we were to consider ourselves bound by the evidence of one witness in a case in which it was quite natural that there should not be a large amount of expert testimony led. I have therefore not felt myself to be restricted to the evidence of Dr M'Kenna, but have thought myself entitled to consider the matter in the light of what has been said by learned Judges in other cases, and of what one knows to be the opinion of experts as disclosed in medical books.

It is absolutely clear that neither in law nor in medical science is it possible to fix an actual number of days as the extreme period of gestation. In certain systems of law the matter has been dealt with by statute, and a limit has been arbitrarily fixed, but in our system there is no such limit. That does not lead to the conclusion that a period might not be submitted to the consideration of the Court of such length that the Court would refuse to hold that the parentage had been proved. The Court is left free to deal with each case as it occurs. In the present case, although the period is unusually long, there is nothing that has led me to think that it would be beyond the province of the Court to hold that it is not impossibly long. Then we have the undoubted fact of connection, the birth of the child, and the absence of suggestion of any other man as the father. The result seems to me to be inevitable.

I am therefore of opinion that your Lordships should allow the appeal, recall the interlocutor of the Sheriff, and restore the interlocutor of the Sheriff-substitute.

LORD KINNAR concurred.

LORD MACKENZIE.—I am entirely of the same opinion. The learned Sheriff in his note puts the matter thus: "The question, therefore, is whether a woman of her character, according to her own account, is more likely to have had connection with some other man subsequently, or that the period of gestation of her child was so prolonged, as it must have been if her story is true? I think the first alternative is the more probable." Since the hearing I have gone through the evidence, and also through the letters which are produced, and I will content myself with simply saying that I cannot take the view which the Sheriff has taken. I am of opinion that the case for the pursuer is entirely proved.

THE COURT recalled the interlocutor of the Sheriff and affirmed the interlocutor of the Sheriff-substitute.

ROBERT GIBB, W.S —HENDERSON & MACKENZIE, S.S.C.—Agents.

GEORGE ADDIE AND OTHERS (Robert Addie's Trustees), AND OTHERS, No. 95.
 First and Second Parties.—*Fleming, K.C.—Black.*
 CAPTAIN THOMAS JACKSON AND OTHERS, Third Parties.— Feb. 28, 1913.
Blackburn, K.C.—Nicolson.
 MRS MARY REARDON (James Baird Jackson's Executrix), AND Addie's
 OTHERS, Fourth and Fifth Parties.—*Marison, K.C.—C. H. Brown.* Trustees v.
 Jackson.

Succession—Vesting—Direction to convey at postponed period—Issue to take predeceasing parent's share—Whether gift to issue subject to conditions affecting parent's share.

A testator directed his trustees to hold a share of the residue of his estate for his eldest son in liferent and his issue, if any, in fee, declaring that in the event of the death of that son without issue, the capital of his share should fall and belong to the testator's two other sons and his three daughters "equally among them, and the survivors and survivor of them the issue of any of them predeceasing being entitled equally among them, if more than one, to their deceased parents' share." The liferenter died without issue predeceased by two of his sisters, who, however, left issue, some of whom, though surviving their parent, predeceased the liferenter.

Held that, as the issue were called in place of their deceased parents and not as original legatees, the gift to them was subject to the same conditions as the gift to their parents; and accordingly that no vesting had taken place in the issue who predeceased the liferenter.

Martin v. Holgate, (1866) L. R., 1 H. L. 175, *distinguished*.

ROBERT ADDIE, coal and ironmaster in Glasgow, died in 1870 leaving 1ST DIVISION. a trust-disposition and settlement whereby, after sundry provisions, he directed his trustees "to hold and apply the whole residue and remainder of my means, estate, and property, heritable and moveable, real and personal, in trust for behoof of my sons, Robert, William, Alexander, and George, and my daughters, Mary, Marion, and Robina, equally among them, but subject always to the several conditions, restrictions, and declarations hereinafter written."

With regard to the share of residue which he left to his son Robert he made this provision:—"And whereas the said Robert Addie, my eldest son, has for many years past been in such a state of mental weakness as to be incapable of managing his own affairs and unable to attend to business, . . . therefore I hereby direct and appoint that the share of the residue of my means and estate hereinbefore provided to him shall, so long as he continues in a state of mental weakness and incapable of managing his own affairs, be held invested by my said trustees in their own names in trust for him in liferent for his liferent alimentary use allenary and for behoof of any child or children he may have, to be divided equally among them, if more than one, in fee. . . . Declaring also that in the event of his death without issue, the capital of the share of said residue hereby provided to him shall fall and belong to my said sons, Alexander and George, and to my said daughters, Mary, Marion, and Robina, equally among them, and the survivors and survivor of them, the issue of any of them predeceasing being entitled, equally among them, if more than one, to their deceased parents' share, . . . but declaring always, as it is hereby expressly provided and declared, that if and whenever my said son Robert shall be restored to a reasonably sound state of mental health and

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become capable of managing his own affairs, and shall continue in that state uninterrupted for a period of not less than two years, my said trustees shall be entitled, and they are hereby authorised and empowered, if they shall deem it prudent and expedient and advantageous to his interests, to pay or assign and make over to him absolutely the capital of the share of said residue hereby provided to him, or the securities on which it may have been invested, to be at his own unlimited disposal."

All the testator's children above mentioned survived him. His son Robert (hereinafter referred to as the liferenter) died unmarried on 16th April 1911, and as he had continued in a state of mental weakness until his death, the trustees never exercised the power conferred upon them of paying to him the capital of the share of residue which he liferented. He was predeceased by his sisters Mary and Robina. The former, Mrs Mary Addie or Jackson, was survived by five children, one of whom, James Baird Jackson, predeceased the liferenter. The latter, Mrs Robina Addie or Fyfe, was survived by one child, Alastair Dunbar Fyfe, who predeceased the liferenter.

Questions having arisen regarding the distribution of the liferenter's share of residue, a special case was presented for the opinion and judgment of the Court, to which the testator's trustees were the *first parties*; George Addie, Marion Addie, and Alexander Addie were the *second parties*; the four surviving children of Mrs Mary Jackson were the *third parties*; the executrix of James Baird Jackson was the *fourth party*; and the trustees of Alastair Dunbar Fyfe were the *fifth parties*.

The case stated the contentions of the parties as follows:—

"The second parties maintain that, on a sound construction of the trust-disposition and settlement of the testator, the vesting of the share of residue liferented by his son Robert Addie was suspended until the liferenter's death, and that upon his death without issue and without the first parties having exercised the discretionary powers conferred upon them the said share vested in the second parties and the parties of the third part, in the proportions of one-fourth to each of the second parties and one-fourth to the third parties *per stirpes*."

The third parties, who claimed one-fourth of the said share, stated a similar contention.

"The fourth party contends that the late James Baird Jackson, on the death of his mother, took a vested interest in one-fifth of one-fifth of the fee of the share of the residue of the testator's estate liferented by the late Robert Addie, subject only to defeasance in the events, which did not happen, of the late Robert Addie dying leaving issue, or of his recovering and the first parties exercising the power conferred upon them of paying over to him absolutely the capital of the share liferented by him. The fourth party accordingly contends that, as executrix and universal legatory of the said deceased James Baird Jackson, she is now entitled to payment of the said one-fifth of one-fifth of the said share of residue liferented by the late Robert Addie."

The fifth parties, who claimed one-fifth of the said share, stated a contention in similar terms to that of the fourth party.

The following questions of law were presented for the opinion of the Court:—"Did the share of residue liferented by the deceased Robert Addie vest only in (a) the children of the testator who survived the liferenter, and (b) the issue (who survived the liferenter)

of the testator's child, Mrs Jackson, who predeceased the liferenter? Feb. 28, 1913.
 or, Did it also vest in the issue (who survived their parents but predeceased the liferenter) of the testator's children, Mrs Jackson and Mrs Fyfe, who predeceased the liferenter?"

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The case was heard before the First Division (without the Lord President) on 18th December 1912.¹

At advising on 28th February 1913,—

LORD MACKENZIE.—[After stating the terms of the will and the contentions of the parties]—The determination of the question depends entirely upon the construction of the clause which declares that in the event which has happened the capital of Robert Addie's share is to belong to the testator's sons and daughters named, and the survivors, "the issue of any of them predeceasing being entitled equally among them, if more than one, to their deceased parents' share." In my opinion the gift to issue is substitutional and not original. There is no independent bequest to issue. The bequest is to the sons and daughters absolutely. Therefore the contingency annexed to the gift to the sons and daughters that they shall survive the liferenter applies also in the case of their issue.

In the case of *Martin v. Holgate*,² which was founded upon by the fifth parties, where it was held that the gift was original, the clause was in marked contrast to the present. There the testator devised his estate and effects to trustees to pay the proceeds to his wife for life, and "after her decease, to distribute and divide the whole, &c., amongst such of my four nephews and two nieces" (naming them) "as shall be living at the time of her decease; but if any or either of them should then be dead, leaving issue, such issue shall be entitled to their father's or mother's share." It was held that the gift to the children was original, not substitutional, and that the daughter of a nephew, upon her father's death, took a vested interest in the share which, if he had lived, he would have taken. The fact that the gift to the parent was contingent did not affect the nature of the gift to the issue, which was an independent bequest. The construction put upon the words "should then be dead leaving issue" was that they were equivalent to "should then have died leaving issue." The words "leaving issue" were held necessarily to apply to the period of the death of the nephews and nieces, and not to the death of the tenant for life. As Lord Westbury observed (at p. 189), the form of the gift was "not elliptical, nor referential, nor substitutional." I am of opinion that in the present case, according to the form of the gift, issue are just substituted for their parents, and the contingency of surviving the liferenter which applied to the parent applies equally to the issue.

In the case of *Banks's Trustees*³—where Lord Low expressed the opinion that but for the word "accruing" the rule of *Martin v. Holgate*² would

¹ The following cases were referred to.—*Martin v. Holgate*, (1866) L. R., 1 H. L. 175, Lord Chelmsford, at p. 187; *Wormald v. Woolley*, [1903] 2 Ch. 206; *Banks's Trustees v. Banks's Trustees*, 1907 S. C. 125, Lord Low, at pp. 130-1; *Johnston's Trustees v. Dewar*, 1911 S. C. 722; *Coulson's Trustees v. Coulson's Trustees*, 1911 S. C. 881.

² L. R., 1 H. L. 175.

³ 1907 S. C. 125.

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have been applicable—the testator's direction to his trustees was, upon the death or second marriage of his wife if she survived him, to pay and make over the residue of his estate to such of his children as had arrived at the age of twenty-one years, or as they respectively reached that age. The declaration was as follows:—"In the case of provisions to children under these presents, that if any child shall die, either before or after me, leaving lawful issue, and without having acquired a vested interest in such provision, such issue shall be entitled to the share or shares, original and accruing, which their parent would have taken by survivorship; and the share of any child dying without leaving lawful issue shall be divided among the surviving children, and the lawful issue of such children as may have died leaving such issue, in equal shares, *per stirpes*." In this case as in *Martin v. Holgate*¹ the construction put upon the gift to issue, but for the word "accruing," would have been that it was original and not substitutional. The form of the clause in the present case is different. I am accordingly of opinion that the first alternative of the question should be answered in the affirmative and the second in the negative.

LORD JOHNSTON.—[In his Lordship's absence his opinion was read by Lord Mackenzie]—The testator, Robert Addie, directed his trustees to hold and apply the whole residue and remainder of his estate in trust for behoof of four out of his seven sons, and of his three daughters, equally among them, but subject always to the several conditions, restrictions, and declarations contained in his settlement. His three other sons had been provided for in his business.

These equal provisions out of residue to the seven children so provided for were not the subject of any general set of conditions and restrictions, but were dealt with more or less severally. The shares of Alexander and George were not affected by any conditions; that of his son William by one set of conditions; that of his son Robert by another set; and those of the three daughters by a general set of conditions applicable to them only.

This case is concerned with the share of Robert Addie, who was at the date of the settlement incapable of managing his own affairs. The trustees were directed to invest the share in their own names in trust for Robert in life tenancy and for behoof of his children in fee. But this was coupled with the following declaration that, in the event of his death without issue, the capital of his share should fall and belong to his brothers Alexander and George, and to his three sisters, equally among them, "and the survivors and survivor of them the issue of any of them predeceasing being entitled equally among them, if more than one, to their deceased parents' share."

On that statement I think that there can be little doubt that vesting was suspended, that there was no vesting in Robert himself, and no room for vesting subject to defeasance in the donees-over. But there is another clause which requires to be attended to. After the destination-over above referred to there is added a power to the trustees, if they should deem it prudent and expedient and advantageous to his interests in view

¹ L. R., 1 H. L. 175.

of his being restored to a reasonably sound state of health, to pay or assign Feb. 28, 1913. and make over to Robert absolutely the capital of his share of residue, to be at his own unlimited disposal, and there is also a general declaration that the shares of residue provided to each of the above-mentioned children should bear interest from the date of the testator's decease, but that the shares of his sons should not vest in them until they respectively attained the age of twenty-five years. I do not, however, see that in the case of Robert these provisions can do more than add another contingency to the destination-over.

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So far, I do not think that there is much difficulty in the case. The share of residue provided for Robert Addie in liferent, in the circumstances which have occurred, vested, in my opinion, at his death, and not sooner, in the children of the testator who survived him. But there remains a question whether the issue of predeceasing children take their deceased parents' share. One sister predeceased Robert, and left children who survived her and also survived Robert, and also a child who survived her but predeceased Robert, and another sister, Mrs Fyfe, predeceased Robert and left a child who survived her, but predeceased Robert.

The question, therefore, is whether survivance of Robert, the liferenter, was a condition of the issue of predeceasing children taking their deceased parent's share. In this aspect of the case we were much pressed by the decision in *Martin v. Holgate*¹ in the House of Lords. I recognise to the full the authority of that decision, but if we are to follow it, the result would be to compel us to determine that the issue of these predeceasing daughters took, at any rate not later than their parents' death, a vested interest in the share which, if the parents had survived, they might respectively have taken. I am obliged to say "might" and not "would" have taken, because as already shown there was nothing to vest in the parents unless and until they survived Robert, and unless, if and when that occurred, certain contingencies had been purified. Now it seems to me that there could be no more vesting in the issue of predeceasing children than in such children if they survived in what was still subject to two contingencies, viz., those of Robert leaving issue, and of his recovery and the trustees determining to pay over to him his share. I think, therefore, that the case bears to be distinguished from *Martin v. Holgate*,¹ and that the first question should be answered in the affirmative and the second in the negative.

LORD KINNEAR.—I entirely concur in the opinion of Lord Mackenzie, and I only wish to add that I should certainly not have reached that conclusion if I had not thought that it was altogether consistent with the decision in *Martin v. Holgate*.¹ There can be no question as to the binding authority of that decision, and this Court must necessarily follow it. And perhaps I may say it is a decision which demands all the more consideration because the judgments in the House of Lords are expressly intended to settle a controversy which had embarrassed the Court in England and upon which the opinions of eminent Judges were conflicting. But while

¹ L. R., 1 H. L. 175.

Feb. 28, 1913. we are bound to follow the rules laid down in *Martin v. Holgate*¹ as principles of law governing the construction of wills, we are not called upon to follow the exact construction of particular language if the language which we have to interpret is different. We are only bound to follow the general Lord Kinnear. principles.

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Now, the principles established by *Martin v. Holgate*¹ are, I think, very clearly stated in two propositions in the judgment of Lord Westbury. In the first place, his Lordship assumes—indeed expresses at another part of his opinion—the perfectly well-established principle that a Court of construction will construe plain words according to their plain meaning. But then, in the application of that doctrine to the particular question, he lays down the two propositions which I am going to cite. I should remind your Lordships that the question was whether—when an estate, which was to be distributed on the lapse of a life interest and was to go to a class of persons and the issue of such of that class as had predeceased—the issue of the predeceasing members of the class might take an immediate vested interest upon the death of their parent, even although the parent himself, if he had survived, could have taken no interest until the lapse of the life interest; and accordingly, whether in such a case, the children might take a vested interest although they predeceased the life tenant. In that case the Court held that they might, but that is not a general doctrine applicable to all cases in which a class of persons and the survivors are called with a gift to the issue of predeceasing members. The propositions which Lord Westbury lays down are these. In the first place, he says: “A Judge is not justified in departing from the plain meaning of words, which admit of a rational interpretation, for the purpose of giving effect to an assumed intention, which appears to him to be more rational or more consistent with the rest of the will.” And the second is that the assumption, which had been made by the Court below, of an intention to make the gift to the issue contingent, because the gift to the parent was made contingent, was not warranted if it were used so as to control the plain meaning of the words. Now, when that doctrine was applied to the construction of the will in the case of *Martin v. Holgate*,¹ it is perfectly clear upon what reasons of construction the House proceeded. They are stated in the outset of the Lord Chancellor’s opinion, and all the other learned Lords concur with him. The terms of the gift were expressed in a direction to trustees to distribute and divide the estate at the death of the tenant for life “among such of my four nephews and two nieces . . . as shall be living at the time of her decease; but if any or either of them should then be dead, leaving issue, such issue shall be entitled to their father’s or mother’s share.” Now, the Lord Chancellor says (at p. 185): “When we speak of a person having died leaving a child or children, we mean leaving a child or children at his death. If, therefore, the language here had been, if any of them should, at the death of my wife, have died leaving issue, it would have meant if any should at or before that time have died leaving issue at his own death, and if that be so, it is hard to say that any difference is to arise from the circumstance that the words are not ‘shall then have died

¹ L. R., 1 H. L. 175.

leaving issue,' but 'shall then be dead leaving issue.' Such a distinction Feb. 28, 1913.
 would savour of technical subtlety barely intelligible to ordinary minds." ^{Addie's}
 That is the ground upon which the House proceeded in the interpretation ^{Trustees v.}
 of that particular will. And then they say it is perfectly clear upon these ^{Jackson.}
 words that the gift is made in favour of the issue of the legatees who shall ^{Lord Kinnear.}
 die leaving issue, and there is no other contingency except the death of the
 parent during the lifetime of the tenant for life to affect this absolute gift
 to the issue. Now, on that reading of the words, the learned Lords say
 you are not entitled to assume a contingency which the testator has not
 expressed merely because the gift to the parent has been subject to that
 contingency. The two gifts are entirely separate and independent. There
 is no substitutional gift in favour of the issue of predeceasing parents. It
 is not a substitution, but it is an independent gift to children described as
 the issue of persons who shall die leaving issue during the existence of the
 liferent.

But if you compare the words used in that case with the words of the
 will which we have to construe, it appears to me that the main principle of
 the House of Lords' judgment—that we are to give a plain meaning to plain
 words—leads to a different interpretation of the words before us from that
 which was put upon the words in *Martin v. Holgate*,¹ because, in the first
 place, it is to be observed that there is but one contingency applicable to
 the whole disposition of the estate, viz., that it is to be upon the death
 of the liferenter. It is upon the death of the liferenter that the capital
 of the share of the residue provided to him "shall fall and belong to my
 said sons, Alexander and George, and to my said daughters, Mary, Marion,
 and Robina, equally among them, and the survivors and survivor of them,
 the issue of any of them predeceasing being entitled equally among them,
 if more than one, to their deceased parents' share." There is no gift to
 children upon any different contingency from the gift to the parents.
 The main ground of the decision in *Martin v. Holgate*¹ is that although
 the gift to the parents was limited by reference to the death of the tenant
 for life, the gift to the children was not so limited at all, and that it was
 not the duty of a Court of construction to assume a limitation which the
 will did not express. But there is here but one reference to one period at
 which the gift is to take effect in favour of any of the legatees. There is
 no reference at all to the death of parents as determining the period at
 which the right of their children is to come into operation. On the plain
 construction of the words according to their plain meaning, what the trustees
 are asked to do is, upon the death of the liferenter, to distribute the estate
 among Alexander, George, Mary, Marion, and Robina, and the survivors
 and the children of the predeceasers. The direction, of course, assumes the
 existence of children or issue, as the case may be, who are capable of taking,
 or, in other words, it assumes the existence of issue at the date of distribu-
 tion. If no such issue exist, then I confess I see nothing to displace the
 right expressly given to the survivors in the event of the predecease of any
 one of these five.

On the whole matter I agree with Lord Mackenzie, and I am not troubled

¹ L. R., 1 H. L. 175.

Feb. 28, 1913. by any doubt as to the possibility of our departing from the decision in *Martin v. Holgate*,¹ which we are plainly not entitled to do. Then we answer the first alternative of the question of law in the affirmative and the second in the negative.

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The LORD PRESIDENT was present when the case was advised.

THE COURT answered the first alternative of the question of law in the affirmative, and the second alternative in the negative.

W. & F. HALDANE, W.S.—TODD, MURRAY, & JAMIESON, W.S.—PEARSON, ROBERTSON, & FINLAY, W.S.—WALLACE & GUTHRIE, W.S.—Agents.

No. 96. ROBERT M'GEEHEN, Pursuer (Reclaiming).—*Horne, K.C.*—*MacRobert*.
JAMES KNOX AND OTHERS, Defenders (Respondents).—
Feb. 28, 1913. *Sandeman, K.C.*—*D. P. Fleming*.

M'Geehen v.
Knox.

Public-house—Licensing authority—Disqualification of member—Bias—Member belonging to a society pledged to prohibition principles.

Held that the mere fact of belonging to a temperance society pledged to the principle of "no licence in any form under any circumstances for the sale of liquors to be used as a beverage" did not operate as a disqualification for sitting as a member of a Licensing Court.

1ST DIVISION. ROBERT M'GEEHEN, spirit merchant, Airdrie, brought an action against James Knox, Provost of the burgh of Airdrie, and others, as members of the Licensing Court, and against the said James Knox and others, as members of the Licensing Appeal Court of that burgh, for reduction of a deliverance of the former Court dated 17th April 1911, and a deliverance of the latter Court dated 8th May 1911.

Lord
Skerrington.

The pursuer averred, *inter alia*;—(Cond. 1) "The pursuer is a wine and spirit merchant in Airdrie, and held a certificate of licence for a public-house for premises situated at 85 Black Street, Rawyards, Airdrie. The premises were first licensed on or about 1846, and the pursuer has been licensee since on or about 9th December 1901, his certificate having been renewed from year to year. The defenders first called are the whole members of the Licensing Court of the burgh of Airdrie. The defenders second called are the whole members of the Licensing Appeal Court of the said burgh. . . ." (Cond. 2) "On or about 23rd March 1911 the pursuer lodged an application for the renewal of his certificate. The said application came up at the general half-yearly meeting of the Licensing Court for the burgh of Airdrie held on 11th April 1911. The pursuer, with about other thirty licence-holders in the said burgh, was cited by the chief constable of the burgh to attend the Court." (Cond. 3) "At the said meeting of the Licensing Court the applications for renewal of certificates by a number of licence-holders were granted. The procurator-fiscal, however, moved that, in the cases of the pursuer and the other thirty applicants before mentioned, consideration of these cases be held over. The Court granted the motion and adjourned to the 17th day of April. . . ." (Cond. 4) "At the continued or adjourned meeting of the said Licensing Court on 17th

April, the said applications were considered. In no case was any fault alleged against the licence-holders, and no objections to the granting of said applications were lodged by any member of the public. The procurator-fiscal led evidence in support of the chief constable's averments of congestion, and also as to the amount of trade in certain of the premises. Twenty-two applications for renewal of certificates were granted, and ten refused. Among those refused was the pursuer's certificate. . . . (Cond. 5) "The said judgment, deliverance, or finding refusing the pursuer's application was null and void. . . . The members of the Licensing Court, and in particular the said James Knox, Matthew M'Laren Henderson, William Jack, and Thomas Armour, were disqualified from acting by reason of bias. In considering the said applications the said Licensing Court did not act judicially, but illegally and oppressively. The members of the Court particularly above mentioned belong to associations or lodges the object of which is the total suppression of all licensed premises. In taking part in the proceedings of said Court the said members did not intend to exercise, and did not in fact exercise, an honest judgment. The said James Knox, the chairman of the Court, is the chief templar of the 'Airdrie' Lodge of the Independent Order of Good Templars. The said Thomas Armour and William Jack are also leading and active officials of the said lodge. The said Matthew M'Laren Henderson is a member of the said lodge, an official of a local 'Order of Rechabites,' and a member of a body called 'The Sons of Temperance.' The following are the 'principles' of the said Independent Order of Good Templars sworn to and to be rightly observed by all members of said Order, viz.:—'Total abstinence enforced by a life-long pledge and the absolute prohibition of the manufacture, importation, and sale of intoxicating drinks as beverages.' The following also are what is termed the Good Templars Platform, viz.:—'(1) Total abstinence from all intoxicating liquors as a beverage. (2) No licence in any form under any circumstances for the sale of liquors to be used as a beverage. (3) The *absolute prohibition* (these two latter words are in italics) of the manufacture, importation, and sale of intoxicating liquors for such purposes; prohibition by the will of the people expressed in due form of law with the penalties derived for a crime of such enormity. (4) The creation of a healthy public opinion upon the subject by the active dissemination of truth in all modes known to enlightened philanthropy. (5) The election of good honest men to administer the laws. (6) Persistence in efforts to save individuals and communities from so dreadful a scourge against all forms of opposition and difficulties until our success is complete and universal.' The pursuer avers that the defenders the said James Knox [and others], as officials or members of such Order, and having sworn or pledged themselves to maintain and uphold, without reservation, the foresaid 'principles' and 'platform' above referred to, were incapable of exercising in the public interest or in the interest of the pursuer a fair or full consideration of or honest judicial discretion in the pursuer's application, and accordingly their decision is null and void." (Cond. 6) "The said James Knox, in September 1905, published a pamphlet entitled 'The Triumph of Enthusiasm, or Social and Temperance Reform in Airdrie.' The said James Knox also wrote a letter, which appeared in the *Glasgow Herald* on or about 6th February 1910, dealing with 'Temperance Progress in Airdrie.' At the time

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Feb. 28, 1913. said letter was written and published the said James Knox was, as provost of Airdrie, a member and chairman of the Licensing Court of the burgh of Airdrie, and also a member of the Licensing Appeal Court for the said burgh. The said letter was written in his official capacity as provost of the burgh, and is so signed. Copies of these publications are produced and referred to. These writings show that the said James Knox could not and did not exercise an honest judicial discretion in dealing with the applications before the Court, and particularly with the pursuer's application. . . ." (Cond. 7) "On behalf of the pursuer and the other nine licence-holders whose applications were refused, appeals were lodged to the Appeal Court of the burgh. The said Appeal Court met on the 8th day of May 1911. The appeals of the pursuer and other six applicants were dismissed. Two appeals on behalf of two widows, one of whom was in poor circumstances, were, however, unanimously sustained by the Court, although no new evidence had been brought forward or submitted to the Court in support of their applications. Explained that there was considerable indignation on the part of the public at the high-handed, corrupt, and flagrant decision of the said members of the Licensing Court for the burgh of Airdrie, and it is believed and averred that these applications were sustained solely as a means of allaying such indignation." (Cond. 8) "The judgments, deliverances, or findings of the Appeal Court in refusing said applications were null and void. The members above referred to as being disqualified from sitting in the Licensing Court sat in the Appeal Court. They were also disqualified from sitting in the Appeal Court for the same reasons." (Cond. 9) "At the said Appeal Court the pursuer's agent took exception to the said James Knox [and others] as members of the Court on the ground that they were disqualified from acting for the reasons above stated. They, however, refused to leave the bench, and continued to sit and act as members of the Court. The said James Knox was chairman of the Appeal Court, and along with the members of the Licensing Court was thus in a position to control, as was intended by them, and did control the Appeal Court by means of his casting vote." (Cond. 11) "The appeal of the pursuer was the first argued before the said Court. On a vote being taken five members voted for sustaining and five for dismissing the appeal. The said James Knox being in the chair, and having, in terms of the said statute, a casting vote, gave this casting vote for the dismissal of the appeal. . . ." (Cond. 12) "The conduct of the members of the Licensing Court who were sitting in the Appeal Court was so flagrantly corrupt and illegal that four out of five of the justices of the peace members left the Court as a protest."

The pursuer pleaded, *inter alia*;—(1) The pursuer is entitled to decree in terms of the conclusions for reduction and declarator in respect—(a) that the whole proceedings in said Courts were illegal and *funditus* void and inept; (b) that members of both Courts were disqualified from hearing and determining the application by the pursuer for the renewal of his certificate by reason of bias; (c) that members of both Courts did not exercise their judgment and discretion fairly and judicially, but acted corruptly and oppressively.

The defenders pleaded, *inter alia*;—(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed.

On 20th March 1912 the Lord Ordinary (Skerrington) sustained the first plea in law for the defenders, and dismissed the action.* Feb. 23, 1913.

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* "OPINION.—[After narrating the pursuer's averments and dealing with certain grounds of reduction to which it is unnecessary to refer for the purposes of this report]—The last and principal ground of reduction is that Provost Knox and three of his colleagues in the burgh magistracy, who sat and voted both in the Licensing Court and in the Appeal Court, were disqualified by bias. An objection on the ground of bias means, in the ordinary case, that a licensing magistrate had such an interest in the granting or refusing of a particular licence, or group of licences, that he ought not to have adjudicated on an application or appeal relating to such licence or licences. The interest which will disqualify need not be direct or pecuniary. Thus a licensing magistrate who was organising secretary of a society which had promoted and financed the opposition to certain applications was interdicted from adjudicating upon these applications (*per* Lord President in *Goodall v. Bilsland*, 1909 S. C., pp. 1177-8). In the present case the alleged bias is of a different kind. It is directed against the granting of all licences for the sale of intoxicating liquors, and it is said to arise from and to be evidenced by the opinions held by the burgh magistrates as to the proper policy of the State towards the liquor traffic. These magistrates are alleged to be leading and active officials of temperance societies, the object of which is the total suppression of all licensed premises. The pursuer avers—[His Lordship quoted the terms of condescendence 5].

"It is not surprising that the pursuer should distrust the discretion of magistrates who advocate legislation absolutely prohibiting and making criminal the trade by which he lives. If the question to be decided had been whether Mr Knox and his colleagues were likely to be influenced by these opinions in the exercise of the discretion entrusted to them by the Licensing Act, I should have had no difficulty in answering it in the affirmative. In considering the number of licences which it is 'meet and convenient' to grant in a certain district, and in deciding whether a particular licensed house is or is not necessary for the public convenience, the standpoint of a temperance reformer like Mr Knox would probably be different from that of a man who approves of our present licensing system, or again from that of a man who disapproves of all legislative restrictions on the liquor traffic. The influence of his opinions upon his practice in the case of a licensing magistrate is frankly admitted by Mr Knox in a pamphlet, No. 9 of process, upon which the pursuer founds in condescendence 6. It was published in 1905, and on pp. 22 and 24 the writer gives the following account of what he calls 'A famous Victory':—'At the approach of the annual Licensing Court in the month of April 1902, reform began to fill the air. The town-council at their March monthly meeting had unanimously passed a resolution recommending the magistrates to take every available opportunity to reduce the number of licenses, and there was a general expectation that something would be done in that direction. The composition of the bench was favourable to reform, for of the five magistrates who constituted it three were members of the lodge. The result of the Court was a great triumph for the reformers. There was a net reduction of sixteen licences, and all the back and side doors of the remainder were ordered to be closed. The reduction was hailed with approval by the general community, and the utmost satisfaction was felt when on appeal being made to Quarter Sessions the magistrates' decisions were all confirmed. This was the first direct blow the liquor interest in Airdrie had received, but it was not to be the last. During the past four years a total of thirty licences have been cancelled, or more than 25 per cent of the whole. Needless to say the remaining 75 per cent are having attention, and will be dealt with in due course.'

"The pursuer also founds upon a letter, No. 10 of process, which Mr

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The pursuer reclaimed, and the case was heard before the First Division (without Lord Johnston) on 26th February 1913.

Argued for the reclaimar;—Though persons holding opinions similar to those professed by the Independent Order of Good Templars might not thereby be disqualified from acting as members of Licensing Courts,¹ yet the fact that the defenders Knox and certain others had explicitly pledged themselves to carry out the principles of that Order, disqualified them from acting, because it was a necessary inference that those principles would be put in force if they were members of Licensing Courts. In the face of so strong a "challenge to their favour" (as it had been called) involved in their pledge to maintain these principles, their determinations could not possibly be free from bias, and the deliverance in question should accordingly be reduced.² The mere risk of bias was enough, and the English decisions in which "challenge to the favour of the Court" was adopted as the test had been accepted in Scotland as illustrative of the principles to be applied.³

Knox, when Provost of Airdrie, wrote to a newspaper on the subject of 'Temperance Progress in Airdrie.'

"Unfortunately for the pursuer he must, in order to succeed, do a great deal more than allege and prove that Provost Knox and his colleagues are agitating for the abolition of the existing licensing system, and hold opinions which will influence the exercise of their discretion as licensing magistrates. It is not impossible faithfully to administer a law of which one disapproves, and if a man declares in some particular case that he can conscientiously do so, that declaration seems to me to be conclusive in a Court of law unless proved to be insincere by evidence of the most positive and convincing character. Different considerations apply where the appeal is made to public opinion, and the pursuer may possibly be able to satisfy his fellow-electors that Mr Knox and his colleagues are not fit and proper persons to represent them in the town-council or to act as licensing magistrates. As a matter of law, however, it is the right and duty of a licensing magistrate to act upon his own opinions, whatsoever these may be, as to what is 'meet and convenient,' provided always that such opinions do not require him to refuse or to grant indiscriminately every application for a licence, and thus to substitute a policy of absolute prohibition or of absolute liberty for the policy of the statute which requires that each application should be considered on its own merits. Every man is the best interpreter of the exact meaning and effect of his own opinions. It may be difficult for the pursuer to understand how Mr Knox and his colleagues can honestly and intelligently allow even a single shop to remain open for the sale of what they regard as a poison; but they have in effect declared that they can do so by accepting office as magistrates. I find nothing in the writings quoted or referred to by the pursuer which proves or even suggests that this declaration is dishonest and untrue, or which would entitle me to allow a proof for the purpose of showing that Mr Knox and his colleagues are prepared to betray their trust and abuse their position as licensing magistrates by refusing indiscriminately all applications for licences, so far as they can safely do so without such misconduct becoming apparent to the public eye."

¹ Goodall v. Bilsland, 1909 S. C. 1152.

² The King v. Sunderland Justices, [1901] 2 K. B. 357, A. L. Smith, M.R., at pp. 364, 366-7, Vaughan Williams, L.J., at p. 371; The Queen v. Huggins, [1895] 1 Q. B. 563, Wills, J., at p. 565.

³ Cameron v. Magistrates of Glasgow, (1903) 5 F. 490, Lord Kincairney, at p. 497.

Argued for the respondents;—The defenders could not be held to Feb. 28, 1913.
be disqualified from acting as members of the Licensing Courts, by reason of the temperance opinions which they held, without placing upon them a disqualification for which there was no statutory warrant and which could only be imposed by legislation. Any such disqualification would be of such universal effect upon Licensing Courts that few, if any, could be held anywhere in England or Scotland. The abuse of magisterial power was no part of the principles to which the defenders had pledged themselves; and disqualifying bias had to be real—such as absence of *bona fides*, sitting as judges in their own cause, or pecuniary interest.¹ The latter consideration distinguished the present case from that of *The King v. Sunderland Justices*.² There was no reason why a member of the Independent Order of Good Templars, however much he might object to the existing state of the law, should not honestly exercise the discretion which was entrusted to members of Licensing Courts by the law as it at present stood.³

At advising on 28th February 1913,—

LORD PRESIDENT.—This is an action of reduction at the instance of a wine and spirit merchant whose licence was refused at the Licensing Court held in April 1911 in the burgh of Airdrie. Various grounds of reduction have been stated, which are dealt with in the Lord Ordinary's note, but the pursuer's counsel very properly admitted that the point argued in *Goodall's* case,⁴ decided by us last week, could not be reopened before this Court, although technically he insisted on it in order to keep the point open for the House of Lords, if an appeal should be taken and should prove successful in *Goodall's* case.⁴ Accordingly the argument before your Lordships was really limited to one point, viz., that several members of the Licensing Court, and in particular the chairman thereof, were members of certain temperance societies. The chairman was admittedly a leading member of the temperance society called the Independent Order of Good Templars, and it is said that in order to obtain admission to that society you have to pledge yourself to total abstinence and also asseverate that you will, to the best of your endeavours, promote what is called the "platform" of the society—the "platform," I suppose, being the determinate policy of the society. It comprehends among other things the following:—That the person himself is to abstain from all intoxicating liquors as a beverage; that no licence in any form is to be given for the sale of liquors to be used as a beverage, and that there is to be an absolute prohibition of the manufacture, importation, and sale of intoxicating liquors, "prohibition by the will of the people expressed in due form of law with the penalties derived for a crime of such enormity."

¹ *The Queen v. Rand*, (1866) L. R., 1 Q. B. 230; *The Queen v. Meyer*, (1875) 1 Q. B. D. 173; *Goodall v. Bilsland*, 1909 S. C. 1152; *Leeson v. General Council of Medical Education and Registration*, (1889) 43 Ch. D. 366; *Allinson v. General Council of Medical Education and Registration*, [1894] 1 Q. B. 750.

² [1901] 2 K. B. 357.

³ *Sharp v. Wakefield*, [1891] A. C. 173, Lord Halsbury, L.C., at p. 181.

⁴ *Supra*, p. 630.

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Now it is said that anybody who has taken this pledge, and professed adhesion to this platform, is necessarily so biased as to make it inconsistent with the proper administration of the law that he should sit in the Licensing Court. The Lord Ordinary has dealt very carefully with this matter, and, in the main, I entirely agree with him, and I only add a few words because of the general importance of the case. In the first place, I should like to associate myself with a remark of Mr Justice Wright in the case of *The Queen v. Huggins*.¹ That case dealt with an objection to a conviction under the Merchant Shipping Act, which imposes a penalty on an unqualified pilot who assumes or continues in charge of a ship after a qualified pilot has offered to take her in charge, and in that case a qualified pilot belonging to the pilotage district within which the offence was committed had sat upon the bench. The conviction was quashed, but in the course of his opinion Mr Justice Wright says this:—"I will only add this. Some of the cases in which the Court has been asked to interfere are cases of decisions by administrative bodies, such as the London County Council and others. They are very different from cases of decisions by judicial tribunals. In my judgment the Court ought to be slow to interfere in the former; but in the latter ought to interfere on much slighter grounds." In that particular case, as necessarily follows from what I have already said, the convicting justices were sitting as a judicial tribunal. Now the present case is rather a case of an administrative body, which has, however, to sit—if I may so phrase it—in a judicial spirit. That is clear from the judgment of the House of Lords in the well-known case of *Sharp v. Wakefield*.² But at the same time I think that the distinction taken by Mr Justice Wright is a very wholesome one.

It would, I think, be a dangerous proceeding if one were to attempt *ab ante*, by words of general definition, to say precisely in what cases the Court would, and in what cases it would not, interfere; and therefore anything I am now going to say must not be taken as definitive or exhaustive, but rather as illustrative of the cases in which the Court may or may not interfere. Speaking in that spirit, and with that caution, I may say that I can scarcely imagine a case in which an administrative body would be interfered with by the Court where the objection to the person acting as a member of that body was based on an opinion he might happen to hold, where that opinion had not been carried into practical operation by any active proceeding. We have already had a case in the Courts of this country in which that matter was considered—viz., the case I referred to in my judgment in *Goodall v. Bilsland*.³ In that case I said that Bailie Battersby had been rightly interdicted from sitting in the Licensing Court. But that was a case where the matter had gone far beyond opinion. That gentleman had acted as the organising secretary of an association which not only professed opinions, but practically got up cases and managed them. That was obviously a case of disqualification, because, to repeat what I said in *Goodall's* case,³ it is contrary to the idea of elementary justice that a man should get up cases and then proceed to adjudicate upon these cases upon the bench.

¹ [1895] 1 Q. B. 563.² [1891] A. C. 173.³ 1909 S. C. 1152, at p. 1177.

The English cases which were quoted to us related mainly to decisions by Feb. 28, 1913. judicial tribunals, and there I take the same view as was expressed by Mr Justice Wright and Mr Justice Wills in the case of *Huggins*,¹ namely, that such decisions must be regarded with greater strictness, and that, as Mr Justice Wills said, "it is far safer to enlarge the area of this class of objections to the qualification of justices than to restrict it." But when you are dealing with decisions by administrative bodies there is a difference; and I am very much moved by this, that if we were to interfere upon the ground that the members of the administrative body in question held certain opinions, or belonged to a certain society, we should be practically placing upon them a disqualification which the Act of Parliament has not expressed. That the Legislature understands how to impose a disqualification is clear from the disqualification which it has placed upon persons having an interest in the liquor trade. It is a question of policy with which we have nothing to do, but with which Parliament had to do—whether it was fair to impose that disqualification and not to insert another with regard to persons who have, so to speak, committed themselves to a certain set of opinions. But it is not there, and I do not think it is for the Court to read into the Act of Parliament a clause which it does not contain.

Moreover, it must be kept in view that in this so called "platform" there is much that obviously cannot be effected except by way of legislation. But the point I lay stress upon is this—that there is no averment here that this gentleman was in any way affected in his conduct as chairman of the Court by the general opinions which were professed by the society of which he was a member. It is for him, in his own conscience, to know how far those general opinions can be entertained consistently with the performance of the duty which he has undertaken on oath to perform—namely, to conduct with fairness and impartiality the proceedings of the tribunal of which he is chairman. While that is so, I cannot see that anything is averred which, if proved, would compel us to hold that this gentleman had neglected his duty, and had decided the question before him, not upon the grounds upon which he is bound to decide, according to the Act of Parliament under which he sits, but according to certain preconceived opinions for which in other places he has professed an admiration.

Upon the whole matter, therefore, I am of opinion that the Lord Ordinary's interlocutor is right and should be affirmed.

LORD KINNEAR.—I agree with your Lordship and with the Lord Ordinary. I think it is impossible for this Court to lay down as law that any man who entertains strong opinions that the present licensing system should no longer exist, or that the sale of liquor should be absolutely prohibited, is therefore incapacitated for administering the system honestly in particular cases while it still subsists.

I also agree with your Lordship and the Lord Ordinary that whether he can conduct the administration of the statute fairly and impartially in particular cases, or whether he may not be exposed to the risk of having his judgment affected by his own strong opinions, is a question for the magis-

¹ [1895] 1 Q. B. 563.

Feb. 28, 1913. trate himself—and it may be a very delicate question ; but I think there is no authority which would justify the Court in laying it down as a matter of law that every person who entertains such opinions is thereby disqualified from performing his duty as a magistrate.

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LORD MACKENZIE.—I am of the same opinion. The averment of the pursuer in cond. 5 is that the defenders were incapable of exercising an honest judicial discretion in discharging their duty as members of the Licensing Court, and his reason for making that averment is also contained in the same article of the condescendence, namely, that the defenders are members of a body whose principles are total abstinence, no licences, and absolute prohibition. But when the averment is examined, it will be found that it really comes to no more than this, that the defenders have certain principles and that they have expressed them. The way in which it is proposed to carry into execution these principles is “by the will of the people expressed in due form of law with the penalties derived for a crime of such enormity.” It is not difficult to see what was meant to be expressed by that, although it is not very clearly worded, namely, that they intend to do all they can to bring about a change in the law. If, instead of that, they had announced that their purpose was to carry out their wishes by voting against every licence that came up in the Licensing Court, then, of course, the matter would have been entirely different, and the case for the pursuer would have been plain. There is no averment that the defenders voted against every licence, and when one considers what was done in the Licensing Court, the number of licences which were granted and the number which were refused—twenty-four were granted ultimately, I think, and eight refused—it will be seen that there was a certain discrimination, and that the defenders had not in all cases voted against the licences.

The defenders have undertaken to administer conscientiously the existing law, and they must interpret it in accordance with the principles which were laid down in the case of *Sharp v. Wakefield*,¹ namely, that they will fairly decide the questions submitted to them, and will not by evasion attempt to repeal the law by which public-houses exist. They have taken an oath to discharge their duty in accordance with these principles, and it is between them and their conscience whether they faithfully discharge that duty or not. But all that is necessary for the decision of the present case is to say that the mere fact that the defenders disapprove of the existing law, and have expressed their disapproval in the terms set out on record, does not necessarily mean that they cannot faithfully administer the law as it exists. It is for the Legislature, as your Lordship has already pointed out, to decide whether a section, similar to section 9 in the statute of 1903,² should or should not be introduced in future legislation, in order to debar a person with strong opinions upon the question from endeavouring to discharge that administrative duty.

THE COURT adhered.

BRUCE & BLACK, W.S.—DRUMMOND & REID, W.S.—Agents.

¹ [1891] A. C. 173.

² 3 Edw. VII. cap. 25.

THE BURNTISLAND HARBOUR COMMISSIONERS, Appellants.—

Cooper, K.C.—Constable, K.C.—E. O. Inglis.

ASSESSOR FOR BURNTISLAND, Respondent.—*Chree, K.C.—Kemp.*

No. 97.

Nov. 20, 1912.

Valuation Acts—Value—Harbour—Revenue principle—Revenue—Sum paid by tenant as penalty for failure to implement condition of lease.

Burntisland Harbour Commissioners v. Assessor for Burntisland.

The commissioners of a harbour leased a portion of the subjects belonging to them under a condition that, if the lessees had not, by a certain date, formed a company for the purpose of constructing a graving dock thereon, the lease should be null and void, and the lessees should forfeit a certain sum to the lessors. The lessees failed to form the company, and paid the forfeit.

Held that the assessor, in determining the yearly value of the harbour undertaking for the following year upon the revenue principle, was not entitled to include in revenue the sum paid as forfeit to the harbour commissioners.

At a meeting of the Burgh Valuation Committee of Burntisland held on 17th September 1912 the Burntisland Harbour Commissioners appealed against an entry in the burgh Valuation-roll for the year ending Whitsunday 1913, in which they were entered as proprietors and occupiers of "Harbour and wet docks, including railway sidings and fixed machinery," at a yearly rent or value of £36,601.

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Ld. Johnston.
Lord Salvesen.
Lord Cullen.

Case 315.

They craved (1) that the subjects should be valued separately, viz., as (a) the harbour and wet docks, including railway sidings and fixed machinery; (b) ground at West Shore (formerly leased to Hudson's Consolidated, Limited); (2) that the valuation of the first of these subjects should be £28,399, 4s. 2d., i.e., £8201, 15s. 10d. less than the figure fixed by the Assessor, and that the second should be valued at £1; or, if the whole subjects fell to be entered as a *unum quid*, that the value should be the foresaid figure of £28,399, 4s. 2d.

The Committee having dismissed the appeal, the appellants craved and obtained a case for appeal.

The case set forth that the following facts were admitted by the parties, or were held by the Court to be proved or within the knowledge of the Court:—

"(1) That the subjects, the harbour and wet docks, including railway sidings and fixed machinery, are owned by the appellants and occupied by them, and that the ground at West Shore extending to eight acres or thereby, formerly leased to Hudson's Consolidated, Limited, was acquired by the appellants from the town-council of Burntisland in the year 1881 under powers contained in the Burntisland Harbour Act, 1881, section 59, under which the said ground was to be used solely for and in relation to harbour purposes and as part of the harbour undertaking, subject to an annual feu-duty of £30 payable by the appellants to said town-council, and with the further provision that in the event of a dock being constructed upon any part of the said lands within twenty years after the passing of said Act of 1881, the said annual feu-duty payable therefor should be raised to £60. Further, that the said ground at West Shore is vacant ground, and that there are at present no railway sidings or harbour and dock appliances thereon. (2) That the ground at West Shore was, prior to 1906, occupied by railway sidings forming part of the dock undertaking, and was for valuation purposes included as part of the harbour and wet docks, the whole being entered in the

Nov. 20, 1912. Valuation-roll as a *unum quid*. (3) That for the years from 1906 to 1911 the ground at West Shore was leased by the appellants (first) to Messrs J. A. Wormald and John Morrison, and (second) to Hudson's Consolidated, Limited [at a rent of £160], and that accordingly said ground was treated by the Assessor separately from the harbour and wet docks and separately entered in the Valuation-roll during these years." (4) [Here followed excerpts from the Valuation-roll, which showed that from 1906 to 1911 the "Ground, West Shore," was separately entered at a value of £160, Messrs Wormald & Morrison, and afterwards Hudson's Consolidated, being entered as tenants thereof; and that for the year 1911-12 it was also separately entered, but was described as "unlet," and the value put upon it was £1]. "(5) That by the North British Railway (General Powers) Act, 1898, section 53, the appellants were authorised to lease the said ground at the West Shore for the purpose of a graving dock, &c., and that they did so by lease between the appellants and Hudson's Consolidated, Limited, 1-4 Lombard Street, London, E.C., dated 22nd, 26th, and 27th, all days of July 1909, to which reference is made. The lease provided, *inter alia*, that the construction of the graving dock should be commenced by Hudson's Consolidated within six months of the date of the lease, and should be duly proceeded with and completed on or before 1st September 1911. The lease excluded assignees and subtenants unless approved by the Harbour Commissioners, but expressly provided that the Harbour Commissioners would approve of an assignment thereof to a construction company having a capital of not less than £150,000, with one-fifth thereof paid up. The lease also stipulated that in the event of the construction of the graving dock not being commenced within the period prescribed for commencement, or not being completely constructed on or before 1st September 1911, the lease should, in the option of the Harbour Commissioners, become void and null. (6) That by agreement entered into between the appellants and Hudson's Consolidated, Limited, made at the same time as the fofoesaid lease and contained in a joint letter dated July 1909, to which reference is made, it was agreed that at the date of the execution of the lease a sum of £8000 should be provided by Hudson's Consolidated and deposited in the Royal Bank of Scotland, Leven Branch, to the credit of a joint account, and that certain payments should be made out of the said £8000, and the balance then remaining to the credit of the joint account should remain for a period of six calendar months, and if a construction company, for the purpose of constructing the said graving dock, having a capital of at least £150,000, and of which one-half should have been *bona fide* subscribed, should not, by the expiration of the said period, have been formed by Hudson's Consolidated, Limited, and registered, the said balance of the said sum of £8000 should be forfeited to the appellants, and in such event the lease should be null and void. (7) That by another agreement between the appellants and Hudson's Consolidated, Limited, dated 15th, 21st, and 27th September 1910, to which reference is also made, it was agreed, in consequence of the said Hudson's Consolidated, Limited, not having implemented the obligations imposed by said lease and agreement contained in said joint letter, *inter alia*, that the said joint account should be closed, and the amount at the credit thereof, being £5060, 5s., should be paid over to the appellants, that Hudson's Consolidated, Limited, should place on deposit-receipt with

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the Royal Bank of Scotland, Leven, in joint names of the appellants and Hudson's Consolidated, Limited, the sum of £3000; that the period allowed for the formation and registration of the construction company should be extended to 30th November 1910; and that if the said construction company should not by 30th November 1910 have been formed and registered, the contents of the said deposit-receipt for £3000, principal and interest, should belong and be paid to the Harbour Commissioners; further, that on due completion of the said graving dock and whole works the appellants should pay to the said Hudson's Consolidated, Limited, the foresaid sum of £5060, 5s. without interest. (8) That the proposed construction company was not formed on or before 30th November 1910, and that the lease between the appellants and Hudson's Consolidated, Limited, therefore was brought to an end. (9) That the sums forfeited and paid by Hudson's Consolidated, Limited, to the appellants, amounting to £8201, 15s. 10d., are made up as follows:—

- (1) Sum conditionally forfeited to the appellants on 23rd September 1910 in terms of the aforesaid agreement between them and Hudson's Consolidated, Limited, dated, 15th, 21st, and 27th September 1910, . £5060 5 0

Interest thereon from 23rd September
1910 to 13th July 1911, . 91 9 10

£5151 14 10

- (2) Sum forfeited to the appellants by Hudson's Consolidated, Limited, through their failure to form proposed construction company as provided for in the aforesaid agreement, . £3000 0 0

Interest thereon from 23rd September
1910 to 10th June 1911, . 50 1 0 3050 1 0

£8201 15 10

(10) That in arriving at his figure of £36,601 as the value of the Harbour undertaking for the year 1912-13, the Assessor proceeded on the method adopted by him in former years of taking the gross income of the Harbour Commissioners for the previous year as shown in their abstract of accounts, and deducting therefrom the necessary expenses and other outlays, and that in the income he has included a sum amounting in all, including interest, to £8201, 15s. 10d., received by the Harbour Commissioners from Hudson's Consolidated, Limited, as above mentioned. (11) That in the appellants' abstract of accounts for the year ending 30th September 1911, the said sum of £8201, 15s. 10d. is entered; that in point of fact the whole of said sum of £8201, 15s. 10d. was paid over by the appellants to the North British Railway Company as a payment to account of arrears of interest on money borrowed by the appellants from said railway company, and that the appellants have, as matter of fact, debited against their ordinary revenue account various sums of money—such as sea wall at West Shore, £80; balance of cost of construction of sidings at Ross Brae written off, £525, 15s. 7d., expended by them in clearing and preparing the said piece of ground at West Shore for the purposes of the foresaid lease. (12) That on the appellants' abstract of accounts above mentioned for the year to 30th September 1911 being submitted to their auditor for examination and audit, the auditor in his docquet, dated Edinburgh, 14th Novem-

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ber 1911, drew the special attention of the appellants to the fact that the said sum of £8201, 15s. 10d., which had been received from Hudson's Consolidated, Limited, as aforesaid, had been treated as revenue and paid over to the North British Railway Company as such. The auditor also stated that he was informed that this method of treating the payment would be confirmed at the next meeting of the Commissioners; that at a meeting of said Commissioners held at Burntisland on 21st November 1911 the auditor's docquet (or report) above mentioned was submitted and read, after which it, together with the abstract of accounts for said year ending 30th September 1911, was expressly approved and confirmed by said Commissioners."

The case was heard on 20th November 1912.

Argued for the appellants;—The Assessor was wrong in treating the ground which had been let for the graving dock and the other ground and subjects as a *unum quid*. They were separate and should be separately entered. It was not suggested that a startling increase in value had taken place in the other ground and subjects, and there was accordingly no justification, so far as regarded them, for the figure fixed by the Assessor. With regard to the ground let for the graving dock, it was out of the question to say that its annual value was £8201, 15s. 10d., when in fact it had for four years been entered in the Valuation-roll at £160, the rent at which it had actually been let. Even, however, if the subjects were valued as a *unum quid*, there was no excuse for increasing the valuation by £8201, 15s. 10d. That sum was an exceptional payment in no sense earned by the harbour or other subjects under valuation; it was not really revenue, but a capital payment representing either the price of an option or compensation for breach of contract; it did not add to the lettable value of the subjects, and would in no way be taken into account by a hypothetical tenant. The case was ruled by *Sharp v. Assessor for Caithness*¹ and *Burgh of Renfrew*.² The undernoted cases³ were also favourable to the appellants.

Argued for the respondent;—The subjects were rightly entered as a *unum quid*, the lease of the graving dock ground having come to an end and the ground being again in possession of the appellants. The respondent had rightly increased the valuation by £8201, 15s. 10d., seeing that that sum formed part of the revenue of the year under consideration, had been earned by the subjects which were being valued, and had been treated by the appellants themselves as ordinary revenue. The former rent of £160 at any rate no longer represented the true value of the graving dock ground. The true value of that ground in a question with the Commissioners was a figure representing the value of the ground converted into a graving dock; seeing that, although the ground had not actually been converted, the Commissioners had received an equivalent pecuniary payment.

¹ (1887) 24 S. L. R. 313, 15 Poor Law Mag. 262.

² (1868) 11 Macph. 979.

³ Dundee and Arbroath Joint Line Committee, (1883) 11 R. 396; Glasgow and South-Western Railway Co. v. Assessor for Greenock, (1898) 25 R. 1229; Assessor for Elginshire v. Duke of Richmond and Gordon, (1905) 7 F. 424; Coatbridge and Airdrie Electric Supply Co., Limited, v. Assessor for Coatbridge, 1907 S. C. 780; Edinburgh and Leith Gas Commissioners v. Assessor for Edinburgh, 1912 S. C. 790.

LORD JOHNSTON.—This is a very special case, and I think it is necessary Nov. 20, 1912.
to direct attention to the circumstances. The Burntisland Harbour Com-Burntisland
missioners in 1881 obtained an Act whereby they acquired for a feu-duty of Harbour Com
£30 the ground in question, extending, I think, to about eight acres, out-missioners v.
side their existing harbour, a part of it overflowed by the tide and a part Assessor for
just above the tide, but subject to this condition that it was to be used Burntisland.
solely for or in relation to harbour purposes. That, of course, lays an
embargo upon the ground which does not make it a subject of free contract
for the future. In the North British Railway (General Powers) Act, 1898,
there is a provision whereby the Harbour Commissioners might lease the
lands in question to any company or person for the purpose of making,
maintaining, and working thereon a graving dock, gridiron, shipbuilding
yard, and other works and conveniences. The next step is that about
eleven years afterwards Hudson's Consolidated, Limited, came forward and
entered into an agreement which is titled a lease, but which is a lease of
a very peculiar character. Reading that document carefully, I think it
becomes pretty clear that Hudson's Consolidated, Limited, are truly in the
position of middlemen or brokers, who entered into this contract with the
object of forming a construction company, and, doubtless, making their
profit in the course of passing this concession—which although called a lease
was truly a concession—on to the construction company.

Now, that document, as I ventured to observe in the course of the argu-
ment—and on reflection I think the observation is sound—is nothing but
an option to lease. It might have been so drawn in point of fact. It
might have been an undertaking on the part of the Commissioners to give
to Hudson's Consolidated, Limited, six months to find the tenant who
would comply with the obligations of the statute and construct the neces-
sary graving dock. The fact that they have chosen to make the contract
in the form of a provisional lease does not, to my mind, alter the nature of
the payment made. The payment of the £8000 odds, although not clearly
so *ex facie*, is in reality a payment for the option to form a construction
company which would undertake to make the graving dock; and the sum
paid down goes to the benefit of the lessees, if the company is duly formed
in terms of the contract. On the other hand, if they fail, just as a sum
paid in respect of an option is forfeited, so this £8000 odds is also forfeited,
and the agreement or lease becomes null and void.

Now, on 30th November 1910 Hudson's Consolidated, Limited, failed to
implement their obligation to form a construction company, and the whole
sum there and then became forfeited and the lease there and then came to
an end. If that is the case, this sum fell into the hands of the Commis-
sioners on 30th November 1910, at a period when the year 1910-1911 was
half way through, and the question is how that £8000 odds is to be dealt
with.

The printed case shows us how the ground in question has been dealt
with in the matter of assessment during the last eight years. I think it
has been dealt with perfectly correctly up to a certain point. During the
first two years the ground was in the hands of the Harbour Commissioners
under their statutes as part of their undertaking. They found no use for
it, and it remained quite properly entered in the Valuation-roll—not sepa-

Nov. 20, 1912. rately, but as part of the general undertaking. We are told that following a custom, very convenient but not statutory, the Harbour Commissioners are assessed at the net returns to them, after expenses are paid, from the working of their concern. And as there was no separate return from this ground and no use made of it, it neither entered the return separately nor affected the valuation indirectly. But during the next three years the land was let to Wormald & Morrison for a rent of £160, and it was accordingly quite right for the Assessor during the third, fourth, and fifth years to enter the ground at the West Shore as a separate subject, and necessary to do so in order to bring Wormald & Morrison on to the Valuation-roll for the purposes of occupancy taxation. Therefore it was quite right to deal with the subject as a separate subject, with a definite rent of £160 and with definite tenants. After the Wormald & Morrison period you get two years in which the Harbour Commissioners are rightly entered as proprietors and Hudson's Consolidated, Limited, as tenants, and again the entry of the rent is £160.

In the course of the argument it was suggested that the £160 paid by Hudson's Consolidation, Limited, could not be taken as the true rent, but that there was a consideration other than rent. I do not think it is necessary to decide that, but my own opinion is very much to the contrary. I think this £160 is the true rent, and that the other considerations are not considerations which go to rent at all. Thus, if the transaction had gone on, during the period of construction there could not have been any further entry of value than this rent; but the moment the construction is completed you then come to a divided proprietary—the landlords, who are receiving nothing but the £160, and the long lease holders, who are under the statutes and for the purposes of the statutes owners for the time being; and their graving dock would then have to be entered as an undertaking of which they were owners; and so far as valuation and taxation go, they would then be in the position of proprietors and occupants. True, the graving dock might incidentally bring profit to the Harbour Commissioners beyond the £160 of rent, but it would be indirectly, by reason that it might be the means of bringing additional traffic to their harbour, and with it additional dues; if so, and indirectly also, their valuation would rise; because, presumably, the net returns from their undertaking would rise. But that does not affect the present question.

But to resume the narrative. In the middle of the year 1910 the sum deposited was forfeited and the lease came to an end. The suggestion is that the sum so forfeited is to be regarded as part of the net returns or profits of the Harbour Commissioners for that year, to be used as a means of fixing the valuation for the next year. I think we must, from the strictly logical point of view, treat the question as if we were dealing with the valuation for 1910-1911, during which the sum fell in. The answer to the Assessor's contention is that at that time a definite rent of £160 was being paid for the subjects, which were not in the hands of the Harbour Commissioners but in the possession of another party; and that that other party practically came forward and asked to be relieved of his obligation, not merely for the rent, but for the whole stipulations, on consideration of a payment of £8000. Now, that £8000 is not paid for possession. It is

paid in order to avoid the heavy obligation of what turns out to be a very Nov. 20, 1912.
favourable contract for the Commissioners, but a disastrous one for the Burntisland
nominal lessees. It seems to me, without saying anything further, that the Harbour Com-
case, although differing in its circumstances, should be decided on exactly missioners v.
the same principles as the case to which we were referred—the case of Assessor for
*Sharp*¹—and with the same result. For these reasons I think this valuation Ld. Johnston.
requires to be altered. Mr Constable, on behalf of the Commissioners,
said that he was quite prepared to consent to an entry of £30 instead of the
nominal figure of £1. I desire to say, with respect to that valuation, that
it must be understood as to be inserted purely of consent, and by no means
on the ground of any principle accepted, or suggestion made, by the Court.

LORD SALVESEN.—I am of the same opinion. The question we have to
decide is whether this sum of £8201, 15s. 10d., which is entered in the
receipts of the Burntisland Harbour Commissioners for the year ending 30th
September 1911, falls to be assessed as part of the revenue of the under-
taking. I am quite clear that it is not that. It may be represented either as
the price of an option, or as compensation for breach of a contract which
the Harbour Commissioners had made with a third party. In either view,
it seems to me, on the principles laid down in the cases of *Renfrew*² and
Sharp,¹ that it does not fall to be taken into account in fixing the valuation
for the Valuation-roll.

It is not every receipt which the Harbour Commissioners may obtain in
the course of conducting their business that forms a basis of assessment.
That is plain from the Assessor's own action in permitting the deductions
which are placed under the head of "Special and Miscellaneous Receipts."
One of these is the price of old materials sold. That is, no doubt, entered
as a receipt, but it is not part of the revenue; it arises from the sale of a
subject belonging to the Commissioners. In the same way the profit that
the Commissioners may make by collecting the pilotage dues is not a revenue
arising from heritage, nor is the profit which they make by carrying on the
business of stevedores. All that is conceded by the Assessor.

It seems to me that this special payment is in precisely the same position.
It is not a recurring payment; and the inequity of supporting the Assessor's
contention, which would result in the Commissioners having to pay assess-
ment upon what may be regarded as the capitalised value of the obligations
undertaken by the lessees, appears from the fact that in the next year or the
year after they might get a tenant who would pay even a higher rent than
the rent which Hudson's Consolidated, Limited, were under obligation to
pay. Of course the moment such a lease was granted the Assessor would
be entitled to put both the landlord and tenant upon the Valuation-roll in
respect of the amount of rent payable under the lease, while all the time the
burgh authorities would have in their pocket what represented the capitalised
assessment on the footing that this ground would never be let again. I
think that consideration, in addition to those which your Lordship in the
chair has referred to, makes it plain that this is not revenue from heritage
at all, and therefore does not fall to enter the Valuation-roll.

¹ 24 S. L. R. 313, 15 Poor Law Mag. 262.

² 11 Macph. 979.

Nov. 20, 1912. LORD CULLEN.—If the ground in question be regarded as a separate subject of valuation, it seems to me to be quite clear that the sum of £8201, 15s. 10d. can in no sense be treated as rent paid for the ground, or as representing the annual lettable value of it. It is something quite different in its nature. Now, if that be so, I am unable to see how, by proceeding to treat the ground and the rest of the harbour property as a *unum quid*, the sum of £8201, 15s. 10d. can be regarded as a contribution of annual lettable value made by the said ground to the total annual lettable value of the undertaking as a heritable subject of valuation. It no doubt enters the harbour accounts as part of the receipts during the year; but, looking to its true nature, it is not a receipt on which it is possible to base a calculation of the amount of rent which a hypothetical tenant might be expected to pay for the subjects.

THE COURT were of opinion that the determination of the magistrates was wrong, and that the harbour and wet docks, including railway sidings and fixed machinery, along with the ground at West Shore, should be entered in the Roll as a *unum quid*, and, of consent, at an annual value of £28,429, 4s. 2d.

JAMES WATSON, S.S.C.—PARTY—Agents.

No. 98.

A. J. WILSON & COMPANY, LIMITED, Appellants.—*Wilton*.
ASSESSOR FOR KINCARDINESHIRE, Respondent.—*A. R. Brown*.

Dec. 17, 1912.

A. J. Wilson & Co., Limited, v. Assessor for Kincardineshire.

Valuation Acts—Subjects—Advertisement board—Contract permitting erection of board—Whether owner of land or owner of board the “occupier” of site—Whether board a “heritable erection”—Statute—Applicability to Scotland—Lands Valuation (Scotland) Act, 1854 (17 and 18 Vict. cap. 91), secs. 1 and 6—Advertising Stations (Rating) Act, 1889 (52 and 53 Vict. cap. 27), sec. 3—Lands Valuation (Scotland) Amendment Act, 1895 (58 and 59 Vict. cap. 41), sec. 4.

The Advertising Stations (Rating) Act, 1889 (which expressly applies to Ireland, but contains no mention of Scotland), by sec. 3 enacts:—“Where any land is used temporarily or permanently for the exhibition of advertisements . . . but not otherwise occupied, the person who shall permit the same to be so used, or (if he cannot be ascertained) the owner thereof, shall be deemed to be in beneficial occupation of such land or part thereof, and shall be rateable in respect thereof to the relief of the poor and to all local rates, according to the value of such use as aforesaid.”

The owner of hotel premises entered into an agreement with a firm of billposters by which, for an annual payment of 10s. 6d., he permitted them to affix an advertisement board for tyres to a part of his premises to be afterwards determined. The permission was to remain in force for three years and thereafter to be ended by three months' notice from either party. The agreement provided that the firm should have reasonable access to the premises for purposes connected with the board, and also that no other advertisement of a tyre was to be displayed on the premises. Following on this agreement a board was erected on a strip of vacant ground in front of the hotel and the “site” of the board was entered by the Assessor in the Valuation-roll at the yearly rent or value of 10s. 6d. and the firm of billposters as “tenants” and “occupiers.” In an appeal at their instance they contended that they should not have been entered as tenants or

occupiers in respect (1) that the agreement was not a lease but a licence, (2) that under sec. 3 of the Advertising Stations (Rating) Act, 1889, the owner of the land being the person who "permitted" the ground to be used for advertisement must be deemed to be the "occupier."

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Held that the entry was correct under the Lands Valuation Acts in respect that the agreement was in effect an ordinary lease of a portion of land at a yearly rent, and that the Act of 1889 (if applicable to Scotland, as to which *opinions reserved*) in no way altered the prescribed mode of making up the Valuation-roll under the Valuation Acts.

Opinions reserved upon the question whether the advertisement board was a "heritable erection," within the meaning of sec. 4 of the Lands Valuation (Scotland) Amendment Act, 1895, falling to be entered in the Valuation-roll.

At a meeting of the Valuation Committee of the County Council of Kincardineshire held at Stonehaven on 12th September 1912, A. J. Wilson & Company, Limited, London, appealed against the following entries in the Valuation-roll of the county for the year 1912-1913:—

Lands Valuation Appeal Court.
Ld. Johnston.
Lord Salvesen.
Lord Cullen.

Description and Situation of Subject.	Proprietor.	Tenant.	Occupier.	Yearly Rent or Value.
Site for Advertising Board, Cammachmore, Newtonhill.	Robert Bridgeford, Publican.	A. J. Wilson & Co., Ltd., 154 Clerkenwell Rd., London, E.C., per James B. Connon, Solicitor, Stonehaven.	Tenants.	10/6
Advertising Board, Cammachmore.	A. J. Wilson & Co., Ltd., 154 Clerkenwell Rd., London, E.C., per James B. Connon, Solicitor, Stonehaven.		Proprietors.	10/

Case 213.

They craved that their name should be deleted from the first entry, and that the second entry should be entirely deleted.

The following narrative of facts is taken from the opinion of Lord Cullen:—

"The appellants in this case carry on the business of advertisement contractors. In July 1910 they made an agreement with Robert Bridgeford, innkeeper, Cammachmore, Newtonhill, Kincardine, whereby Mr Bridgeford, who is the owner of the premises now in question, agreed by letter of 22nd July 1910 to permit the appellants 'to affix a Dunlop tyre poster on that part of my premises at Aberdeen Road arranged by myself and Mr J. I. Paxton, of Messrs A. J. Wilson & Company, Limited, this permission to remain in force for a period of three years, and thereafter to be put an end to by either party giving three months' notice in writing.' The consideration stipulated for is a payment to Mr Bridgeford of 10s. 6d. The appellants are to have reasonable access to the premises 'for the purpose of taking down, repairing, or renewing the said poster,' and it is provided 'no

Dec. 17, 1912. other advertisement of a tyre to be displayed on the same field, wall, fence, or house.'

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shire.

"The appellants, following on said agreement, erected on the selected site a wooden board displaying an advertisement of Dunlop tyres. The said board is described in the case as 'an ordinary advertising board erected upon posts sunk into the ground and supported by wooden props or stays.'

"In these circumstances the Assessor made two entries in the county Valuation-roll. In the first place he entered the ground occupied by the advertising board at the value of 10s. 6d., Mr Bridgeford as the proprietor thereof, and the appellants as the tenants. In the second place, proceeding on the Lands Valuation (Scotland) Amendment Act, 1895, he entered the board itself as a heritable erection falling to be valued in terms of that Act, and the appellants as the proprietors and occupiers thereof at the annual value of 10s.

"No question has been raised in this appeal as to the amount of the annual values so entered by the Assessor."

The Committee sustained the entries and dismissed the appeal, finding "(1) that the appellants were lessees of the site of the board under the agreement contained in the letter, dated 22nd July 1910, from Robert Bridgeford to the appellants, and the appellants' reply thereto, dated 3rd August 1910, and that they accordingly fell to be entered in the Valuation-roll as tenants and occupiers of the said site; (2) that the board was an erection made by the appellants in terms of section 4 of the Lands Valuation (Scotland) Amendment Act, 1895, and that the appellants accordingly fell to be entered in the Roll as proprietors and occupiers thereof; (3) that the Advertising Stations (Rating) Act, 1889, cited by the appellants, did not apply to Scotland, and in any case dealt exclusively with assessment, and did not in any way affect any entries required by the Valuation Acts * to be made in the Valuation-roll."

* The Lands Valuation (Scotland) Act, 1854 (17 and 18 Vict. cap. 91), enacts:—

Sec. 1. "The commissioners of supply of every county and the magistrates of every burgh in Scotland respectively shall annually cause to be made up a Valuation-roll, showing the yearly rent or value for the time of the whole lands and heritages within such county or burgh respectively . . . and the names and designations of the proprietors or reputed proprietors, and where there are tenants or occupiers, of the tenants and of the occupiers thereof respectively. . . ."

Sec. 6. "In estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year; . . . and where such lands and heritages are *bona fide* let for a yearly rent conditioned as the fair annual value thereof without grassum or consideration other than the rent, such rent shall be deemed and taken to be the yearly rent or value of such lands and heritages in terms of this Act. . . ."

The Advertising Stations (Rating) Act, 1889 (52 and 53 Vict. cap. 27), enacts:—

Sec. 2. "In this Act the term 'owner' means the person for the time being receiving or entitled to receive the rackrent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive or be entitled

The appellants obtained a case for appeal, which was heard on 20th Dec. 17, 1912. November 1912.

Argued for the appellants;—The appellants' names should be deleted from the first entry in the Valuation-roll, they being neither the tenants nor the occupiers of the site of the hoarding. Under the agreement, all that they had was a licence¹ to put up the hoarding upon the proprietor's ground and a limited right of access to the proprietor's ground for purposes connected with their property. The payment they made to the proprietor was not rent for the ground on which the hoarding stood, but payment for the privilege of putting it up on ground still legally occupied by the proprietor. It was erroneous to represent the hoarding as really occupying ground, but, if it did, the occupancy was that of the proprietor, who merely permitted the appellant, for a pecuniary consideration, to erect the hoarding. Accordingly, even if regard were had only to the Valua-

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to receive the same if such lands or premises were let at a rackrent; and the word 'person' shall be deemed to include any body of persons, whether corporate or unincorporate."

Sec. 3. "Where any land is used temporarily or permanently for the exhibition of advertisements, or for the erection of any hoarding, frame, post, wall, or structure, used for the exhibition of advertisements, but not otherwise occupied, the person who shall permit the same to be so used, or (if he cannot be ascertained) the owner thereof, shall be deemed to be in beneficial occupation of such land or part thereof, and shall be rateable in respect thereof to the relief of the poor and to all local rates, according to the value of such use as aforesaid."

Sec. 4. "Where any land or hereditament occupied for other purposes and rateable in respect thereof to the relief of the poor and local rates is used temporarily or permanently for the exhibition of advertisements, or for the erection thereon or attachment thereto of any hoarding, frame, post, wall, or structure, used for the exhibition of advertisements, the gross and rateable value of such land or hereditament shall be so estimated as to include the increased value from such use as aforesaid."

The Lands Valuation (Scotland) Amendment Act, 1895 (58 and 59 Vict. cap. 41), enacts:—Sec. 4. "Section 6 of the Valuation Act, 1854, shall be read and construed as if the following proviso were inserted after the words 'as compared with the amount of such valuation,' that is to say—'Provided also that where any lessee of any such lands and heritages, holding under a lease or agreement, the stipulated duration of which is twenty-one years or under from the date of the entry under the same, and in the case of minerals thirty-one years or under from the date of such entry, has made or acquired erections or structural improvements on the subjects let, and where the actual yearly value of such erections or structural improvements cannot, under the provision of section 6 of this Act, be entered in the Valuation-roll, such erections or structural improvements shall be deemed to be lands and heritages within the meaning of this Act, and such lessee shall be deemed to be proprietor thereof for the purposes of this Act, and the assessor shall ascertain the yearly value of such erections or structural improvements as a separate subject, by taking the amount of rent, if any, in addition to the rent stipulated to be paid under such lease or agreement at which, one year with another, the subjects let and such erections or structural improvements might together in their actual state be reasonably expected to let from year to year, in consequence of such erections or structural improvements having been made, and shall make a separate entry thereof in the Valuation-roll, setting forth all the particulars relating thereto, as hereinbefore provided with respect to other lands and heritages.'"

¹ Provincial Bill Posting Co. v. Low Moor Iron Co., [1909] 2 K. B. 344.

Dec. 17, 1912. *A. J. Wilson & Co., Limited, v. Assessor for Kincardine-shire.* tion Acts, it was clear that the appellants could not be entered as tenants or occupiers of the site. But the Advertisement Stations (Rating) Act, 1889, which, on this matter, superseded the Valuation Acts, led directly to the same conclusion. The effect of sections 2 to 4 of that Act was to impose upon the owner of the land, and not the owner of the hoarding, all burdens connected with valuation, and under section 3 the proprietor was directly made the occupier of the site. The Act applied to Scotland, and its applicability had not been doubted in the case of *Fry & Sons v. Assessor for Edinburgh*.¹ It was perfectly general in its terms, and there was nothing expressly or impliedly excluding Scotland²; and the technicalities of the laws of England and Scotland in matters of mere expression, such as valuation and rating, fell to be disregarded, and the language of the Legislature taken in its popular sense.³ *Burton v. St Giles's and St George's Assessment Committee*,⁴ showed that the person who permitted the land to be used for advertisements, and who was accordingly under section 3 of the Act the occupier, was not the advertisement contractor but the owner of the lands. As to the second entry, it should be wholly deleted, as the advertisement board was not a heritable erection within the meaning of section 4 of the Lands Valuation (Scotland) Amendment Act, 1895.

Argued for the respondent;—The appellants were rightly entered as tenants and occupiers of the site of the hoarding under the Lands Valuation (Scotland) Act, 1854, sections 1 and 6, they being, under their contract with the proprietor, lessees⁵ of the spot of ground which it occupied. The extent of the ground and the object for which it was let were immaterial. The Advertising Stations (Rating) Act, 1889, did not apply to Scotland; it was an Act applying only to England and Ireland, and dealt with rating and not valuation.⁶ But even if it did apply, the entry was right, in respect that the appellants, and not the proprietor, were the persons who had permitted the ground to be used for a hoarding within the meaning of section 3. The present case was indistinguishable from, and was ruled by, *Beith v. Assessor for Glasgow*,⁷ in which all the arguments now submitted by the appellants had been considered and rejected by Lord Kyllachy in an opinion which the respondent now respectfully adopted as his argument. The second entry was also correct, the advertising board being a heritable erection within the meaning of section 4 of the Lands Valuation (Scotland) Amendment Act, 1895.⁸

At advising on 17th December 1912,—

LORD CULLEN (in his Lordship's absence his opinion was read by Lord

¹ (1893) 20 R. 622.

² *Bridges v. Fordyce*, (1844) 6 D. 968, Lord Justice-Clerk Hope, at p. 972; *Perth Water Commissioners v. M'Donald, &c.*, (1879) 6 R. 1050.

³ *Lord Saltoun v. The Advocate-General*, (1860) 3 Macq. 659, Lord Chancellor Campbell, at p. 671.

⁴ [1900] 1 Q. B. 389. *Vide* also cases cited in *Ryde on Rating*, (3rd ed.) p. 810, note *g*.

⁵ *Rankine on Leases*, (2nd ed.) p. 1.

⁶ *Glasgow Parish Council v. Assessor for Glasgow*, 1912 S. C. 818.

⁷ (1904) 6 F. 504.

⁸ Lord Johnston referred to *Taylor v. Overseers of Pendleton*, (1887) 19 Q. B. D. 289.

Johnston).—[After the narrative already quoted]—The appellants maintain, Dec. 17, 1912. *inter alia*, that the first of these two entries is not justified by the Act of 1854. They say that the agreement between them and Mr Bridgeford does not amount to a lease, but what they describe as a licence to go on the ground and to do something on it, to wit, to set up the advertising board.

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shire.

It appears to me that this question is ruled by the decision of this Court in the case of *Beith v. Assessor for Glasgow*.¹ The question there related to a hoarding erected by Beith, an advertisement contractor, along the frontage of certain unoccupied ground situated at the junction of two streets in Glasgow. He had right only to use the ground for the hoarding, and he paid the owners a sum of £25 per annum. The Assessor entered the site of the hoarding in the Valuation-roll at the annual value of £25, on the footing that it had been let to Beith at that rent. This entry was upheld. Lord Kyllachy, who gave the leading judgment, said: "The extent of the ground is of no consequence, nor does it matter whether it is simply a strip of frontage or includes the area around which the frontage extends. It is equally immaterial for what purpose the ground was let. The tenancy was an ordinary tenancy of land at a yearly rent, and as such it is, under the statute, imperative that it should enter the Valuation-roll, and enter it exactly in terms of the entry complained of."

Lord Cullen.

I do not think the appellants have succeeded in showing that there is any real difference between that case and this. The ground here in question is of trifling extent. But it has an ascertained annual value of 10s. 6d., the amount which is paid, under contract, by the appellants for the right to occupy it in the way they do, and I can see no good reason why this ascertained annual value should not enter the Valuation-roll. A proprietor of land may turn it to annual value in many different ways, and if he lets it, he may let it in such portions, large or small, as may yield the highest return, or as best suits himself. If he owns a field, of a very small portion of which he grants a right of occupancy for a stated annual payment (as here), and which, *quoad ultra*, he lets for grazing purposes to someone else for a stated annual payment, the two payments received by him make up together the total annual value by way of rent drawn by him from the ground, and the smaller must enter the Roll as well as the larger.

The next question relates to the separate entry of the advertising board itself at the annual value of 10s. This entry has been made on an application of the Lands Valuation Amendment Act of 1895. That Act was passed to meet a class of case which often presented itself where a tenant, holding at a fixed rent, under a lease of not more than twenty-one years duration or, in the case of minerals, thirty-one years, had put up for the purposes of his occupation houses or other erections on the land let to him. Under the Act of 1854 the rent in the lease fell to be taken as the measure of valuation, and the houses or other erections could not be entered in the Roll, seeing that the proprietor received nothing in respect of them. The Act of 1895 met such cases by providing that where such a tenant "has made or acquired erections or structural improvements on the subjects let," these shall be entered in the Roll as lands and heritages within the

Dec. 17, 1912. meaning of the Act of 1854, and that the tenant shall be deemed to be proprietor thereof for the purposes of that Act.

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The question which here arises is whether the said advertising board is a heritable erection of the kind falling within the meaning of the Act of 1895. There is no definition of the word "erection" in that Act. And so, I take it, one is thrown back on the general rule that all lands and heritages which have an annual value must be entered in the Roll at that value. And as the board has, *ex concessis*, an annual value of 10s. it follows that, if it is heritable in character, it must be entered in the Roll. Now, on the question whether the board is so affixed to the ground as to be *pars soli*, we had no argument at all from the appellants' counsel, owing, no doubt, to the appellants having desired to concentrate attention on the effect of the Advertising Stations (Rating) Act, 1889, to which I shall refer immediately. No authority of any kind was quoted. The topic was merely mentioned and left. The question may perhaps come to be a nice one; and I have not considered it incumbent on me to make an investigation, which the appellants themselves have not essayed, into the very numerous authorities in this difficult branch of law. The board is undoubtedly firmly fixed to the *solum*. The Valuation Committee have upheld the Assessor's view that it is a heritable erection under the Act of 1895. The appellants have not chosen to submit any real argument on the subject. I propose, therefore, that we should not interfere with the determination of the Valuation Committee. This will only rule the present year's Roll. In case the question should be properly put before us in any future year I entirely reserve my opinion on it.

I have so far dealt with the case from the point of view of the Lands Valuation Acts of 1854 and 1895. The appellants, however, laid the stress of their argument on the Advertising Stations (Rating) Act, 1889, the leading provisions of which are quoted in the case. The appellants, under section 3, contended that the owner, Mr Bridgeford, should be entered in the Roll both as owner and occupier of the ground occupied by the advertising board in question. In their first ground of appeal they contend that "they are exempt" under the Act of 1889. This appears to mean exemption from rateability.

The Act of 1889 was brought prominently before this Court in the case of *Beith*,¹ which I have already referred to, and the question was there raised whether it applied to Scotland. Grave doubts were expressed both by Lord Kyllachy and by Lord Stormonth-Darling as to whether it did so apply. There is no exclusion of Scotland in the Act. But there is a good deal about it to suggest that the case of Scotland was, at least, in no way before the minds of its framers. There is in the Act a linking together of occupancy and rateability which reflects the rating law of England but is in dissonance with that of Scotland, where rating on occupancy alone is exceptional. It would appear from section 6 of the Act relative to Ireland that there are special Acts there in force regarding the valuation of rateable property; and that section makes special provision for the application of the Act of 1889 to Ireland in view of these. No special provision of any

¹ 6 F. 504.

kind is made with regard to Scotland, although the incidence of rating, Dec. 17, 1912. generally, is here different from that obtaining in England, and a Valuation-roll which, *inter alia*, forms the basis of rating is annually made up under special Acts confined to this country which are self-contained and prescribe how that Roll shall be framed. The Valuation-roll so made up in terms of our Lands Valuation Acts is not exclusively a basis for rating. It also, for example, bears on the registration of parliamentary voters. Thus the 17th section of the Registration of Voters (Scotland) Act, 1856,¹ provides that the Valuation-roll made up in terms of the Act of 1854 shall form *prima facie* proof as to gross rent or value, and also "that the persons therein set forth as proprietors, tenants, and occupants respectively have, for the period to which such valuation applies, been such proprietors, tenants, and occupants respectively as therein stated."

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shire.
Lord Cullen.

This Court and the inferior valuation tribunals under the Scottish Lands Valuation Acts are not directly concerned with rating, the incidence thereof, or any exceptions therefrom. Their function solely is to make up annually a Valuation-roll in terms of these Acts. Now, the Advertising Stations (Rating) Act of 1889 bears to be a rating statute. In its application to England, presumably, no difficulty presents itself, as there is in England, as I understand, no Valuation-roll made up under independent Lands Valuation Acts as in Scotland, and what is made up is a rating-roll. The Act of 1889, as I have mentioned, specially provides for the case of Ireland. But it contains nothing, as I can construe it, which repeals or alters, for Scotland, the provisions of the Scottish Lands Valuation Acts regulating the mode of making up the yearly Valuation-roll under these Acts. And upon these, I think, we are bound to proceed. I do not, from this point of view, deem it necessary or fitting to express any opinion on the question of the application of the Act of 1889 to Scotland. If it does so apply, I can see difficulties in working it out. I limit myself to the opinion that it does not alter the prescribed mode of making up the Valuation-roll under our Lands Valuation Acts.

Following the views which I have expressed, I am of opinion that this appeal should be refused.

LORD JOHNSTON and LORD SALVESEN concurred.

THE COURT were of opinion that the determination of the Valuation Committee was right except as to their third finding, and sustained the entries.

DAVIDSON & SYME, W.S.—WILLIAM B. RAINNIE, S.S.C.—Agents.

¹ 19 and 20 Vict. cap. 58.

No. 99

Dec. 17, 1912.

Assessor for
Aberdeen v.
Magistrates
of Aberdeen.Assessor for
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of Lanark.ASSESSOR FOR ABERDEEN, Appellant.—*Murray, K.C.—Lippe.*

THE PARISH COUNCIL OF THE CITY PARISH OF ABERDEEN,

Complainers (Appellants).—*A. R. Brown.*THE LORD PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF THE CITY
OF ABERDEEN, Respondents.—*Chree, K.C.—Hon. W. Watson.*ASSESSOR FOR LANARK, Appellant.—*Party.*THE PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF LANARK,
Respondents.—*Morton.**Valuation Acts—Subjects—Value—Sewers and purification works in burgh
—“Lands and heritages”—Method of valuation.**Held* that sewers and sewerage purification works in a burgh were
“lands and heritages” within the meaning of the Lands Valuation
(Scotland) Act, 1854, and as such fell to be entered in the Valuation-
roll at their true and not at a merely nominal value.*Observations* on the principles upon which their yearly value should
be determined.*Aberdeen Case.*Lands Valua-
tion Appeal
Court.
Ld. Johnston.
Lord Salvesen.
Lord Cullen.At a Court of the Burgh Valuation Committee of Aberdeen held
there on 10th September 1912, the Lord Provost, Magistrates, and
Town-Council appealed against the following entry in the Valuation-
roll for the year ending Whitsunday 1913 :—

Description of Subject.	Proprietor.	Tenant and Occupier.	Yearly Rent or Value.
Burgh of Aberdeen Sewers.	Town-Council.	Proprietors.	£17,000.

They craved that the sewers should not be entered in the Roll
and that the entry should be deleted.The Parish Council of the City Parish of Aberdeen complained
under section 13 of the Lands Valuation (Scotland) Act, 1854, and
section 6 of the Valuation of Lands (Scotland) Amendment Act,
1879, against the entry, and craved that the valuation of the subjects
should be increased to £19,000.The Valuation Committee were of the opinion that the sewers
ought not to be entered in the Roll, and accordingly sustained the
appeal, and directed that the entry should be deleted.The Assessor and the Parish Council craved and obtained a case
for appeal.The case set forth that the following facts were admitted to be the
facts of the case :—“(1) The sewers in question were formed partly
by the Aberdeen Police Commissioners and partly by the Town-
Council under the powers contained in the Aberdeen City Acts, 1862
to 1911. The powers and duties of the Aberdeen Police Commis-
sioners are now vested in the Town-Council under the Aberdeen
Municipality Extension Act, 1871. The sewers are formed under
the public streets of the city (with certain exceptions where it was
found to be necessary to carry them through enclosed or other land)
and discharge into the sea through an outfall sewer constructedCases 316,
317.

across the River Dee. . . . (3) The sewers are constructed entirely underground and (with the exception of the manholes) occupy no part of the surface. The length of the sewers is slightly under 100 miles. (4) The matter which the sewers convey consists of the sewage and rain water from the various buildings and premises within the city as well as surface water from the street channels. (5) The sewers are maintained by the Town-Council by means of an assessment upon owners levied under the authority of the City Acts. The assessment is also applied in payment of interest on the amount borrowed to meet the cost of construction of the sewers and towards the sinking fund. (6) A statement was put in by the Town-Council. The figures in that statement relating to the cost of the sewerage system as laid down within the city from 1864 to 31st May 1912 (£376,630) and the capital value of abandoned sewers (£20,000) were admitted by the Assessor, and are also admitted by the Parish Council for the purposes of this case.”

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Aberdeen v.
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of Aberdeen.Assessor for
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of Lanark.

Lanark Case.

This was an appeal by the Assessor for Lanark against a decision of the Valuation Committee deleting from the Roll an entry of sewerage purification works, which had been entered at a value of £210.

The works, which were situated within the burgh, consisted of two underground tanks for purification by the septic process, and also storm water beds and filter tanks. Parties were agreed that if the subjects fell to be entered in the Roll the value should be £187, 10s.

The two cases were heard on 21st November 1912.

Argued for the appellants;—(1) The sewers and purification works were “lands and heritages” within the meaning of the Valuation Acts, and, in particular, of section 1 of the Act of 1854.¹ The fact that they were not among the enumerated “lands and heritages” in section 42 was immaterial, because that section was meant merely to give an aid to interpretation and not an exhaustive definition. The section did not say lands and heritages shall “mean” the things enumerated, but merely shall “include.”² It was out of the question to say that a public sewer was merely a “pertinent” of the houses which it served and as such was already valued in the Roll, if for no other reason than that public sewers served public streets as well as private houses. A similar argument might be put forward in favour of gas and water mains, which had, however, always entered the Roll. (2) The sewers and purification works were in the occupation of the Town-Council, who exercised the sole management and control. The case for occupation by the Town-Council was a *fortiori* of *Glasgow Parish Council v. Assessor for Glasgow*,³ where it was held that the Town-Council occupied the public parks. (3) The occupation was valuable, and therefore the sewers and purification works fell to be entered in the Roll at their true annual value and not at a merely nominal figure. It was true that the Town-Council derived no profit from their occupation, but they were thereby enabled to perform a statutory duty, and this made the occupation valuable. All three points had already

¹ 17 and 18 Vict. cap. 91.

² *The Queen v. Kershaw*, (1856) 6 E. & B. 999, at p. 1007; *Dilworth v. Commissioners of Stamps*, [1899] A. C. 99, at p. 105.

³ 1912 S. C. 818.

Dec. 17, 1912. been decided in favour of the appellants both in Scotland¹ and in England.²

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Argued for the respondents;—The Valuation Committees had been right in deleting the entries from the Valuation-roll. Sewers and sewerage works were not "lands and heritages" within the meaning of the Valuation Acts; they were not included in the enumeration of section 42 of the Act of 1854, which must have been meant to be exhaustive, and they were quite different from the subjects there enumerated. They were "pertinents" of buildings; and as such they had already been included in the Roll, and valued along with the buildings to which they pertained. Water and gas mains were in a different category, as they formed sources of profit to their owners, and were a part of profitable commercial undertakings. On the other hand, no profit was derivable from sewers, and, if they fell to be entered in the Roll at all, it ought to be at a merely nominal figure. English cases were not authoritative in Scotland in questions of valuation, because English cases dealt with rating, which was quite a different subject. The cases of the *Inveresk Paper Company*³ and the *Magistrates of Dundee v. Assessor for Forfarshire*⁴ were distinguishable. The former case dealt with a private sewer; and in the latter case the sewer in question was situated in the county of Forfar, but served the burgh of Dundee, and accordingly could not be said to enhance the letting value of any heritable subject in the county, or to have already entered the county Valuation-roll as a pertinent of any such subject. If these works entered the Roll at all, the value put upon them should be purely nominal, as they were not subjects capable of profitable or valuable occupation.

Counsel were also heard upon the question at what yearly value the Aberdeen sewers should be entered, assuming that they fell to be entered at all, and assuming that the value was not merely nominal. The import of the argument appears sufficiently from Lord Salvesen's opinion.

At advising on 17th December 1912,—

Aberdeen Case.

LORD SALVESEN.—The question in this case is whether the Town-Council of Aberdeen fall to be entered in the Valuation-roll as proprietors and occupiers of the sewers by which the drainage of the city is conveyed to the sea. These sewers have been constructed under statutory powers, and are mainly formed under the public streets of the city, although in certain cases they have been carried through unenclosed or other lands. With the exception of the manholes the sewers are constructed entirely underground, and their length is slightly under 100 miles. The matter which they convey consists of sewage and rain water from the buildings and streets

¹ *Inveresk Paper Co. v. Assessor for Musselburgh*, 1907 S. C. 747; *Magistrates of Dundee v. Assessor for Forfarshire*, 1912 S. C. 848; *Glasgow Parish Council v. Assessor for Glasgow*, 1912 S. C. 818.

² *West Kent Main Sewerage Board v. Dartford Union Assessment Committee, &c.*, [1911] A. C. 171; *Ystradyfodgw and Pontypridd Main Sewerage Board v. Bensted*, [1907] A. C. 264.

³ 1907 S. C. 747.

⁴ 1912 S. C. 848.

within the city. They are maintained by means of an assessment levied Dec. 17, 1912. upon owners under the authority of sundry local Acts.

The Assessor entered their annual value at the sum of £17,000, but the Valuation Committee sustained an appeal at the instance of the Town-Council, and directed that the entry should be deleted from the Roll.

Since the Valuation Act was passed in 1854 sewers have never entered the Valuation-roll of any burgh, the general view taken by Assessors apparently being that such sewers, although not directly rated, did appear indirectly in the Roll, and contributed to the rates by enhancing the letting value of the houses which they served. This is the view taken by Mr Armour in his work on Rating, and affords an explanation of the practice which has hitherto prevailed. The action of the Assessor of Aberdeen therefore constitutes a new departure, which, if it be sustained, cannot fail to have very wide-reaching results. Personally I cannot but regret this attempt to disturb a practice which has so long prevailed, and which, but for the difference in the incidence of the various rates which are levied on the basis of the Valuation-roll, would be of no practical importance. The Parish Council, however, who are charged with the duty of levying poor and school-rates, find it in their interests that every kind of heritage which is capable of a separate valuation should enter the Roll. The higher the assessable value of lands and heritages within their area the lower will be the rate which they require to levy in order to meet a given annual expenditure, and as the sewage rate is levied upon owners only, while the poor-rate is payable equally by owners and occupiers, the inclusion of this substantial new item hitherto exempt from taxation affects the proportion of taxes falling to be contributed by a large body of individual taxpayers. It is not therefore surprising that the Parish Council have appeared to support the Assessor's appeal, and indeed it is perhaps not unfair to assume that the innovation is due to their initiative.

Two alternative views were presented on behalf of the Town-Council. They maintained (1) that sewers are not lands and heritages within the meaning of the Valuation Act of 1854, and (2) that they are parts or pertinents of subjects which have already been included in the Roll, and that there is thus a double valuation if they are separately rated.

The first view was based on the language of section 42, which provides that the expression "lands and heritages" shall extend to and include the subjects therein specially enumerated. It was maintained that this enumeration is exhaustive, and that as drains and sewers are not mentioned, they are not lands and heritages within the meaning of the Act. The argument would have been irresistible if, instead of using the words "shall extend to and include," the statute had simply said "shall mean"; but I think it is well settled that an interpretation clause in the form of section 42 is exegetical merely, and does not really define. Now it has already been decided in two cases in this Court (*The Inveresk Paper Company*,¹ and *Magistrates of Dundee* ²) that an underground sewer falls within the description of lands and heritages, and, as it is capable of being separately valued, must enter the Valuation-roll. The question was perhaps not concluded

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¹ 1907 S. C. 747.

² 1912 S. C. 848.

Dec. 17, 1912. by these two decisions, for the argument on section 42 was not there pointedly maintained, but, having heard what was to be said upon it, I see no reason to doubt the soundness of the decisions arrived at.

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The alternative argument for the respondents was that the drains of Aberdeen are pertinents of the buildings, and that their value is already included in the rental. I have great sympathy with this view. The rating value of any urban tenement must to some extent depend on the fact that it is connected with an efficient drainage system. It may further be said that the modern method of conveying sewage and surface water in underground pipes is merely a civilised substitute for the gutters by means of which all liquid sewage as well as rain water was in ancient times carried away. I am, however, unable to sustain the view that the system of sewers constructed by the Town-Council and under their administration can be regarded as a pertinent of the buildings which they drain. These buildings belong to other proprietors, and it is difficult to understand how the property of the Corporation can be regarded as pertinents of the properties of individual citizens of Aberdeen. Whether sewers may on other grounds be exempt from assessment is not a matter with which we are concerned. Our sole duty is to see that all lands and heritages enter the Valuation-roll at their fair annual value. It is worthy of note, however, that in England it has now been settled by a decision of the House of Lords that sewers, whether overground or underground, are rateable notwithstanding that they had enjoyed an exemption from taxation for a period of several hundreds of years.¹

The remaining question is at what yearly value the system of sewers ought to be entered. On this matter I am bound to say that we did not receive much assistance from counsel on either side; and I think we are only in a position to fix the principles on which the valuation should be made, leaving the parties to adjust the figure. The only possible hypothetical tenant for such a system would be a body having the like statutory duty to drain the City of Aberdeen that is laid upon the respondents by their various local Acts. What would such a tenant give by way of rent for the existing system? Obviously no more than it would cost him year by year if he provided a new system for himself. The items of annual expenditure would thus be, in the first place, interest on the capital sum expended on efficient sewers which would all be utilised in connection with the system, such interest being taken at $3\frac{1}{2}$ to $3\frac{3}{4}$ per cent. In addition he would have to provide a sinking fund to meet the annual depreciation of the sewers. The Assessor admits that $33\frac{1}{3}$ years is less than the probable life of a sewer pipe, and it was conceded in argument that probably the true figure might be taken at fifty years; although it is conceivable that some portions of the system might not be subject even to so much depreciation as that, as, for instance, if there are any stone-built culverts or the like. Third, the tenant would have to meet the expense of maintenance, which must be distinguished from cost of renewals, as otherwise depreciation would be twice charged. These appear to be the chief items which the hypothetical tenant would take into account in fixing his rent.

¹ West Kent Main Sewage Board, [1911] A. C. 171.

It was suggested that as the sewers are already old the capital value of the system on which interest falls to be annually charged should be taken at the depreciated value. I do not think so. So long as the sewers are efficient the hypothetical tenant would pay the same rent, as his only alternative would be to construct new sewers for himself. These being the main considerations, no doubt the parties will be able to adjust the proper figure at which to enter the undertaking for the present year. It may be that other considerations may enter into the calculation; but as the question of value has not been fully gone into, either in the case or in the argument, we have not the means of determining these. I desire, however, to guard myself against the assumption that this valuation will necessarily fix the valuations of other undertakings of a similar character, although no doubt it will go far to determine the basis of such valuations.

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LORD CULLEN (in his Lordship's absence his opinion was read by Lord Johnston).—I concur in the result at which your Lordships have arrived.

The subjects in question are the city sewers of Aberdeen. These are heritable subjects of large annual value. They are owned by the respondents, the Lord Provost, Magistrates, and Town-Council of the city and royal burgh of Aberdeen.

The question has been raised whether such sewers are, in their nature, a species of property falling within the scope of the words "lands and heritages," as used in the Act of 1854. I am of opinion that they are. Sewers are not specifically mentioned in the enumeration contained in the 42nd section of that Act, but that enumeration has never, so far as I am aware, been regarded as an exhaustive enumeration of all the different species of property falling to be entered in the Valuation-roll. In the *Inveresk* case¹ a mill aqueduct was held to be a subject falling to be entered in the Roll, and last year we sustained an entry in the Roll for the county of Forfar of a portion of the main outlet sewer of Dundee. Sewer pipes are, moreover, *ejusdem generis* with water-pipes and gas-pipes, which are undoubtedly proper subjects of valuation.

In no previous instance, it would seem, have the sewers of a town been entered in a burgh Valuation-roll. This fact cannot, in itself, justify a continuance of the practice of omitting them, but can only, at the most, suggest for consideration whether there may not underly the practice some good ground of principle which supports it. In England, prior to 1911, underground sewers had for centuries been treated as exempt from rating, but this *de facto* exemption was, in the *West Kent* case,² found to rest on no legal principle, and it was then decided that such sewers are rateable subjects in England.

The respondents in this case do not rest their argument merely on the practice which has hitherto prevailed of omitting town sewers. They advance the view that that practice is not an arbitrary one, but is founded on sound principle. In support of it they represent that the annual value of such sewers is already contained in the Roll although not *eo nomine*. Town sewers, they say, are of the nature of pertinents of the houses, which

¹ 1907 S. C. 747.

² [1911] A. C. 171.

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would not command the lettable values at which they stand in the Roll but for the existence of the sewers. It may be observed that the town sewers in question do much more than serve the houses in the town. They carry off the surface drainage of the town, and they are in no legal sense pertinent of any or all of the houses. They form a general system of drainage serving various uses, and they are in the separate ownership of the respondents. That the existence of the sewers is essential to the present letting value of the houses which they serve is true, but it is no ground for omitting particular lands and heritages having an annual value from the Valuation-roll that their existence is essential to the values at which other lands and heritages of different owners are there entered. There is a necessary interdependence of values between many species of property, particularly in a town. The existence of a dock, for example, may be said to create the assessable annual values of certain kinds of property surrounding it. Dwelling-houses in a town would not command the rents they do if they did not have available a water supply and gas or electric lighting, as well as sewers. And water pipes and the heritable properties embraced in gas and electric lighting undertakings enter the Valuation-roll. It is, in my opinion, fallacious to say, as the respondents do, that the annual value of the sewers is already entered in the Roll. In plain fact it is not; and it seems to me to be no answer to say that because of the existence of the omitted sewers other lands and heritages included in the Roll are so included at values which they would not otherwise possess. Each particular land or heritage must be dealt with by itself, and be entered at such annual value as it has for the year under the existing circumstances affecting its value, although that value may be enhanced or created by the existence of other properties belonging to different owners.

I am accordingly of opinion that the Assessor was right in entering the sewers in question in the burgh Valuation-roll. As to the value at which they should be entered, I concur in what has been said by Lord Salvesen.

LORD JOHNSTON concurred.

Lanark Case.

LORD SALVESEN.—This appeal relates to certain purification works situated in the royal burgh of Lanark. Following the principles laid down in the Aberdeen case, we hold that the value of these works must enter the Roll. Parties have relieved us of any difficulty as to value, because they are agreed that £187, 10s. represents the fair annual value of these works. The Valuation-roll falls to be altered accordingly.

LORD JOHNSTON and LORD CULLEN concurred.

IN the Aberdeen case the Court were of opinion that the determination of the Magistrates was wrong, and that the sewers in question should be entered in the Valuation-roll, and, with consent of parties, fixed the annual value at £17,000.

IN the Lanark case the Court were of the same opinion, and fixed the annual value at £187, 10s.

MACPHERSON & MACKAY, S.S.C.—ALEX. MORISON & Co., W.S.—GORDON, FALCONER, & FAIRWEATHER, W.S.—PARTY—R. G. BOWIE, W.S.—Agents.

THE COMMISSIONERS OF INLAND REVENUE, Appellants.—

Sol.-Gen. Anderson—J. A. T. Robertson.

MRS CATHERINE WALKER, Respondent.—*Macmillan, K.C.—*

J. R. Christie.

No. 100.

Mar. 6, 1913.

Inland
Revenue v.
Walker.

Revenue—Increment Value Duty—Site Value on occasion of sale—Method of ascertainment—Deductions—Meaning of “like” deductions—Deduction in respect of goodwill and matters personal to parties—Finance (1909-1910) Act, 1910 (10 Edw. VII. and 1 Geo. V. cap. 8), secs. 2, 25.

A valuation of a tenement under the Finance (1909-1910) Act for the purposes of duties on land values, fixed the following values as at 30th April 1909 :—(1) Original total value, £400, (2) original assessable site value (got by deducting £380 for buildings), £20. In June 1911 the tenement was sold by the owner for £650 to a purchaser, who had for many years occupied the tenement as a tenant, and had carried on a draper's business there as well as used it as his dwelling-house. Nothing had occurred between 1909 and 1911 to add to the value either of the site or buildings. The Commissioners of Inland Revenue, for the purposes of increment value duty, fixed the site value on the occasion of the sale at £270, by deducting from the purchase price of £650 the sum formerly deducted as the value of the buildings, viz., £380.

An appeal was taken to a referee, who fixed the site value at £70, a figure which he arrived at in the following way :—Being of opinion that the property had not altered in value since the original valuation, but that the figures in that valuation were too low, he fixed the value of the buildings at £400, and deducted from the purchase price of £650 (1) under sec. 25 (4) (a) the value of the buildings, viz., £400, and (2) under sec. 25 (4) (d) a sum of £180, being the portion of the price paid which was, in his opinion, attributable to goodwill or personal considerations. The Commissioners of Inland Revenue contended (1) that under sec. 25 (4) (a) the deduction for buildings should have been £380, the same amount as had been deducted in the original valuation, in respect that the expression “like deductions” in section 2 (2) (a) was equivalent to “same deductions”; (2) that, in the circumstances, no deduction for goodwill or personal considerations under sec. 25 (4) (d) fell to be allowed.

Held (1) that the referee had rightly revalued the deduction to be made in respect of buildings, the expression “like” not being equivalent to “same”; (2) (*diss.* Lord Cullen) that the referee was entitled to attribute £180 to goodwill or personal considerations, and to deduct that sum; and, accordingly, that the site value on the occasion of the transfer was £70.

Opinions that where property consisting of lands and buildings increases or decreases in value the increase or decrease does not necessarily fall to be attributed to the site, but may be attributed in whole or in part to the buildings.

On 8th June 1911 Mrs Catherine Walker sold a tenement in Dalry to James Burns Walker, and the Commissioners of Inland Revenue fixed the site value on the occasion of the sale (for the purpose of increment value duty under the Finance (1909-10) Act, 1910,*) at £270.

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* The Finance (1909-10) Act, 1910 (10 Edw. VII. and 1 Geo. V. cap. 8), enacts :—

Sec. 2. “(1) For the purposes of this part of this Act the increment value of any land shall be deemed to be the amount (if any) by which the site value of the land, on the occasion on which increment value duty is to be col-

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Mrs Catherine Walker appealed to a referee (Thomas Binnie junior), who reduced the value to £70.

The Commissioners of Inland Revenue craved and obtained a stated case for appeal from the referee.

The case set forth * :—" Having in presence of parties inspected the property which forms the subject of the appeal, and having thereafter heard parties on the appeal, I find that the following facts are agreed or admitted :—(1) That John Walker, the husband of the appellant, died on 10th January 1911, he being at that date possessed of the property above referred to, which is burdened with a feu-duty of 5s. (2) That on 6th March 1911 the value of the property was returned for estate-duty purposes by or on behalf of the appellant as executrix of John Walker at £400, and that on 9th August 1911 that value was accepted by the Inland Revenue district valuer on the understanding that it should form the basis of the different values under the Finance

lected as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions of this part of this Act as to valuation. (2) The site value of the land on the occasion on which increment value duty is to be collected shall be taken to be—(a) where the occasion is a transfer on sale of the fee simple of the land, the value of the consideration for the transfer . . . subject in each case to the like deductions as are made, under the general provisions of this part of this Act as to valuation, for the purpose of arriving at the site value of land from the total value."

Sec. 12. "A person shall not be entitled to claim any deduction for the purpose of ascertaining the site value of any land on any occasion on which increment value duty becomes payable, if the deduction is one which could have been, but was not, claimed for the purpose of ascertaining the original site value of the land."

Sec. 25. "(1) For the purposes of this part of this Act the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances and from any burden, charge, or restriction (other than rates or taxes), might be expected to realise. (2) The full site value of land means the amount which remains after deducting from the gross value of the land the difference (if any) between that value and the value which the fee simple of the land, if sold at the time in the open market by a willing seller, might be expected to realise if the land were divested of any buildings and of any other structures (including fixed or attached machinery) on, in, or under the surface, which are appurtenant to or used in connection with any such buildings, and of all growing timber, fruit trees, fruit bushes, and other things growing thereon. (3) The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common, and to any easements affecting the land, and to any covenant or agreement restricting the use of the land [subject to certain conditions]. (4) The assessable site value of land means the total value after deducting—(a) The same amount as is to be deducted for the purpose of arriving at full site value from gross value and . . . (d) any part of the total value which is proved to the Commissioners to be directly attributable to the expenditure of money on the redemption of any land-tax, or any fixed charge . . . or on effecting the release of any covenant or agreement

* A short narrative of the facts, and of the opinion of the referee as disclosed in the stated case and in his further statement, will be found in the first three paragraphs of Lord Salvesen's opinion.

(1909-10) Act, 1910. (3) That no increment value duty was claimed by the Commissioners of Inland Revenue on the occasion of the death of the said John Walker. (4) That the provisional valuation, as at 30th April 1909, under the Act just cited was served upon the appellant or her solicitors on 30th August 1911, the details thereof being:—

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Original gross value, ... £405

Deductions from gross value—

(a) Difference between gross value and value of the fee-simple of the land divested of buildings, trees, &c., . . . £380

(b) Feu-duty, ground-annual, or tack-duty, . . . £5

Original full site value, ... £25

Original total value, ... £400

Original assessable site value, ... £20

(5) That no appeal was intimated against the provisional valuation, which has accordingly become final. (6) That by disposition dated 3rd and 8th, and recorded 9th June 1911, the property was sold by the appellant to James Burns Walker, her brother-in-law, and his wife. (7) That the consideration payable to the appellant for the transfer was £650. (8) That the Inland Revenue district valuer states that, when he agreed on 9th August 1911 to accept a value of £400 as the value of the property for estate-duty purposes, he was not aware that it had been transferred on 8th June 1911 for the consideration of £650 above mentioned; but that the transfer and the consideration therefor must have been within the knowledge of the appellant on 9th August 1911. That the appellant states that she has no means of knowing how and when the said disposition came to the knowledge of the district valuer. (9) That no works had been executed or capital expenditure made upon the property during the period from 30th April 1909 (the date as at which the provisional valuation was made) and 8th June 1911 (the date of the transfer above mentioned). (10) That by an assessment dated 29th April 1912 the site value, on the occasion of the said transfer, has been determined by the Commissioners of Inland Revenue at £270, and that the Commissioners have accordingly fixed the increment value on the said occasion at £250, being the amount by which the site value on the occasion exceeds the original site value fixed by the provisional valuation; and that increment value duty has been claimed from the appellant on the said sum of £250. (11) That by notice of appeal dated 22nd May 1912 the solicitors for the appellant appealed against the the said assessment on the following grounds:—‘That no increment value (*sic*) is due on the occasion in question.’ ‘That the value of the site has not increased since the date of the original valua-

restricting the use of land which may be taken into account in ascertaining the total value of the land, or to goodwill or any other matter which is personal to the owner, occupier, or other person interested for the time being in the land; and (e) Any sums which, in the opinion of the Commissioners, it would be necessary to expend in order to divest the land of buildings, timber, trees, or other things of which it is to be taken to be divested for the purpose of arriving at the full site value from the gross value of the land, and of which it would be necessary to divest the land for the purpose of realising the full site value . . . Any reference in this Act to site value (other than the reference to the site value of land on an occasion on which increment-duty is to be collected), shall be deemed to be a reference to the assessable site value of the land as ascertained in accordance with this section.”

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tion.' 'That no explanation of how the claim for increment value duty is made up has been given.'

"I am of opinion that at 8th June 1911, the date of the occasion above mentioned, the fee-simple of the property, if sold in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes), might have been expected to realise £475. That the fee-simple of the land, if sold at the time under the above conditions, but divested of buildings, trees, &c., might have been expected to realise £75; and that, subject to the burden of the feu-duty already mentioned, it might have been expected to realise £70. At the hearing before me I was requested by the solicitor for the appellant to state my decision in the form of a special case for the judgment of the Court on points of law advanced by him, and I accordingly do so.

"It was contended before me, on behalf of the appellant:—(a) That there has been no increase in the value of the site within the meaning of section 2 of the Act above cited between 30th April 1909 and 8th June 1911; and that the Commissioners of Inland Revenue having agreed to accept £400 as the basis of the different values under the Act, as stated in paragraph 2, the site value on that basis was £20 at both dates. (b) Alternatively, that the consideration of £650 paid for the property by James Burns Walker was greatly in excess of its value in the open market at 8th June 1911; that in paying that price he was actuated partly by sentiment, partly by family affection towards his brother's widow, and partly by a dread that, if the subjects were acquired by an outsider, he might be compelled to quit the premises he had long occupied in the property, namely, his shop in which he carried on business as a draper, and his dwelling-house; and that, on a sound construction of the Act, and particularly section 25 (4) (d), a deduction falls to be made from the consideration paid on the transfer to him in respect of goodwill or other matter personal to him as occupier of part of the property.

"It was contended before me, on behalf of the Commissioners of Inland Revenue:—(a) That in fixing the increment value on the occasion of the transfer of the property to James Burns Walker the site value, on a sound construction of section 2 (2) (a) of the Act, must be taken to be the value of the consideration for the transfer, subject to the like deduction—in this case the same deduction, as there had been no capital expenditure made upon the property—as was made in the provisional valuation for the purpose of arriving at the site value from the total value; and that, in arriving at the site value on the occasion as stated in paragraph 10, the directions in section 2 (2) (a) have been duly followed. (b) That, on a sound construction of section 12 of the Act, it is not competent for the appellant, on the occasion of the said transfer, to claim any deduction for goodwill or other matter personal to James Burns Walker, no such deduction having been claimed when the original site value was fixed.

"I decide that contention (a) of the appellant is not a question of law but is a question of fact, and I decide that the site value of the land on the occasion of the transfer on 8th June 1911 is £70, and I find the appellant entitled to her expenses in this appeal, modified at two-thirds, and remit these to the Auditor of the Court of Session for taxation. If the Court determine that I am wrong in deciding that contention (a) of the appellant is a question of fact, and that it forms a sound contention in law, I decide that the site value of the land on

the said occasion is £20, and I find the appellant entitled to her expenses in this appeal, and remit these to the said Auditor for taxation. If the Court determine that contention (b) of the appellant is correct, I decide that the site value of the land on the said occasion is £70, and I find the appellant entitled to her expenses in this appeal, modified at two-thirds, and remit these to the said Auditor for taxation. If the Court determine that either contention of the Commissioners of Inland Revenue is correct, I decide that the site value of the land on the said occasion is £270, and I find the said Commissioners entitled to their expenses in this appeal, and remit these to the said Auditor for taxation.”

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The case was heard before the Valuation Appeal Court on 19th November 1912. The arguments of parties sufficiently appear from the statements of the referee and the opinions of their Lordships.¹

On 17th December 1912 the Court remitted the case to the referee for a further statement.

The further statement was in the following terms:—

“In regard to contention (a) of the original appellant, I am of opinion—1st. That as matter of fact the Commissioners of Inland Revenue did agree to accept £400 as the basis of the different values under the Act, as stated in paragraph 2; this opinion being founded on the correspondence between the district valuer and the original appellant's solicitors. 2nd. That as matter of fact there had, on the hypothesis that the original site value was a fair one, been no increase in the value of the site between 30th April 1909 and 8th June 1911. But, for the reasons after given, I have come to the conclusion that the values in the provisional valuation are all too low.

“In regard to contention (b) of the original appellant, I must explain that I had considerable difficulty in coming to a decision on this point. I should have liked to get from James Burns Walker personally a statement of the motives by which he was actuated in paying the consideration of £650 for the property; but on the date when I inspected the property and heard parties on the appeal—viz., 28th June 1912—Mr Walker was, as I learned by inquiry at his house, very seriously ill, and in fact he died on 14th July 1912. For this reason I was unable to get from him any statement as to what was in his mind when he purchased the property, and as far as I could learn from the parties there was no other person to give me any information on this point. I have, therefore, had to form my conclusions on the matter as best I could. After full consideration, I am satisfied as matter of fact that in paying the purchase price of £650, James Burns Walker was actuated by some one or other of the considerations alleged in contention (b) of the original appellant. Further—I am of opinion that in law the facts warrant a deduction in respect of some such personal element from the purchase price, under section 25 (4) (d) of the statute. Further—I consider, assuming such a deduction competent in law, that the sum of £180 should be allowed in respect thereof. For the reasons stated above, I was

¹ The following cases were cited:—Bradford-on-Avon Assessment Committee v. White, [1898] 2 Q. B. 630, Channell, J., at p. 638; Chandler's Wiltshire Brewery Co., Limited, and London County Council, [1903] 1 K. B. 569, Wright, J., at p. 572; Erskine's Trustees v. Crombie, (1870) 9 Macph. 54; Attorney-General v. Jameson, [1905] 2 I. R. 218, Fitzgibbon, L.J., at p. 230.

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not able to arrive directly at the sum just mentioned; I could only arrive at it by ascertaining to the best of my ability the market value of the subjects, and then taking the difference between this and the consideration on sale as necessarily the proportion of the consideration on sale given for the personal element, the figures of the calculation being—

Consideration on sale	£650	0	0
Less market value of property at 8th June 1911 estimated by me at	470	0	0

Leaving	£180	0	0
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as the proportion of the consideration on sale given for the personal element.

“ If the Court should decide that the deduction claimed cannot competently be allowed under the statute, and that the purchase price of £650 must be accepted as the occasional total value, without deduction in respect of any personal consideration, then, on that alternative hypothesis, I am of opinion that, of the said sum of £650, the sum of £552 represents the value of the buildings or other appurtenants to the site, and the sum of £98 represents the value of the site. Or to put this in another way—

Accepting the consideration on sale as the occasional total value	£650	0	0
Whereas the total value in the provisional valuation was	400	0	0

Shows a rise in value between 30th April 1909 and 8th June 1911 of	£250	0	0
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Of this, the amount attributable to a rise in the value of the buildings is £552 less £380, the amount allowed for buildings in the provisional valuation	£172	0	0
And the amount attributable to a rise in the value of the site is £98 less £20, the original site value in the provisional valuation	78	0	0

£250	0	0
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“ In regard to contention (a) of the Inland Revenue Commissioners, I, as a layman, feel great diffidence in offering an opinion on a question of law. In response to the directions of the Court I have to state that, in my opinion, the Commissioners are wrong in contending that the words ‘the like deduction’ are in every case synonymous with the words ‘the same deduction.’ I think that buildings, even where there has been no capital expenditure made upon them, may, from various causes, rise or fall in value between two given dates, just as everyone knows as a fact that bare ground rises and falls in value. The contention of the Commissioners is that the deduction for the value of the buildings must, on the occasion, be the same as was allowed in the provisional valuation—viz., £380.

“ In regard to contention (b) of the Commissioners, I am of opinion that section 12 of the statute does not render incompetent the deduction claimed for goodwill or other matter personal to James Burns Walker. And that for this reason: a deduction for matter personal

to James Burns Walker, the purchaser of the property on 8th June 1911, could obviously not have been claimed by the original appellant in the particulars which she was called upon to furnish to the Commissioners for the original valuation at 30th April 1909. The only person who could claim such a deduction was James Burns Walker, and he could not claim it until he became owner of the subjects.

"Following the directions of the statute, I arrive at the following conclusion as to the assessable site value on the occasion of the sale to James Burns Walker:—

Consideration on sale, ... £650 0 0
Deduct—

Under section 25 (4) (a) 'the same amount as is to be deducted for the purpose of arriving at full site value from gross value, ... £552 0 0

Under section 25 (4) (b), (c), and (e), no deductions were claimed by the original appellant, so I allow none, ... nil

£552 0 0

Result—Assessable site value, ... £98 0 0

"At this point I may perhaps state how my estimate of £470 as the market value of the property at 8th June 1911 was made up.

The rental of the property at that date was £38, and this I capitalised at 12½ years' purchase, ... £475 0 0

(which is the figure corresponding to gross value in the provisional valuation).

Deducting the capitalised value of the feu-duty of 5s. at 20 years' purchase, ... 5 0 0

Gives as the market value £470 0 0
(corresponding to total value in the provisional valuation).

Deducting from this the difference between gross value and value of the fee-simple of the land divested of buildings, trees, &c., which difference I estimate at, ... 400 0 0
(as against £380 in the provisional valuation)

Leaves as the market value of the site, ... £70 0 0
(this corresponding to assessable site value in the provisional valuation).

"I do not think that, speaking generally, there has been any material alteration in the value of properties in Dalry between 30th April 1909 and 8th June 1911. If, therefore, the figures just given are accurate (and they are supported by transactions in the neighbourhood quoted to me by the valuers of the Inland Revenue), then it follows that the various values in the provisional valuation were under-estimated. As will be seen from the correspondence between the original appellant's solicitors and the district valuer, the latter originally estimated the total value of the property as at 10th January 1911—the date of John Walker's death—at £450, which very closely approximates to my estimate of its market value a few months later. In order, however, to meet the views of the original appellant's solicitors (*vide* correspondence), the district valuer reduced his estimate of the total value to £400, with the result that, in the

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provisional valuation, he brought out the full site value at £25. Now the site, which is in one of the main streets in Dalry, has an area of acres 0·062 (dec.) or 300 square yards of net building ground, with a frontage of 54 feet, so that the full site value of £25 is equal to 1s. 8d. per square yard. Such a price per square yard would fairly represent the value of ground devoted to small villas or cottages on the outskirts of a country town, but it seems to me far too low a price to apply to a site on a main street close to the centre of a town like Dalry. I am very reluctant to criticise a Government valuer, but I cannot help thinking that an error has crept into his calculations in this particular case. Of course, the provisional valuation has now become final, but I must criticise it in order to make my own conclusions clear.

"Finally, I should perhaps explain how the findings, which I gave in the stated case, were arrived at.

"My first or principal finding, fixing the site value on the occasion at £70, was my estimate of the market value of the site on the occasion.

"My second finding, fixing the site value on the occasion at £20, needs no explanation.

"My third finding, fixing the site value on the occasion at £70, was arrived at by taking the consideration on sale, . £650 0 0
and deducting for buildings, . £400 0 0
and for matter personal to James Burns

Walker,	180 0 0	
		580 0 0

Leaving as site value on the occasion	. £70 0 0

"My last finding, fixing the site value on the occasion at £270, was arrived at by taking the consideration on sale, . £650 0 0
and deducting for buildings the same amount as in the
provisional valuation, . 380 0 0

Leaving as site value on the occasion	. £270 0 0"

No further argument was submitted for the parties.

At advising on 6th March 1913,—

LORD JOHNSTON.—The present appeal is concerned with the proper amount to be assessed, as the increment value duty under the Finance (1909-10) Act, 1910, on a small property in the main street of the burgh of Dalry, which brought £650 when sold in 1911 to the brother of the deceased owner. The original site value was fixed as at 30th April 1909 at £20. The Commissioners value the site value, on the occasion of sale, viz., 9th June 1911, at £270, and claim as the increment value duty one-fifth of the difference between the £270 and the original site value of £20, or £50. An increase in the site value to the extent of twelve and a half times the original site value, in two years in the site of a small property in a small country town, must be admitted to be an extravagant result of the Act. But it is maintained by the Crown that it is an unavoidable result of the phraseology of the statute whatever the intention may have been.

The statute (section 2 (1)) defines "increment value" as the amount by

which the site value of any land, as ascertained in accordance with this Mar. 6, 1913. section, i.e., section 2, on the occasion when increment value duty is to be collected, exceeds the original site value, as ascertained in accordance with section 25. The declared object of the Act was to tax what was popularly described as the unearned increment of land—the increase in the value of bare land, occasioned by circumstances beyond the owner's control and to which he had not contributed. The conception of that object imports the ascertainment of the difference between real value at two different times. In construing and applying a statute we cannot rely upon the declared object of its promoters, however much it may be common knowledge. But it is a consideration that cannot be ignored, that the general scope of this Act is in accordance with its promoters' declared object. And I do not think that there is much doubt that the intention and expectation of the Legislature was so also.

On the other hand the Crown maintain that, whatever the object of the Act, the result of its provisions is to tax the difference between a real value and a mere statutory conception or fictitious value. It may be so, for the provisions of the Act are wrapped up in such a cloud of words, that it is quite possible that they may, if literally read, achieve a result not dreamt of by those who framed the statute.

The important figures in the case, following the order of the Act of 1910, are these :—

(1) Original gross value as at 30th April 1909, ...	£405
(2) Original full site value, ...	£25
Consequent difference between original gross and original full site value, ...	£380
Capitalised value of feu-duty, ...	£5
(3) Original total value, ...	£400
(4) Original assessable site value, ...	£20
(5) And consideration for transfer on sale at 9th June 1911, ...	£650

As admittedly there had been no expenditure between 1909 and 1911 on the property, the Inland Revenue Commissioners took the site value on the occasion of sale to be the consideration for sale, less the difference between original gross value and original full site value, or £650 - £380 = £270. In this they are clearly wrong, and can only defend themselves by construing the word "like" occurring at the end of section 2 (2) as equivalent to "same." I do not delay by examining this contention further, but merely say that, in my opinion, where the statute says "like" it means "like," and not "same." But this only disposes of a fringe of the question at issue.

Another incidental point may similarly be dealt with at once. John Walker, the owner, died on 10th January 1911. The property was sold by his widow to her husband's brother, James Burns Walker, on 9th June 1911, at £650. The provisional valuation was not served (on John Walker's widow) till after John Walker's death, and as it was not objected to, it became final. But meantime the value of the property had been returned for estate-duty at £400, and it is said that that value was accepted by the Inland Revenue district valuer on the understanding that it should form the basis of the different values under the Finance (1909-10) Act,

Mar., 6, 1913. 1910. That seems in a sense to have been the case. But its effect could only be to fix £400 as the value for the provisional and final original valuation as at 30th April 1909, and for the increment-duty accruing on John Walker's death on 10th January 1911. And that effect it has received. It could not regulate the value for increment-duty on the occasion of sale on 9th June 1911, even if the valuer had been made aware of the transaction, which he denies. For he had no authority to accept it as such in the circumstances, and I am satisfied did not do so. This contention of the widow may therefore be at once disposed of.

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Mrs Walker was dissatisfied with the assessment of the increment value by the Commissioners on occasion of the sale, and appealed. A reference was accordingly made under the statute to Mr Thomas Binnie, who has reduced the occasional site value to £70 and consequently the increment value to £50, being £70 - £20. Against his award the Inland Revenue Commissioners have appealed to this Court.

The ground of Mrs Walker's contention for reduction is thus stated by her, viz., that the consideration of £650 paid by James Burns Walker was not paid merely for the property as a marketable subject, and was indeed greatly in excess of the value of the property in open market at 9th June 1911; that in paying this price James Burns Walker was actuated partly by sentiment, partly by consideration for his brother's widow and family, and partly by fear of disturbance. As regards the latter, it is the case that he was advanced in life, and actually died pending the reference, and that he had for a great number of years, as many as thirty I think, occupied the premises, partly as his dwelling-house and partly as the shop in which he carried on his business of draper. And Mrs Walker maintained that, on a sound construction of the Act, section 25 (4) (d), a deduction fell to be made from the consideration on sale to James Burns Walker, in respect of goodwill or other matter personal to him as occupier. This contention Mr Binnie has sustained, and has accordingly reduced the occasional site value as above stated. The grounds on which Mr Binnie had based his conclusion, and the data on which he had reached his figures, not being quite clear from the case as originally presented, we asked Mr Binnie to supply us with further information. This we now have, and are enabled to dispose of the case.

The original values have been finally and irrevocably fixed under the statutory procedure. Mr Binnie considered that they were considerably under the true value as at the statutory date. But he states this opinion, not as in any way seeking to disturb the datum level of values provided by the Act, but merely as explaining part of his own subsequent valuation.

It is necessary, then, to consider carefully the statutory method of arriving at occasional site value. The Act, section 2 (2), says that it shall be taken to be the value of the consideration for transfer on sale, that is, the purchase price, subject to the like deductions as are made under section 25 (4) for the purpose of arriving at the original site value from the total value. Section 25 (4) enumerates these deductions (reading only those with which this case is concerned) thus: "(a) The same amount as is to be deducted for the purpose of arriving at full site value from gross value"; and "(d) Any part of the total value which is proved to the Commissioners

to be directly attributable . . . to goodwill or any other matter which is personal to the owner, occupier, or other person interested for the time being in the land." These two deductions must be taken separately.

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The first deduction is, divesting the statutory provision of its circuitry, simply the difference between gross value and full site value, or the difference between the hypothetical market value of the subject as it stands at the time, and the hypothetical market value of the bare site, that is, in popular language, its "prairie value." This difference is really not so much the value of the buildings, &c., on the site *per se*, as the value added to the bare site by the buildings and other structures on, in, or under the surface, which are appurtenant to or used in connection with any such buildings, and of growing timber, &c.,—that is, the value added to the bare building ground by man's expenditure of money and labour. The statute, section 25 (2), talks as if this is to be estimated as a deduction to be made from gross value to arrive at full site value, and section 25 (4) (a) talks of it as the amount to be deducted for the purpose of arriving at full site value from gross value. But there is no reality in the definition. I defy any valuer to follow the theoretical lines laid down for him by the draughtsman. He must estimate the gross value, and he must estimate the full site value, things which he is competent to estimate, and the difference is this deduction which he is not in a position to value otherwise than by deducting estimated full site value from estimated gross value, but which he is assumed to value in order to arrive at full site value. And the strange thing is that full site value is not wanted, and is of no use except for the purpose of ascertaining this deduction, which is a thing really wanted to be created for an ulterior purpose, viz., that of section 25 (4) (a). Now the trouble in following the statutory direction of section 25 (4) (a) is that gross value was necessarily ascertained under section 25 (1) when arriving at original total value, from which original site value was deduced, but that, in the case of occasional values, the valuator is presented with total value directly, in the form of the consideration for the transfer on sale, and has not had to get at it by the process of ascertaining gross value. But if the letter of the statute is to be followed, the valuer, having been presented with total value in the form of the purchase price, which is a real thing, must throw it over and, going back on the track, must estimate for himself, section 25 (1), according to the best of his opinion, the value of the fee-simple of the land *if sold at the time in the open market by a willing seller in its then condition*, free from all burdens and restrictions, and then also estimate for himself (section 25 (2)) the value of the divested land *if sold at the time in the open market by a willing seller*. How far he may use the purchase price as a guide or help in these estimates is entirely for himself. Mr Binnie, following the letter of the statute, although, as he explains, there has been absolutely no change in any of the values between 1909 and 1911, for sufficient reasons which he explains estimates gross value in 1911 at £475 as against £405 original, and full site value at £75 as against £25 original, and therefore the difference between them at £400 as against £380 original. And this last figure of £400 becomes the first, or (a), deduction of section 25 (4) from the purchase price of £650. There remains £250. He next considers whether any deduction falls to be made

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Mar. 6, 1913. under section 25 (4) (d)—whether there is ground for such in fact, and whether the deduction is competent in law. I think that the latter question should be first considered. Mr Binnie holds, and in this I agree with him, that the facts alleged by Mrs Walker warrant in law some deduction in respect of the personal element from the purchase price.

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Any part of the purchase price which can be attributed to such considerations as have been advanced by the original owner's widow appears to me to be exactly what is intended to be covered by this branch of the subsection. I pass over the suggestion of the charitable intentions of Mr James Burns Walker towards his brother's family, as perhaps somewhat fanciful and intangible. But goodwill and the avoidance of disturbance, which is but another phase of goodwill viewed from a special standpoint, are neither fanciful nor intangible, and if part of the price is attributable to these considerations, it forms, in my opinion, a good deduction in terms of section 25 (4) (d). It is part of the total value directly attributable, not to the site, but to a matter which is personal to the occupier. If, taking the figure of the sale in 1911, an apparent rise in site value, as compared with 1909, from £20 to £250, is established, where no such increase has occurred in reality, and if this apparent rise is attributable to a matter personal to the occupier, it results that if the increment value duty is to be calculated on such apparent increment the Revenue is taking toll, not of an increment in site value, but of something quite different which the statute never meant to be taxed. This deduction is therefore, I think, within, and properly within, the terms of the subsection.

If so, what part, then, of the total value or purchase price, if any, is directly attributable to this matter? It has been contended, and I am aware that my brother Lord Cullen so holds, that there is neither proof that any such consideration entered into the purchase price, nor of the proportion to be attributed to it. Unfortunately we have here no direct proof, owing to the death of Mr James Burns Walker pending the reference to Mr Binnie. But we have circumstances, in the first place, in which such an additional price for goodwill, or avoidance of disturbance, was reasonably to be presumed, because the conditions precedent to it existed, and, in the second place, a substantial part of the price is not accounted for, and so substantial—nearly 50 per cent above Mr Binnie's well-supported estimate of true value—that it cannot be attributed to mere difference of opinion between valuers, but has to be accounted for. Was Mr Binnie bound to assume that Mr James Burns Walker simply made a gross mistake in the value of the property, which he had so long occupied, or was hopelessly ill-advised, when Mr Binnie had before him the tangible fact of Mr James Burns Walker's double occupation of the subjects, both as a residence and as a place of business? Mr Binnie states that he was, after full consideration, satisfied that as matter of fact, in paying the purchase price of £650, James Burns Walker was actuated by some one or other of the considerations alleged by the original appellant. I am not prepared to disagree with him, for I think that the inference was one of fact which he was entitled to make, and which I should have made myself had I been in his position. So much in the application of the provisions of this Act is committed to the opinion and discretion of valuer and referee, that I do not think that this Court is

justified in calling on them to show that they had absolute legal proof Mar. 6, 1913. which would satisfy a Court of law of every consideration on which they proceeded.

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In the next place, I think that it was quite competent for Mr Binnie, if he was satisfied that such reason for the excessive price existed and had no proof of the precise amount actually attributed to it by the purchaser, to put his own value upon it. His function under the Act is to put values on things according to his own judgment. Nay, I would say that, even if he had had such proof, he was still bound to put his own value upon it. Neither the evidence of the purchaser that he did put a definite amount, nor the express attribution of a portion of the price in the contract of sale or conveyance, would have precluded the Inland Revenue from requiring Mr Binnie to apply his mind to the real amount or value of the consideration. I think, therefore, that Mr Binnie has properly disposed of this case, by proceeding to put a value on the consideration in question in the best way he could. I do not think that it was necessary for him to disclose the mental process which he went through in arriving at his figures. But he has done so, and I cannot find fault with it. He says: "I consider, assuming such a deduction competent in law, that the sum of £180 should be allowed in respect thereof. For the reasons stated above, I was not able to arrive directly at the sum just mentioned; I could only arrive at it by ascertaining to the best of my ability the market value of the subjects, and then taking the difference between this and the consideration on sale as necessarily the proportion of the consideration on sale given for the personal element, the figures of the calculation being:—

Consideration on sale,	£650
Less market value of property at 8th June 1911, estimated by me at	470

Leaving	£180
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as the proportion of the consideration on sale given for the personal element."

I prefer this ground of judgment. But Mr Binnie has suggested another, viz., that, if he is not entitled to make any deduction for the alleged personal element, and is bound to hold that the sum of £650 must be attributed entirely to site and buildings, he must then consider whether the buildings as well as the site have not had their share in the appreciation. I am entirely with him in the view that increase or decrease in value cannot all be attributed to site. I can conceive of cases in which, viewed from the point of view of market value, the bare land, as building ground, may not have increased in value, and yet the subjects as a whole may have increased, and that even though in the interim nothing has been spent on the extension or improvement of the buildings. In fact the demand which regulates market price may from time to time create any amount of permutation between the relative proportions attributable to land and to buildings. But where, as here, there has been an increase so extravagant that it is impossible to attribute it to the intrinsic increase in value of the combined subject in open market, I think that it would be an improper application of the Act empirically to proceed to divide the increase between land and buildings, which

Mar. 6, 1913. do not justify it, where there is, as here, another and satisfactory mode of accounting for it. In other circumstances the alternative course taken by Mr Binnie might be necessary.

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Ld. Johnston. Mr Binnie explains that his third finding fixing the site value on the occasion at £70, was arrived at by taking the consideration on sale, £650 and deducting for buildings, ... £400 and for matter personal to James Burns Walker, ... 180

580

leaving as site value on the occasion £70

I think, for the reasons above stated, that this finding was correct and should be affirmed, but I think that Mrs Walker was entitled to the full expenses of her appeal to Mr Binnie, and that she is entitled as respondent to her expenses in the case before this Court.

LORD SALVESEN.—The question in this case relates to the increment value duty on a small property situated in Dalry. The material facts which are stated by the referee are as follows :—The late John Walker, the owner of the property, died on 10th January 1911. The property consists of a piece of ground extending to about 300 square yards, with a frontage of 54 feet to New Street. On this site there is a house, the lower storey of which was occupied as a draper's shop, the occupier being Mr James Burns Walker, a brother of the late owner. He had long occupied the shop, in which he carried on his business, and resided in the upper floor of the building. He paid £38 annually of rent for his premises. The only burden on the property is a feu-duty of 5s.

On 6th March 1911 the value of the property was returned for estate-duty purposes by the respondent, as executrix of her husband, at £400, and on 9th August 1911 that value was accepted by the Inland Revenue district valuer. A provisional valuation as at 30th April 1909 under the Finance (1909-10) Act, 1910, was served upon the appellant on 30th August 1911; and as no appeal was entered this provisional valuation has become final. The only material figures therein contained are: (1) £400, the original total value; and (2) £20, the original assessable site value, the difference representing the value of the buildings. The property had in the meantime been sold in June 1911 to the occupier, Mr James Burns Walker, for a sum of £650—no capital expenditure having been made upon the property during the period from 30th April 1909 to 8th June 1911. The referee is of opinion that there has been no material alteration in the value of property in Dalry between these dates; but he thinks that the property was undervalued in the provisional valuation, and that it ought to have been valued at £470, £400 of which would be attributable to the buildings and £70 to the site. (As the capitalised value of the feu-duty remains constant in the calculations, I leave it, for the sake of simplicity, entirely out of count.) He was accordingly of opinion that the site had increased in value as compared with the provisional valuation by the sum of £50, and that increment value duty was leviable upon this sum. The Commissioners of Inland Revenue, on the other hand, claim that the difference between the

sum actually paid for the property, namely, £650, and the value of the buildings as fixed in the provisional valuation, £380, must be treated for the purposes of the Act as an increment in the value of the site; and that duty accordingly falls to be paid upon £270, less £20, the original site value.

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Before disposing of the appeal we thought it necessary to obtain some further facts; and these have been stated by the referee in an additional report. He holds that the difference between the price actually paid and his valuation of the market value of the subjects, namely, £180, must be attributed to considerations personal to the purchaser, in which case the increment value of the site would be the £50 arrived at by him. If, on the other hand, £650 is to be treated as the market value of the subjects, then he holds that the value of the buildings must be regarded as £552 and the site as £98; from which latter sum the original site value of £20 falls to be deducted, leaving the increment value of the site £78.

The controversy between the parties turns on the construction of sections 2 and 25 of the Finance (1909-10) Act. The former section contains the leading provision, which is in these terms: "For the purposes of this part of this Act the increment value of any land shall be deemed to be the amount (if any) by which the site value of the land, on the occasion on which increment value duty is to be collected as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions of this Part of this Act as to valuation." Accordingly, if the site value has remained constant or has diminished, no increment value duty would *prima facie* appear to be leviable. The same section goes on to provide: "(2) The site value of the land on the occasion on which increment value duty is to be collected shall be taken to be (a) where the occasion is a transfer on sale of the fee simple of the land, the value of the consideration for the transfer."

There is also a provision (d) which may have a bearing on the construction of section 25, to the effect that where the occasion is a periodical occasion on which the duty is to be collected in respect of the fee simple of any land, the total value of the land on that occasion falls to be estimated in accordance with the general provisions as to valuation. There follows a qualification which is applicable to the whole of subsection (2), and which is expressed in these terms: "Subject in each case to the like deductions as are made under the general provisions of this Part of this Act as to valuation for the purpose of arriving at the site value of land from the total value."

On referring to section 25, which contains the regulations as to valuation, one finds that the gross value of land is defined as the amount which the fee-simple of the land if sold at the time in the open market by a willing seller in its then condition free from incumbrances might be expected to realise. Similarly the full site value of the land is defined as meaning the amount which remains after deducting from the gross value of the land the difference between that value and the value which the fee-simple of the land if sold at the time in the open market might be expected to realise if the land were divested of any buildings and other structures; and the total value of land is the gross value after deducting the capitalised value of any

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incumbrances. Subsection (4) proceeds to define the assessable site value, which in the case before us is defined as being the total value after deducting the value of buildings or other structures as in subsection (2), and "(d) any part of the total value which is proved to the Commissioners to be directly attributable to . . . goodwill or any other matter which is personal to the owner, occupier, or other person interested for the time being in the land."

These being the provisions which we have to construe, and which are necessarily complex in form, because of the infinite variety that must exist in the quality of heritable subjects, the problem here is to apply them to what is a comparatively simple case, always keeping in view the leading principle of the Act, that the duty falls only to be levied on the increment of site value. Here we have property belonging in fee-simple to the owner and having only two elements of value, namely, the value of the site and the value of the buildings upon it. This property was sold by a willing seller to a willing purchaser; and *prima facie* such a sale, whether the result of a private transaction or of a public roup, is the market value of the whole. To what extent that market value is contributed to by the value of the buildings must always be a matter of valuation, and if there be no other considerations entering into the price the value which remains after deducting the value of the buildings represents the assessable site value. When that figure is compared with the assessable site value as ascertained by the provisional valuation, you ascertain whether there has been any increment in value, and if so, the amount of the increment.

Here, however, the transaction is complicated by the fact that there were personal considerations which entered into the price paid by the purchaser. If the goodwill of the draper's business had belonged to the seller and had been included in the price, a deduction would require to be made of the value of such goodwill before it could be ascertained whether the value of the heritable subjects as a whole had been increased. The simplest case of all would have been if the parties had *bona fide* stated in the conveyance the sum at which they respectively agreed to sell and purchase the goodwill so far as that pertained to the heritage and was capable of being valued apart from it. We are familiar with cases of this kind in dealing with the sale of licensed premises, where it sometimes happens that the value of the heritable goodwill exceeds the value of the heritable subjects themselves treated as subjects to which no licence attached. In the present case there were no elements of value belonging to the seller and conveyed by her, but it is said that there were considerations which were personal to the purchaser as the occupier of the shop in the building. It was contended that the buyer, James Burns Walker, paid a sum in excess of the value of the subjects because of the affection which he entertained towards his brother's widow. Even if that could be ascertained as matter of fact I do not think that it would be a part of the total value which could be taken into account in fixing the assessable site value under section 25 (4) (d). But it is scarcely the subject of legitimate conjecture, in a case where the facts are not known, that the buyer took this method of making what was in effect a present to his brother's widow. The other element, however, is in a different position. It is said that the purchaser feared that if the subjects were acquired by an

outsider he might be compelled to quit the premises in which he had for a Mar. 6, 1913.
long time carried on business as a draper. This is a matter which I think
did have a commercial value for him, because in the first place he would ^{Inland}
have to face the cost of removal, and it might be that if a rival draper's ^{Revenue v.}
business was established in his old premises he might lose some of the busi- ^{Walker.}
ness which depended on the fact that a business of a particular kind had ^{Lord Salvesen.}
been carried on there for many years. It was also an element which the
seller might well have in view in demanding a higher price from the pur-
chaser than she would have obtained from one who was merely buying the
property as an investment. It was, however, in my opinion, a part of the
total value which was personal to the occupier. It was not personal to the
owner, because if the occupier had died this element of value would have
disappeared.

But it is not enough to say that such an element might enter into the
price; it must be proved that it in fact did so. I think that is established
by the valuation of the referee of the subjects as heritable subjects at the
sum of £470, which I presume is conclusive between the parties and is,
in any event, well warranted according to the ordinary principles of valua-
tion. As I read the referee's findings, these include a comparison with
neighbouring subjects similarly situated, as well as the application of an
appropriate number of years' purchase to the actual rental paid by the
tenant. Had that rental for any reason been less than the rental of similar
subjects in the neighbourhood, a valuation based solely upon it would have
been misleading. But the referee expressly finds that the figures on which
he proceeds were supported by transactions in the neighbourhood quoted
to him by the valuers of the Inland Revenue.

I think, accordingly, that the referee's conclusion in fact that £180 of
the price actually paid represented an element of value which was personal
to the purchaser was legitimate, and that accordingly the site value on the
occasion has been properly fixed at the sum of £70.

Even if this were not so—and we were obliged to take the case on the
footing that there was no personal element which entered into the price—
the result, in the view that I take, would not be substantially different.
The consideration on sale would then represent the market value of the
subjects as such. I entirely demur to the view contended for on behalf of
the Inland Revenue, that on this assumption you are to deduct from the
price exactly the same sum as was deducted in the provisional valuation in
respect of the value of the buildings, where such buildings have not been
added to or improved. The result, of course, would be that the site value
would have appreciated on this method of valuation by £250 in the course
of a few months, a figure more than eleven times greater than the valuation
fixed by the provisional valuation, and that although the referee was of
opinion that there had been no actual appreciation, but that the site had
been undervalued to the extent of £50 in the provisional valuation. This
would be a result so divorced from actuality and so utterly opposed to the
leading provision of the Finance Act itself that I should be very slow to
accept it. In the case where the subjects as a whole have been undervalued
and their true value is ascertained on the occasion of a sale, I can see no
principle upon which the whole increase of value is to be attributed to the

Mar. 6, 1913. Inland Revenue v. Walker. site. Where both site and buildings have remained unaltered, as is found in the present case, the difference may be attributed either to an increase in the value of the buildings, which may quite well happen if the prices of material have in the meantime gone up, or to an increase in the value of the site, as where there has been a growing demand for land in the locality, or partly to the one and partly to the other. Here the referee holds that the difference is attributable to the extent of £172 to an undervaluation of the buildings, and to the extent of £78 to an undervaluation of the site. The latter sum would on this footing be the sum on which increment value duty falls to be calculated.

It is easy to figure cases in which the method for which the Inland Revenue contends in the present case would be disastrous to the Crown. Take, for instance, the case of a warehouse which at the date of a provisional valuation was well let and which had for years been unoccupied before the occasional site value came to be ascertained. I know of concrete cases where such property has become practically valueless, so far as the buildings are concerned, through the conditions of trade having entirely altered. When grain was carried in sailing vessels whose arrival was uncertain, provision had to be made for the requirements of the community by storing it in warehouses, for the use of which substantial rents were paid. Now that similar cargoes are conveyed in steamers, the date of whose arrival can be fixed with almost mathematical precision, the necessity for storing grain has to a large extent disappeared, the buyers' requirements being periodically supplied by fresh arrivals of steamers. The result has been that many such warehouses have become practically unsaleable, and instead of adding value to the site, perhaps diminish it by the necessity of removing the buildings in order to make way for new ones of a different type. It would be absurd in such a case to stereotype the value of the building at the time when the sale took place by reference to its value as fixed by a provisional valuation when it was a lettable and valuable commercial subject. An even stronger case would be where buildings had been allowed to become dilapidated and the whole value consisted in the value of the site. Where in such a case the price paid was largely in excess of the assessable site value as previously ascertained but below the combined value of the site and buildings, there would be no increment value on which duty could be charged, although in fact the site had doubled or quadrupled in value. I cannot imagine the Legislature had this in view, nor do I see any warrant for the contention that the value of the buildings, assuming that they remained physically the same, is always to be treated as a fixed quantity ascertainable only by reference to the provisional valuation.

The only other point on which I desire to offer an opinion has reference to the view which I understand is held by one of your Lordships, that the gross value of a particular piece of land falls, under section 25, to be ascertained by a valuer irrespective of the amount at which the land has actually been sold at the very time when the valuation falls to be made. For my own part I see no warrant in section 25 (1) for such a view. The language is, of course, general, because it applies to cases where there has been no actual transaction as well as to cases in which there has been a transaction. In the former case—as, for instance, when land continues to be held by a

body corporate or unincorporate—the value can only be ascertained by Mar. 6, 1913. means of a valuation; but when there has been an actual sale in the open market there is no need, and no justification, for resorting to what is at best only an approximate method of ascertaining the value in the open market. I cannot appreciate the view that the price paid by the purchaser here may have been the price fixed by an unwilling seller and so in excess of the market value. There is no suggestion that the respondent was in any sense an unwilling seller; and assuming that no personal considerations entered into the transaction, I cannot conceive that she got more than the market price of her property. If so, then Mr Binnie's value is that of that market price. £552 represents the value of the buildings and £98 the value of the site divested of buildings. On questions of value the referee is *prima facie* conclusive; and it would be an odd result if we were required by the Act in arriving at the assessable value of the site to deduct from the gross value a figure as representing the value of the buildings which has been reached on the footing that the market value of the subjects was £180 less than the price actually paid by a willing purchaser to a willing seller. There may be anomalies in the Act; but I do not think that this is one which results from a fair construction of its provisions. I can conceive a case where, although the total amount actually realised for a piece of land covered with houses was less than the amount of the provisional valuation, increment-duty would still be chargeable if, on a revaluation of the buildings, the valuator found that they had been overvalued in the provisional valuation, or had greatly depreciated in value; but even such a result would not be outwith the scope of the Act, as its leading enactment provides for a duty being levied upon any increment value of a site, and it is this alone with which the Act proposes to deal. But I could not be a party to a decision which would result in holding that, when a referee has fixed the value of the site at £70 on one method of calculation and at £98 upon another, we should, nevertheless, be driven to the conclusion that its true value was £270 for the purposes of the Act. The fallacy which I humbly conceive underlies this view consists in assuming that the value in the open market of the fee-simple of land falls to be ascertained, not by reference to the market price actually obtained, but by some calculation as to what it would fetch if it were exposed for sale. When reliance is placed on Mr Binnie's valuation of the buildings on this property at the sum of £400, it must be kept in view that he reached this on the footing that some considerations personal to the occupier entered into the price, whereas if this assumption were erroneous he valued the buildings at £552.

I have therefore reached the conclusion that the referee was right in holding that the increment value duty leviable on the respondent falls to be calculated on the sum of £50; or, in the event of its being held that no part of the total value was attributable to a matter personal to the occupier of the subjects, on the sum of £78.

LORD CULLEN.—The property in question in this case was the subject of valuation in terms of section 26 of the Finance (1909-10) Act, 1910. The "total value" as at 30th April 1909 was fixed at £400, and the "assessable site value" at £20. In June 1911 the property was sold by the

Mar. 6, 1913. respondent Mrs Walker to her brother-in-law, James B. Walker, for £650. James B. Walker was the tenant of the premises, which consisted of a dwelling-house and shop. The Crown now claim increment value duty on the occasion of this transfer on sale, and the question at issue relates to the mode of calculating the site value on the occasion under the provisions of the statute.

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Lord Cullen.

The subject of the duty is denominated (section 1) "the increment value of any land," and increment value is to be deemed to be (section 2 (1)) "the amount (if any) by which the site value of the land, on the occasion on which increment value duty is to be collected as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions of this part of this Act as to valuation." In ascertaining the site value on an occasion, where the occasion is a transfer on sale, the statutory calculation begins (and it may also end) with the price paid. Section 2 (2) (a) of the statute enacts that, on the occasion of a transfer on sale, the site value of the land "shall be taken to be . . . the value of the consideration for the transfer," subject to "the like deductions as are made, under the general provisions of this Part of this Act as to valuation, for the purpose of arriving at the site value of land from the total value."

Starting then with the price here paid—£650—one proceeds to consider what are the allowable deductions from it.

There is an allowable deduction under section 25 (4) (a). It consists of "the same amount as is to be deducted for the purpose of arriving at full site value from gross value." Before the referee it was contended for the Crown that in estimating this deduction it fell to be taken at the same figure as in the original valuation at 30th April 1909. The Crown did not pursue this contention at the hearing before us, and it appears to me to have been unsound. Section 2 allows "the like deductions"; and, in the interval between 30th April 1909 and an "occasion" which gives rise to a claim for increment value duty, the respective values may have changed.

In order to give effect to the deduction in question it is necessary to fix, as at the period of the occasion, the "gross value" and the "full site value." The difference between these forms the amount of the deduction. Gross value and full site value are respectively the subject of definition in section 25 (1) and (2). Both definitions hinge on value in open market as on a sale by a willing seller. Now this standard of value is not necessarily represented by any price which is paid. A price paid may be anything. It may, on the one hand, be a nominal price or a price short of open market value to any extent. It may, on the other hand, be in excess of open market value, as where an owner, instead of becoming a willing seller in open market, makes himself an unwilling seller and obtains from a particular offerer a *pretium affectionis*. Hence for the purpose of estimating, in accordance with their definitions, gross value and full site value, as on the occasion of a transfer on sale, the price paid does not necessarily afford a test of open market value. It may correspond with that value or it may not. A valuer will take account of the price paid; but he may legitimately hold that the open market value is a different amount.

In the present case the referee, applying the statutory definitions, says:—

"I am of opinion that at 8th June 1911, the date of the occasion above mentioned, the fee-simple of the property, if sold in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes), might have been expected to realise £475." This is his determination of gross value as on the occasion of the sale in question. The referee then goes on to determine the full site value, which he states at £75. The difference between the gross value and the full site value as so determined is £400. There are no materials before us on which, in my opinion, we can hold the referee's said determination of gross value and full site value as on the occasion in question to be wrong. The price paid was £650. But, as I have said, a price paid is not necessarily a test of open market value. The referee holds that the price of £650 was in excess of such open market value, and in this the respondent agrees. It would seem to follow, therefore, that the amount of the allowable deduction under section 25 (4) (a) of the statute is £400. If this sum be deducted from the price of £650, there is left £250, as being, so far as the calculation has gone, the site value on the occasion. And on a comparison of this figure with the original assessable site value—£20—there is brought out an increment value, for the purposes of the statute, amounting to £230. This is the sum on which the Crown now claims increment value duty.

If the above calculation is in accordance with the statute, and if no further deductions fall to be made, it is clear that, to a large extent, the increment value brought out does not represent an increase in actual site value, but represents the excess of the price paid over the open market value of the property. And it is urged that as increment value, under its definition in section 2, is to be ascertained by comparing two "site values," such a result must be contrary to the intendment of the statute. This criticism proceeds on the assumption that the "site values" so to be compared are both actual site values. They are, however, statutory values, artificial in their definition, and it may be that the application of the statutory definitions will, in some cases at least, bring out results which are also artificial under the denomination of increased site values. Occasional site value here in question is, under section 2, a value which is to be "ascertained in accordance with this section." And a consideration of how the section would apply to other and simpler cases which may be figured will, I think, show that the statutory increment value may be something which does not at all correspond with increase of actual site value. Let me suppose the case of a bare site subject to no incumbrances, burdens, or restrictions. In such a case the gross value, full site value, total value, and original assessable site value would all be the same, to wit, the value of the land if sold in the open market by a willing seller. And let it be supposed that this value was £100, and that the original assessable site value was entered up at that figure. If thereafter the open market value of the site rose to £150, and the owner then sold it for £100, say to his son, there would be no increment value bearing duty, notwithstanding that there had been an increase of the actual site value. For in the case of a sale the statutory occasional site value can never be greater than the amount of the price paid (section 2). Suppose, again, that the same site remained stationary in point of open

Mar. 6, 1913. market value at £100, but that the owner, by making himself an unwilling seller on private bargain, was fortunate enough to sell the land to some one who, for reasons peculiar to himself, paid a *pretium affectionis*, say £150. As there would be no room for any deductions, this price of £150 would, under section 2, be the site value on the occasion, and there would result an increment value subject to duty, although, *ex hypothesi*, there had been no increase of actual site value. The conclusion, therefore, seems to me to be unavoidable that, while the tax created by the statute might have been one to be levied only on increase of actual site value, it is a tax leviable on an "increment value" which may or may not correspond with increase of actual site value, and which, in cases like the present, will include what may be described as the windfall to an owner, arising from his having been fortunate enough to sell his property for a price which exceeds its open market value as on a sale by a willing seller.

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Another view, however, has been suggested as to the mode of calculating the allowable deduction under section 25 (4) (a) on the occasion of a transfer on sale such as the present. As I understand it, the definition of gross value in section 25 (1)—which hinges on open market value—is to be discarded, and gross value is to be constructed from the price paid, whatever may be its relation to open market value. The foundation of this view is the provision in section 2 that the deductions subtractable from the price are to be the like deductions as would have been subtractable from total value had the calculation been one for arriving at original assessable site value from total value; from which provision the true inference is said to be that the price is not merely stated as the amount from which such deductions may be taken, but is stamped with the statutory character of total value of the property on the occasion. And so taking the price, whatever it may be, as the statutory total value on the occasion, a corresponding gross value on the occasion is to be constructed from it (according to a process which does not figure in the statute) by adding to the price the value of any incumbrances, fixed charges, or restrictions subject to which the property has been sold at that price. I can see no warrant in the statute for this view. The statute does not say, or, to my mind, imply, that any price which may be paid is to be held to be the total value of the property on the occasion according to its definition of total value. What it says is that the price paid is to be primarily deemed to be the site value on the occasion, but that there may be subtracted from it in reaching the increment value subject to duty the like deductions, if any, as would have been subtractable from total value if the process of calculation had been one for reaching original assessable site value from total value. If the view under consideration is followed out in figures, it will be seen that, while the price is formally introduced into the calculation proposed, it is allowed no influence on the resulting increment value, and that the calculation is one of no utility. It may be superfluous to present the calculation in figures. But let me state it. The referee here estimates the full site value on the occasion at £75, and, deducting £5 as the capitalised value of the fixed charge of feu-duty, he estimates the actual open market value of the burdened site on the occasion at £70. These values he reaches by direct estimate. The price paid was £650. Gross value, according to the

referee's determination and following its statutory definition, is £475. This Mar. 6, 1913. figure, however, is to be discarded, and there is to be substituted for it a gross value constructed on the basis of the price, conceived as total value ^{Inland Revenue v. Walker.} on the occasion. This is to be done by adding to the price the capitalised value of the fixed charge of feu-duty, thus making gross value £655. As Lord Cullen. full site value has already been determined to be £75, the difference between it and the said gross value is £580. This sum, therefore, is the amount of the allowable deduction from the price of £650 under section 25 (4) (a). And on so deducting it there remains £70, which is just the referee's already determined estimate of the actual open market value of the burdened site on the occasion. Thus the introduction of the price into the calculation has no influence on the result, and the calculation so based on it is meaningless.

I can see no warrant in the statute for the view that gross value, on any occasion when it falls to be estimated for the purpose of ascertaining increment value, is to be estimated otherwise than in accordance with its statutory definition. The definition is based on the value of the property if sold in open market by a willing seller; and a price paid in any particular case may differ indefinitely from this standard of value.

The matter, however, does not rest here, for the respondent claims a further deduction under the provision contained in the last part of subsection (4) (d) of section 25. This provision permits of a deduction of "any part of the total value which is proved . . . to be directly attributable to . . . goodwill, or any other matter which is personal to the owner, occupier, or other person interested for the time being in the land." "Total value" is a value strictly appropriate (by definition) to the land as a real subject. Logically, therefore, there is no room for a deduction from it in respect of personal matters. But the deduction is made applicable, *inter alia*, to the case of fixing the site value on the occasion of a transfer on sale, and under section 2 the occasional site value is to be taken primarily to be the consideration paid for the transfer. Now, a consideration paid for such a transfer may be a mixed one—it may be given in respect of the transfer of the land and of something else. In such a case there may be room for splitting up the consideration so as to eliminate from it in the calculation of the claim for duty any part of the price which is not paid for the land, to which alone the increment value duty relates. The statutory definition of what may be thus eliminated (reading "price" for "total value") is "any part of the price which is proved to be directly attributable to goodwill, or any other matter which is personal to the owner, occupier, or other person interested for the time being in the land."

The respondent's contention raises, in the first instance, a question of fact. She alleges that the price of £650 paid by James B. Walker was "greatly in excess of its value in the open market at 8th June 1911"; and, further, that "in paying that price he was actuated partly by sentiment, partly by family affection towards his brother's widow, and partly by a dread that, if the subjects were acquired by an outsider, he might be compelled to quit the premises he had long occupied in the property, namely, his shop in which he carried on business and his dwelling-house." The respondent does not here say what part of the price she assigns to the

Mar. 6, 1913. mixed personal motives ascribed by her to the purchaser. The referee did not make any pronouncement on the fact in the original case. But in his "further statement" he says that, in his opinion, the price of £650 was, to the extent of £180, paid by James B. Walker from the mixed personal motives ascribed to him by the respondent. In my opinion the referee had no sufficient ground for coming to this conclusion in fact. He says that he was unable to get any statement from James B. Walker on the subject, and that he found that there was no one else from whom he could get any information. And in these circumstances he simply compares the price of £650 with his open market value of £470, and assumes that James B. Walker must have paid the difference of £180 from such motives as the respondent ascribes to him. This appears to me to be an unwarrantable inference in fact. There is no room for more than mere conjecture on the subject. The only ascertained fact is that Mr Walker paid for the transfer of the property a price of £650, which, *ex concessis*, exceeded its open market value by £180.

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But, *esto* that it is to be taken as matter of fact that James B. Walker paid £180 of his price of £650 under the influence of the mixed motives ascribed to him by the respondent and by the referee, there remains the question of law, whether this fact gives room for a deduction under the provision contained in the last part of subsection (4) (d) of section 25 already quoted. The provision is elastic in expression. It provides, in this connection, for a price paid being split up, and for the elimination from it of any part of it which is proved to be directly attributable to goodwill or any other matter which is personal to the owner, &c. On a construction of the provision it appears to me to refer to cases where a buyer pays a lump price, in consideration of which he obtains a transfer of the land and also a transfer or surrender of something else of a personal character to which some ascertainable part of his lump price is "directly attributable" as not being paid for the land. And I am unable to bring into this category any part of the price of £650 in the present case which may have been paid for the land by James B. Walker from a sentiment of benevolence on his part towards the respondent or from a fear of losing his occupancy of the premises if he did not buy them.

I am therefore of opinion that the claim of the Crown for increment value duty on the sum of £230 is well founded.

THE COURT pronounced the following interlocutor:—"Find that the decision of the referee on contention (b) of the original appellant is right, and affirm the same in so far as it fixes and determines that the site value of the subjects mentioned in the stated case on the occasion of the transfer is £70."

Sir PHILIP J. HAMILTON GRIERSON, Solicitor of Inland Revenue—PATRICK & JAMES, S.S.C.—Agents.

JOHN MACKAY HUNTER HAMILTON (James Hamilton's Executor), No. 101.

Appellant (Reclaimant).—*Morison, K.C.—G. C. Stewart.*

THE BANK OF SCOTLAND, Respondent.—*Clyde, K.C.—C. H. Brown.* Mar. 7, 1913.

Bankruptcy—Sequestration—Trustee—Transaction—Discharge of bankrupt's co-cautioner with consent of trustee—Commissioners—Necessity for consent of commissioners—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), sec. 176. Hamilton's Executor v. Bank of Scotland.

The Bankruptcy (Scotland) Act, 1856, sec. 176, enacts:—"The trustee may, with consent of the commissioners, compound and transact or refer to arbitration any questions which may arise in the course of the sequestration regarding the estate, or any demand or claim made thereon, and the compromise, transaction, or decree-arbitral shall be binding on the creditors and the bankrupt."

A cautioner under a letter of guarantee was discharged by the creditor with the consent of the trustee on the sequestrated estate of a co-cautioner.

Held that the consent of the trustee to the discharge was an act of management to which the foregoing section did not apply, and that the concurrence of the commissioners was unnecessary.

Cautioner—Discharge—Giving time—Creditor assuming control of debtor's business.

Averments by a cautioner for a limited company to the effect that the creditor, a bank, held shares in the company, and had assumed control and carried on the business in the interest of the shareholders and to the prejudice of the cautioners, *held* insufficient to support the contention that the creditor by his actings had given time to the debtor, and had so essentially altered the relation of parties as to discharge the cautioner from his obligation.

Cautioner—Discharge—Recall of guarantee—Effect of recall—Giving time.

A letter of guarantee, granted in favour of a bank in security of advances made by it to a limited company, empowered the bank to give time to the debtor without affecting the liability of the cautioners, and provided that the guarantee should continue in force until recalled.

Opinion that the recall of the guarantee by a cautioner, while preventing further advances to the debtor on the credit of the revoking cautioner, would not in every case debar the bank from giving time to the debtor after the date of the recall.

JOHN MACKAY HUNTER HAMILTON, executor-dative of the deceased James Hamilton, as such executor and as an individual, presented an appeal against a deliverance of Thomas Patrick Laird, C.A., trustee on the sequestrated estate of the said James Hamilton, on a claim in the sequestration lodged by the Bank of Scotland on 24th March 1910. 2^d Division.
Lord Hunter.

The claim was for £21,865, being the sum due under a letter of guarantee, dated 19th and 20th March 1903, granted by James Hamilton, John Leslie Hunter, and three other persons, guaranteeing payment of all sums, not exceeding £20,000 and interest, due or to become due to the Bank by the Lanemark Coal Company, Limited. The letter also stated:—" . . . And we further declare that you may at any time or times at your discretion grant to the said Lanemark Coal Company, Limited, or to any drawers, acceptors, or indorsers of bills of exchange or promissory-notes, received by you

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from them or on which they may be liable to you, any time or other indulgence, and compound with them or with the said drawers, acceptors, or indorsers respectively, without discharging or satisfying the liability of us or any of us; . . . And it is further declared that this guarantee is to remain in force until recalled by us, or our heirs or executors, in writing." The Lanemark Coal Company, Limited, went into liquidation on 27th January 1909, the amount of its indebtedness to the Bank then being £25,105. Mr Hamilton died on 10th September 1907, and his estate was sequestrated on a petition presented by the Bank of Scotland on 3rd December 1909.

On 17th February 1912 the trustee in the sequestration ranked the Bank to the amount of the sum claimed, less sums received prior to the date of the sequestration.

In his appeal against this deliverance Mr Hamilton's executor averred, *inter alia*, that after Mr Hamilton's death the appellant, on 30th September 1907, wrote to the Bank recalling the guarantee. The letter stated, "the obligation of the estate under the bond for cash-credit held by you in security of advances to the Lanemark Coal Company is withdrawn." On 1st October 1907 the Bank replied in these terms:—"We have to acknowledge your letter of yesterday withdrawing the obligation of the late Mr Hamilton in connection with the Lanemark Coal Company, Limited, at our Ayr branch. Until a proposal to the satisfaction of the directors is forthcoming, we cannot, as you are aware, release the obligation of Mr Hamilton, and in order to protect the Bank's interests we have instructed the Ayr agent to make the account inoperative."

He further averred:—(Cond. 5) ". . . The Bank were largely interested in the said Lanemark Company as shareholders therein. And during 1907 and 1908 the Lanemark Company had ample liquid assets to meet its creditors and pay off the Bank's indebtedness, which amounted to from £20,000 to £30,000. But if the company had then been wound up, nothing would have remained for the shareholders of the company. In order, therefore, to protect their interest as shareholders, the Bank, through their treasurer and their agent at Ayr, on the one hand, and Mr R. A. Murray, on behalf of the company, negotiated to make a new satisfactory arrangement as mentioned in said letter, and arrangements were definitely made to the Bank's satisfaction, and the obligation of the late Mr Hamilton was thereby released. In particular, a new arrangement was made in October 1908, under which the Bank advanced a further sum of £1000 for carrying on the company. And on the 13th October 1908 Mr Murray telegraphed the treasurer of the Bank: 'Referring our meeting will you kindly wire Ayr confirming arrangement advance on open account £1000,' and the Bank replied, giving the instructions desired. Further, during 1907 and 1908 the Bank controlled the whole business of the company, and carried it on in their own interests as shareholders and to the prejudice of the interests of the said guarantors. The directors of the company were under the control of the Bank. The shares held by the Bank were sufficient to enable them to control the business of the company, and they did in fact control and carry on the business during these years. They appointed a new secretary and law-agent. In January 1908 an offer of £30,000—a sum sufficient to pay the company's whole debts—was made by Messrs John Watson, Limited, but the Bank succeeded in getting this offer rejected on 24th January 1908, and carried a resolution

that the business of the company was not to be sold except at a price which would yield the shareholders 10s. per £. The Bank thereafter financed and continued the said company's business, and in consequence of its actings the company incurred further trading losses, and went into liquidation on 27th January 1909. The said liquidation was caused entirely by the actings of the Bank. But for the financial advances made by the Bank the company could not have continued its business, nor would it have incurred the trading losses which ultimately compelled liquidation. The Bank seriously prejudiced the position of said guarantors, as the company was then only able to pay to its creditors a dividend of about 10s. per £. The whole of these proceedings were carried on by the Bank without the appellant's knowledge or consent." (Cond. 6) "In December 1906 the Bank, without the consent of the late Mr James Hamilton, agreed to increase the overdraft allowed to the Lanemark Coal Company, Limited, from £20,000 to £30,000. In security of this additional overdraft of £10,000 the Bank obtained . . . supplementary guarantees for £5000. . . . The Bank, however, made it a condition precedent to their granting the increased overdraft, that they should be allowed to appoint a new manager with control over the management of the company, and also an additional director. The Bank shortly thereafter exercised this power, and appointed a new manager and nominated a new director. The manager appointed by the Bank subsequently became also the managing director of the company."

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The appellant further averred that Mr J. L. Hunter, one of Mr Hamilton's co-cautioners, executed a trust-deed for creditors on 25th January 1909, that the bank lodged a claim upon his estate for £13,168, that on 22nd December 1909 they received a dividend of £4745, and on the same date granted a discharge in favour of Mr Hunter of all his obligations under the letter of guarantee. This discharge was granted with the express consent in writing of Mr Hamilton's trustee, but without the consent of the commissioners on his bankrupt estate.

Answers were lodged for the Bank of Scotland.

The appellant pleaded, *inter alia* ;—(1) The Bank of Scotland having by their actings freed and relieved the late Mr James Hamilton and his estate of all liability under the said letter of guarantee founded on by them, the present appeal should be sustained: (3) The trustee's deliverance ought to be recalled in respect . . . (b) the bank have discharged the late Mr Hamilton of his obligations under the said guarantee; (c) that the Bank have given time to the debtor since the obligation under the guarantee was recalled; (d) that the Bank have illegally discharged Mr Hamilton's co-cautioners.

The respondents pleaded, *inter alia* ;—(1) The appellant's averments being irrelevant, the appeal should be dismissed.

On 21st December 1912 the Lord Ordinary on the Bills (Hunter) pronounced an interlocutor sustaining the first plea in law for the respondents, and dismissing the appeal.*

* "OPINION.—[After dealing with a matter with which this report is not concerned]—The real case for the appellant, if he has a case at all, is that the cautionary obligation is, in the circumstances, not binding on the estate of the bankrupt. On this matter I find myself brought face to face with a large number of complicated averments and a varied assortment of pleas in law. It is not always easy to say whether the averments are intended to

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The appellant reclaimed, and the case was heard before the Second Division on 18th, 19th, and 21st February 1913.

Argued for the reclaimer;—(1) Mr Hunter, Mr Hamilton's co-cautioner, had been discharged by the Bank with the consent of Mr Hamilton's trustee, but without the consent, in writing, of his commissioners,¹ contrary to the provisions of section 176 of the Bankruptcy Act, 1856.² In effect this amounted to the discharge of Mr Hunter without Mr Hamilton's consent, and therefore operated as a discharge in favour of Mr Hamilton.³ The consent of the commissioners was required to every "administrative act of importance,"⁴ and an appeal could be taken from their decision under section 169 of the Bankruptcy Act, 1856. (2) Mr Hamilton was also freed by the actings of the Bank in assuming control of the business of their debtor, as set forth in condescendences 5 and 6. They had placed themselves in a position in which it was impossible, consistently with their duty to

bear on one or more of the pleas in law. On this ground the appellant seemed to suggest that the most advisable course for me to adopt would be to allow a proof without any limitations and without determining any point. The Bank, however, argued that although they did not dispute the appellant's title to challenge the deliverance, it was to be kept in view that he had desired the sequestration, and that any pecuniary interest in the estate which he had was dependent upon the creditors being paid in full and a reversion remaining over. The declared dividend is 3d. per £. They therefore maintained that the relevance of the appellant's averments, which, if allowed, without limitation, to go to proof, would result in a long, costly, and intricate inquiry, ought to be carefully examined, not only generally, but in detail. I think this is a case where that course ought to be followed; and I should allow a proof, if at all, only upon specific averments, which, in my opinion, would, if proved, lead to my sustaining a plea in law in the appellant's favour.

"In considering the appellant's averments I think that they may be conveniently treated under the three heads: (1) Whether time was given to the debtor by the creditor, and the cautioner thereby released; (2) whether in view of the actings of the creditor the situation was so altered or the position of the cautioner so prejudiced as to release him from his obligation; (3) whether one of the late Mr Hamilton's co-cautioners was released without the consent of the appellant.

"The averments relative to giving time to the debtor were, according to the argument submitted to me, said to be contained in condescendence 6, though plea 3 (c) appears rather to refer to the actings of the Bank subsequent to the cautioner's death. I do not, however, find that the appellant makes any specific averment that the Bank came under a positive obligation not to sue the debtor which prejudiced or might have prejudiced the cautioner's position. The principle upon which giving time to the debtor releases the cautioner is laid down in *Oakeley v. Pasheller*, 10 Bligh, N. R., 548, as being that, if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal, and therefore you act in breach of the agreement into which you have entered with the principal—(See Lord Hatherley in *Oriental Financial Corporation v. Over-*

¹ Mercantile Bank of Sydney v. Taylor, [1893] A. C. 317.

² 19 and 20 Vict. cap. 79. Quoted in the rubric.

³ Mercantile Law Amendment Act (Scotland), 1856 (19 and 20 Vict. cap. 60), sec. 9.

⁴ Edgar v. Kennedy & Hutton's Trustee, (1905) 7 F. 452, per Lord McLaren, at p. 455.

the shareholders, to sue the company, and this amounted to "giving time" to their debtor.¹ They had essentially altered the relations of parties, and thereby freed the cautioners from their obligation.² It was no answer to say that the letter of guarantee expressly empowered the Bank to give time, because that condition only held good so long as the guarantee remained in force, and came to an end when the guarantee was recalled.³

Argued for the respondents;—(1) Section 176 of the Bankruptcy Act, 1856, had no application, and therefore the consent of the commissioners to Mr Hunter's discharge was unnecessary. Their concurrence was only required in certain specified cases, such as the compromise of a claim, or the sale of the estate.⁴ In other cases, such as the valuation of claims,⁵ the trustee could act by himself. The consent to Mr Hunter's discharge was a mere step in the administration of the estate, which the trustee could competently take on

end, Gurney, & Company, L. R., (1871) 7 Ch. 142, at pp. 150 and 152. In the latter case the Lord Chancellor indicated that it is competent to the creditors to reserve all their rights against the surety, in which case the latter is not discharged. In *Rouse v. Bradford Banking Company*, [1894] A. C. 586, Lord Herschell, at p. 594, after discussing the rule as to giving time to the debtor freeing the cautioner, points out that time is only given within the meaning of the rule if there is a binding agreement arrived at for good consideration. It has also to be kept in view that the cautionary obligation expressly provides:—'And we further declare that you may at any time or times at your discretion grant to the said Lanemark Coal Company, Limited, or to any drawers, acceptors, or indorsers of bills of exchange or promissory-notes received by you from them or on which they may be liable to you, any time or other indulgence, and compound with them or with the said drawers, acceptors, or indorsers respectively, without discharging or satisfying the liability of us or any of us; and that this guarantee shall apply to and secure any ultimate balance of the sums that shall remain due to you, after applying any dividends, compositions, and payments which you may receive.' In face of that express provision I do not think that any averments are made which if established would warrant my sustaining the plea founded upon giving time to the debtor.

"In the next place, the actings of the Bank subsequent to the death of the debtor are said to be such as to preclude them from suing on the guarantee. These averments are to be found in the 5th article of the concordance. It is said in the first place that a new satisfactory arrangement such as was referred to in the Bank's letter of 1st October 1907 was come to in 1908, and the obligation of the late Mr Hamilton released. This averment proceeds, I think, upon a wrong construction of the letter referred to. What is there alluded to is a satisfactory proposal as to releasing the cautioner, and I do not find any averment that such a proposal was sub-

¹ *Polak v. Everett*, (1876) 1 Q. B. D. 669; *C. & A. Johnstone v. Duthie*, (1892) 19 R. 624.

² *Bonar v. McDonald*, (1850) 7 Bell's App. 379; *Hamilton v. Watson*, (1845) 4 Bell's App. 67, *per* Lord Campbell, at p. 103; *Holme v. Branskill*, (1877) 3 Q. B. D. 495; *Stiff v. Eastbourne Local Board*, (1869) 20 L. T. (N. S.) 339; *Watts v. Shuttleworth*, (1860) 29 L. J., Ex. 229, *per* Pollock, C.B., at p. 234; *Bell's Prin. sec. 259*; *Gloag & Irvine on Cautionary Obligations*, p. 865.

³ *Coulthart v. Clementson*, (1879) 5 Q. B. D. 42; *Doig v. Lawrie*, (1903) 5 F. 295; *Harris v. Fawcett*, (1873) L. R., 8 Ch. 866; *In re Silvester*, [1895] 1 Ch. 573; *Hudson on Building Contracts*, (3rd ed.) vol. 1, p. 697.

⁴ Secs. 114, 136, 176.

⁵ Sec. 66.

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his own authority. (2) There was no averment of anything which amounted to "giving time," or of anything which so affected the obligation as to discharge the cautioners. The Bank had no duty to protect the interests of the cautioners, so long as they did nothing to prejudice their right to sue the debtor. In any event, they had express power under the guarantee to grant indulgence to the debtor, and this condition was not affected by the recall. All the acts founded upon took place after the guarantee was revoked in September 1907.

At advising on 7th March 1913,—

LORD SALVESEN.—The most important question in this appeal is whether the late Mr Hamilton was freed from his obligation as a cautioner by a discharge granted by the Bank to his co-cautioner, Mr Hunter. It is conceded that if this discharge was granted without the consent of the trustee

mitted to, far less approved of by, the Bank. The other points of complaint against the Bank in article 5 of the condescendence are that the Bank held certain shares in the company; that they acquired control over the management and refused or procured the refusal of an offer of £30,000 for the company assets—a sum sufficient to pay the company's whole debts. It is admitted in answer that the Bank were registered holders of £4700 belonging to customers of the Bank, the total capital of the company being £60,000. For the purposes of the argument I assume that the Bank in virtue of this holding, and otherwise, influenced the action of the company. In so acting they are said to have acted in their interests as shareholders and to have sacrificed the rights of the cautioners. I do not know what duty, according to the appellant's argument, the Bank owed to the cautioners or in what respect they failed in the fulfilment of that duty. They were entitled to be shareholders, and so far as I can see they and the other shareholders who constituted the company were entitled to refuse an offer for the assets and to hold out for a sum that would yield a return of 10s. per share to the shareholders—as it is suggested they did—if in their opinion it was in their interests to do so. That was not, if I may so express it, a dealing by the creditors with the debtor, but solely the act and policy of the shareholders, i.e., the company. The position of the cautioner was not affected thereby. It did not preclude him from suing the Lanemark Company as principal debtor for relief of the cautionary obligation (*Doij*, 5 F. 295), or from making payment directly to the creditor and getting an assignation which he might have made effectual against the debtor. It would not, I think, serve any good purpose for me to refer in detail to any of the cases which were cited to me by the appellant (e.g., *Hamilton*, 4 Bell's App. 67; *Bonar*, 7 Bell's App. 379, and other cases). It is sufficient for me to say that nothing contained in the judgments delivered in them appears to me to support the proposition that a creditor in such an obligation as the present is in breach of duty to a cautioner by acting such as are founded on by the appellant.

"The last, and to my mind the most difficult part of the case, arises out of the averments relative to the discharge of Mr Hunter, one of the co-cautioners of Mr Hamilton in the letter of guarantee. These averments are contained in articles 7, 8, and 9 of the condescendence. [His Lordship summarised the averments.] The appellant argued to me that the consent given by the trustee was *ex facie* bad, as it did not bear to have been granted with the approval of the commissioners upon the bankrupt estate, and upon this ground it was maintained that I ought, without inquiry, to reverse the deliverance pronounced by the trustee. Section 176 of the Bankruptcy Act, upon which this argument is founded, provides: 'The trustee may, with consent of the commissioners, compound and transact or refer to arbi-

on Mr Hamilton's sequestrated estate this would be the legal result. The Mar. 7, 1913.
 discharge itself is produced, and it is therefore incumbent upon the Bank
 to show that it was granted with such consent. The appellant contended, Hamilton's
 in the first place, that no relevant averment of such consent was set forth in Executor v.
 answer 9, which is the part of the Bank's record which deals with this Bank of
 matter, and alternatively that, assuming that the letter of 17th December Scotland.
 1909 founded on is according to its terms a sufficient consent to the dis- Lord Salvesen.
 charge in question, it was invalidated by the circumstances under which it
 was granted, as averred in cond. 9. Of these averments the appellant asks
 a proof. [His Lordship dealt with an objection to the letter by Mr Hamil-
 ton's trustee consenting to Mr Hunter's discharge, with which this report is
 not concerned.]

The second objection raises a point of law. The appellant contended that
 as the letter does not bear to have been granted with the consent of the
 commissioners, and it being admitted that there is no minute signed by them
 authorising the trustee to consent, no consent binding on the bankrupt's
 estate has in fact been given. This argument was based on section 176 of
 the Bankruptcy Act, 1856, which provides that "the trustee may, with
 consent of the commissioners, compound and transact or refer to arbitration
 any questions which may arise in the course of the sequestration regarding
 the estate, or any demand or claim made thereon." I agree with the Lord
 Ordinary that this section does not apply. I think the words "compound
 and transact" are really equivalent to "compromise." To hold otherwise
 would be in effect to decide that the trustee cannot transact any business
 in connection with the bankrupt estate without the consent of the commis-
 sioners. Their duties are defined by section 85, and while under that section
 it is imperative that they shall concur with the trustee in submissions and
 transactions, and while upon them is laid the duty of deciding as to the
 paying or postponing payment of a dividend, there is no indication that
 their concurrence in other acts of management by the trustee is essential to
 their validity. One of the most important duties of a trustee is to adjudicate
 on claims lodged on the estate, and the deliverance of the trustee himself in
 a general sense is as much a "transaction" as the granting of a consent to
 the discharge of a co-cautioner. The fallacy underlying the appellant's
 argument is that, dissociating the word "transact" from the word "com-

tration any questions which may arise in the course of the sequestration
 regarding the estate, or any demand or claim made thereon, and the com-
 promise, transaction, or decree-arbitral shall be binding on the creditors
 and the bankrupt.' In my opinion this section does not apply. The Bank
 had already made a contract with Mr Hunter, and what occurred was not a
 compounding or transaction of a claim or demand in the sequestration within
 the meaning of the language used in the section. Further, the appellant
 has made no averment and founded no plea upon the absence of the com-
 missioners' consent to the course pursued by the trustee. I was informed
 at the bar that the commissioners had in fact approved what was done.
 Had I, therefore, taken a different view of the scope of the section referred
 to, I should not have disposed of this part of the case without an amend-
 ment of the record and proof or admission of the facts bearing upon the
 question of consent or absence of consent of the commissioners. . . .

"Upon the whole matter, I sustain the first plea for the respondents,
 and dismiss the appeal."

Mar. 7, 1913. pound," with which it is connected in section 176, he erroneously treats it as equivalent to "act." I am therefore for repelling this objection. Hamilton's Executor v. Bank of Scotland. [His Lordship dealt with another objection with which this report is not concerned.]

Lord Salvesen. The next contention which it is necessary to notice is that the Bank gave time to the principal debtor without the consent of the cautioners, and thereby released the latter from their obligation. The averments on this head are said to be contained in cond. 5 and the letters there referred to. In my opinion they fall short of what is necessary in order to sustain such a plea. It is noteworthy that, while there is a quite definite plea on this head, the words "giving time" or any equivalent form of expression do not occur in the condescendence. It has been often held that mere delay on the part of a creditor in enforcing his demand against the principal debtor will not discharge the cautioner. A creditor whose claim is sufficiently guaranteed has no motive to press the principal debtor for payment. If the cautioner considers that the payment ought to be exacted, he can either pay up the amount due to the creditor and proceed to enforce the debt as his assignee, or he can, as in the case of *Doig*,¹ without taking this course call upon the principal debtor to free and relieve him of the liability he has undertaken. Either of these remedies would be barred by the creditor having postponed his right to exact payment by an arrangement with the debtor; but the appellant makes no sufficient averment of such an arrangement. It may well be that it would have been inconsistent with the attitude taken up by the Bank in continuing to finance the principal debtor that they should have instantly demanded payment of his debt; but the appellant must in effect aver that they had disabled themselves from doing so in order that the plea of giving time can be relevantly proponed. This he has nowhere done.

In this view it is unnecessary to consider what is the effect of the clause in the original letter of guarantee, under which it was expressly agreed that the Bank might at their discretion grant to the principal debtor any time or other indulgence without discharging the liability of any of the cautioners. It was argued on behalf of the appellant that so soon as he revoked the guarantee this condition became inoperative. I was at first much impressed with the argument presented on this subject, and I think that circumstances may easily be figured where, if the creditor, notwithstanding the protest of a particular cautioner who had revoked the guarantee, disabled himself from suing the debtor, he could not plead the clause in the original letter of guarantee as entitling him to hold the cautioner still bound. But there is nothing of the kind in the present case, and the so-called revocation by itself primarily operates so as to stop further advances to the principal debtor on the credit of the revoking cautioner. In these circumstances I am of opinion that the conditions on which the original guarantee was granted remained operative, and if the Bank in good faith granted time to the debtor, their so doing would not necessarily free the cautioner from his liability. [His Lordship then dealt with another objection with which this report is not concerned.]

LORD DUNDAS and LORD GUTHRIE concurred.

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Lord Dundas intimated that the LORD JUSTICE-CLERK, who was absent at the advising, also concurred in Lord Salvesen's opinion.

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THE COURT adhered.

MACKAY & YOUNG, W.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

THE SCOTTISH INSURANCE COMMISSIONERS, Petitioners.—

No. 102.

Sol.-Gen. Anderson—A. R. Brown.

THE ROYAL INFIRMARY OF EDINBURGH, Respondents.—

Mar. 8, 1913.

Macmillan, K.C.—Hon. W. Watson.

Insurance — National Insurance — Employment — Contract of service — Medical staff of infirmary—Master and Servant—National Insurance Act, 1911 (1 and 2 Geo. V. cap. 55), sec. 1 (1) and (2), and First Schedule, Part I (a).

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surance Com-
missioners v.
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Infirmary.

The National Insurance Act, 1911, enacts, Part I. section 1 (1) and (2), and First Schedule, Part I. (a), that persons employed within the meaning of the Act shall include all persons who are engaged in any "employment in the United Kingdom under any contract of service."

Held that persons appointed to act in an infirmary (1) as resident physicians and resident surgeons; (2) as non-resident house physicians, non-resident house surgeons, and clinical assistants; and (3) as supervisors of the administration of anaesthetics, were not persons employed within the meaning of the Act, in respect that, as the managers of the infirmary had no control over the manner in which these members of the staff carried out their treatment of the patients, no contract of service existed between them.

ON 30th January 1913 the Scottish Insurance Commissioners, established under the National Insurance Act, 1911, presented a petition, in accordance with the provisions of section 66 thereof, for the decision by the Court of a question which had arisen under that Act.

The petition, after quoting the sections of the Act affecting the question,* proceeded as follows:—

* The National Insurance Act, 1911 (1 and 2 Geo. V. cap. 55), Part I., enacts:—

Sec. 1 "(1). Subject to the provisions of this Act all persons of the age of sixteen and upwards who are employed within the meaning of this part of this Act shall be, and any such persons who are not so employed but who possess the qualifications hereinafter mentioned may be insured in manner provided in this part of this Act, and all persons so insured (in this Act called 'insured persons') shall be entitled, in the manner and subject to the conditions provided in this Act, to the benefits in respect of health insurance and prevention of sickness conferred by this part of this Act.

"(2) The persons employed within the meaning of this part of this Act (in this Act referred to as 'employed contributors') shall include all persons of either sex, whether British subjects or not, who are engaged in any of the employments specified in Part I. of the First Schedule to this Act, not being employments specified in Part II. of that Schedule."

Part I. (a) of the First Schedule is in the following terms:—

"(a) Employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether expressed or

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"A question has arisen as to whether the classes of employment hereinafter specified are employment within the meaning of Part I. of the Act, and the petitioners desire, instead of themselves deciding the question, to submit the same for the decision of your Lordships in terms of section 66 (1) (iii.) above recited. The classes of employment to which this application relates are employments at the Royal Infirmary of Edinburgh of (a) resident physicians and resident surgeons; (b) non-resident house physicians and non-resident house surgeons and clinical assistants; and (c) supervisors of the administration of anæsthetics.

"The material facts relative to the above-mentioned classes of employment, so far as the petitioners have been able to ascertain, are as follows:—

"(a) *Resident Physicians and Resident Surgeons.*

"Resident physicians and resident surgeons at the Royal Infirmary of Edinburgh are appointed by the Board of Managers on the recommendation of the respective members of the honorary medical and surgical staff, to whom they are to be attached. They reside within the Infirmary, and the duties which they are appointed to perform are the care and treatment of patients in the institution. No one is eligible for appointment who is not a duly registered practitioner. Each resident physician and resident surgeon is responsible to the physician or surgeon under whom he acts for the treatment and professional care of all patients under his charge, and is subject to his control in these matters. He is responsible to the superintendent of the Infirmary for the discipline and general conduct of the wards. He exercises supervision over the conduct of the nurses attached to his wards. The appointments run for periods of six months from 1st October in one year to 31st March in the next, and from 1st April to 30th September in the same year.

"The resident physicians and resident surgeons are bound to observe the regulations prescribed by the managers, a print whereof is herewith produced and referred to. Every applicant for appointment as

implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece, or partly by time and partly by the piece, or otherwise, or, except in the case of a contract of apprenticeship, without any money payment."

Part II. of the First Schedule contains, *inter alia*, the following provisions, viz:—

"EXCEPTIONS.

"(g) Employment otherwise than by way of manual labour and at a rate of remuneration exceeding in value £160 a year, or in cases where such employment involves part time service only, at a rate of remuneration which, in the opinion of the Insurance Commissioners, is equivalent to a rate of remuneration exceeding £160 a year for whole time service."

"(h) Employment of a casual nature otherwise than for the purposes of the employer's trade or business, and otherwise than for the purposes of any game or recreation where the persons employed are engaged or paid through a club, and in such case the club shall be deemed to be the employer."

a resident physician and resident surgeon is required to fill up a printed form of application, which is in the following terms:—

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“The Royal Infirmary,
“Edinburgh, 19 .

“The Right Honourable and Honourable
the Managers of the Royal Infirmary.

“My Lords, Ladies, and Gentlemen,—I beg to apply for the appointment of , to the

under the charge of , for six months from , and undertake, in the event of your granting my application, not to relinquish my duties prior to the expiry of that period, unless I shall previously have obtained your sanction to my so doing.—I am, my Lords, Ladies, and Gentlemen, your obedient servant,

“‘(State qualifications here.)’

“There is no salary attached to the office. Each resident receives board and lodging free, and an allowance of £2, 10s. in lieu of laundry for the period of his engagement. The value of the board and lodging, taken along with the said allowance, does not exceed £160 per year.

“(b) *Non-Resident House Physicians, Non-Resident House Surgeons, and Clinical Assistants.*

“Non-resident house physicians, non-resident house surgeons, and clinical assistants are appointed by the Board of Managers on the recommendation of the respective members of the honorary medical and surgical staff, to whom they are to be attached. They must be duly qualified medical men, and a number of them subsequently become resident physicians and resident surgeons on completing their term of six months as clinical assistants. Their duties are to assist in the care and treatment of patients. They are occupied in the performance of their duties for two or three hours daily on an average. Their appointment remains in force for six months, but may be renewed by the Managers for a further period of similar duration. Each is responsible to and under the control of the physician or surgeon under whom he acts professionally, and to the Superintendent of the Infirmary for the discipline and general conduct of his wards or department when such is under his charge.

“They are subject to the regulations above referred to so far as is compatible with non-residence in the Infirmary. Each applicant for appointment is required to fill up the form of application above quoted.

“There is no remuneration for the work, but a number of the holders of the office are allowed lunch at the residency.

“(c) *Supervisors of the Administration of Anæsthetics.*

“These are appointed by the Board of Managers on the recommendation of the various members of the honorary staff to whom they are to be attached. They must be duly qualified medical practitioners. The holders of the office are generally young medical men who have commenced practice on their own account, and who may also be acting as private assistants to surgeons and specialists. Their duties are to supervise and direct the administration of anæsthetics in the various operating theatres of the institution. Each supervisor is attached to a particular surgeon under whose directions he acts, and whom he attends when required. The physician or surgeon is entitled to give directions to the administrator not only as regards the time, place, and

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general mode of performance of his duties, but also as regards the particular method of administration, including the prescribing of the particular anæsthetic to be administered. The Board of Managers regard the physician or surgeon and not the administrator as the person responsible.

"The said supervisors are subject to the before-mentioned regulations and also to the further 'rules for supervisors of the administration of anæsthetics,' adopted 21st October 1912, a print of which is produced. The time occupied in the performance of their duties varies from one to two hours per day on an average.

"They receive an honorarium of £20 per annum, a rate of remuneration which, in the petitioners' opinion, is not equivalent to a rate of remuneration exceeding £160 a year for whole time service.

"All the members engaged in the three classes of employment (a), (b), and (c) above specified are liable to be suspended by the Superintendent for any insubordination or improper conduct, or any infraction of the said regulations."

Answers were lodged for the Royal Infirmary of Edinburgh, in which it was stated:—" (2) These respondents maintain that the three classes of persons—(a), (b), and (c), referred to in the petition—are not employed within the meaning of Part I. of the National Insurance Act, 1911, and that there is not a contract of service between any of these persons and the respondents or the Board of Managers on their behalf within the meaning of Part I. (a) of the First Schedule to said Act. On an application made to them under section 66 (a) of said Act, and after a public hearing, the English Insurance Commissioners under said Act have decided as follows, viz.:—'That resident medical officers at hospitals employed under the conditions referred to at the hearing on the 22nd October 1912 are not employed under a contract of service within the meaning of the National Insurance Act, and are accordingly not required to be insured thereunder, even if their rate of remuneration does not exceed in value £160 a year.' (3) In any event, these respondents maintain that the supervisors of the administration of anæsthetics constitute a class of employment excepted from the operation of the Act under Part II. (A) of the First Schedule to the Act. . . ."

Counsel were heard before the First Division (without Lord Macenzie) on 8th March 1913.

Argued for the petitioners;—The question raised in this petition was whether these various classes of professional gentlemen had entered into contracts of service with the Managers of the Infirmary. There was no necessary implication that because they were professional men they could not be the servants of the managers.¹ Although similar questions arising under this statute with regard to clergymen had been decided in England against the view that was presented here by the petitioners,² these decisions did not rule the present case, because they proceeded on the ground that a clergyman was not employed but was appointed to an office. At the same time, the

¹ *Hillyer v. Governors of St Bartholomew's Hospital*, [1909] 2 K. B. 820, *per* Farwell, L.J., at p. 825; *Foot v. Directors of Greenock Hospital*, 1912 S. C. 69.

² *In re Employment of Church of England Curates*, [1912] 2 Ch. 563; *In re Employment of Ministers of United Methodist Church*, (1912) 28 T. L. R. 539.

position occupied by the medical staff here satisfied the three tests of Mar. 8, 1913. employment laid down in the *Church of England Curates* case, by Parker, J.,¹ with regard to appointment, power of dismissal, and duties owed. With respect to the duties owed, the relation of master and servant existed where the employer had control of the services of the employed.² In the present case the managers had control of the services of these gentlemen as to the time, the place, and the manner of the performance of the services, and it was immaterial whether the immediate control of the treatment of the patients was exercised by the managers directly or through their representatives, the honorary physician or surgeon.³

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Argued for the respondents;—The persons concerned were not employed under contracts of service. Their contracts with the managers were contracts for services, which were clearly recognised in law as being something different from contracts of service.⁴ The root idea of a contract of service was that a servant was "a person subject to the commands of his master as to the manner in which he shall do his work."⁵ The essential matter was not whether there was control over the persons rendering the services, but whether this control extended over the actual services rendered.⁶ Any control which the managers had over these professional gentlemen was as to the hours and place of the performance of their duties, but not as to the method in which the duties should be performed. All that the managers undertook to provide was a competent medical staff, but they neither did, nor professed to, control the manner in which medical treatment was carried out.⁷ The case of *Walker*⁸ was distinguishable in the latter respect; there the profession of the football club was, by means of hired players, to provide a game of football.

LORD PRESIDENT.—This is a petition presented by the Scottish Insurance Commissioners under the National Insurance Act, 1911, in terms of the provisions of section 66 of the Act, which provides that "if any question arises (a) as to whether any employment or any class of employment is or will be employment within the meaning of this part of this Act," the Commissioners may, if they think fit, instead of deciding that question themselves, submit it for decision to the Court. The particular question that

¹ [1912] 2 Ch., at p. 570.

² Pollok on Torts, (9th ed.) p. 81; *Simmons v. Heath Laundry Co.*, [1910] 1 K. B. 543; *Walker v. Crystal Palace Football Club, Limited*, [1910] 1 K. B. 87.

³ *Walker v. Crystal Palace Football Club, Limited*, [1910] 1 K. B. *per* Cozens-Hardy, M.R., at p. 92.

⁴ *Simmons v. Heath Laundry Co.*, [1910] 1 K. B. 543, *Fletcher Moulton, L.J.*, at p. 549.

⁵ *Yewens v. Noakes*, (1880) 6 Q. B. D. 530, *per* Bramwell, L.J., at p. 532.

⁶ *Simmons v. Heath Laundry Co.*, [1910] 1 K. B. 543, *per* Fletcher Moulton, L.J., at p. 549; *Hall v. Lees*, [1904] 2 K. B. 602, *per* Collins, M.R., at p. 614.

⁷ *Evans v. Liverpool Corporation*, [1906] 1 K. B. 160, *per* Walton, J., at p. 166; *Murphy v. Enniscorthy Guardians*, [1908] 2 I. R. 609; *Hillyer v. Governors of St Bartholomew's Hospital*, [1909] 2 K. B. 820, *per* Farwell, L.J., at p. 825, and *Kennedy, L.J.*, at p. 829; *Foot v. Directors of Greenock Hospital*, 1912 S. C. 69.

⁸ *Walker v. Crystal Palace Football Club, Limited*, [1910] 1 K. B. 87.

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has been submitted to us is as regards three classes of persons in connection with the Royal Infirmary of Edinburgh, to wit, the resident physicians and the resident surgeons; the non-resident house physicians, non-resident house surgeons, and clinical assistants; and the supervisors of the administration of anæsthetics.

The facts bearing upon the position of these various classes of persons are set forth in the petition, and there is no difference of opinion as to their being correctly set forth. Roughly speaking, it comes to this, that the resident physicians and the resident surgeons are appointed for periods of six months, that they have to reside in the Infirmary, and that their duties are in connection with the patients, they being subordinated in all matters of professional treatment and care of the patients under their charge to the honorary physicians and surgeons. Then the non-resident house physicians and non-resident house surgeons and the clinical assistants, not being residents, do not give their services at all times of the day; in the same way, supervisors of the administration of anæsthetics are only present if necessity calls for them in operations. In the carrying out of his work a member of any of these classes of persons is either the senior medical man present, in which case he is himself the judge of what is the proper course of treatment to be carried out at the moment, or he is acting with senior physicians or surgeons, in which case he is under the orders of whoever is the head physician or surgeon present at the moment. In no case is he, or can he be, interfered with by the Managers of the Infirmary in his treatment of the patients.

Now the Act provides:—[His Lordship quoted section 1 and Part I. of the First Schedule]. The matter, therefore, seems to turn entirely upon whether these people are employed under a contract of service. I am of opinion that they are not. Various cases have been quoted to us by which the subject has certainly been illuminated. And it cannot be more tersely put than it has been put by Fletcher Moulton, L.J., in *Simmons v. Heath Laundry Company*,¹ where he says the question depends on whether the matter is a contract of service or a contract for services. It is a very convenient way of expressing the real question at issue. I think this is a contract for services and not one of service. The test is, I think, as Mr Macmillan put it to us, control in the matter of service rendered. There are many cases where there is a proper control of service and yet, when you come to the details of how that service is carried out, there is no practical control, because there may be skill in the servant which the master does not possess; indeed the servant is often engaged solely because he happens to possess skill which the master does not possess, but nevertheless, in the general direction of what the servant is or is not to do, the master is supreme.

Now if the business of the Infirmary Managers was to treat the patients, then there might be control; but that is not the business of the Infirmary Managers, as is pointed out in the case of *Hillyer v. Governors of St Bartholomew's Hospital*,² which was quoted to us. The managers of a hospital do not go to the public with a profession of themselves operating on or

¹ [1910] 1 K. B. 543, at p. 549.

² [1909] 2 K. B. 820.

nursing or treating patients. They only hold themselves out as providing an institution where patients will be able to meet with skilled persons who will do those things. And that is the real distinction between this case and the case of *Walker v. Crystal Palace Football Club, Limited*,¹ because the latter case, I think, is only supportable upon the view that the profession of the company there was to provide a game of football, and, as they could not do this themselves, they could only do it through employees, whom they accordingly hired for the purpose of doing that which they could not do themselves, but which was their business. Here the treatment of the patients is not the business of the Infirmary Managers. All the Managers do is to provide the Infirmary; when it comes to the treatment, that is done by the skilled persons who give their services gratuitously or upon very inadequate terms.

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surance Com-
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Accordingly I am of opinion that we should answer the question by saying that these persons, one and all of them, do not fall within the expression "contract of service," and, consequently, are not employed within the meaning of the Act.

LORD KINNEAR.—I am of the same opinion, and for the reasons your Lordship has given. I think that the relation of master and servant has not been established between the Governors of the Infirmary and the resident physicians and surgeons and others referred to in this petition. These gentlemen are not employed by the Infirmary, as I understand it, under a contract of service, and the Governors of the Infirmary have, accordingly, no power to regulate their treatment of patients or even to interfere with their treatment in any way whatever. They are subject to the orders and at the disposal of the honorary physicians and surgeons, but not of the Governors of the Infirmary. I think that any apparent difficulty which might arise at first sight upon the statement of this question is completely removed by a correct definition of the expression "contract of service," because the relation of master and servant exists only between persons of whom one has the order and control of the work done by the other, not only as regards its object, but also as regards the method of execution. It is satisfactory to know that the view which your Lordship has taken has the authority both of the Court of Appeal in England and of the Chief Justice in America, whose judgment is cited by that Court.

LORD JOHNSTON.—I concur with your Lordships, and have nothing to add.

THE COURT found that the classes of employment mentioned in the prayer of the petition were not employments within the meaning of Part I. of the Act.

JAMES WATT, W.S.—HOPE, TODD, & KIRK, W.S.—Agents.

¹ [1910] 1 K. B. 87.

No. 103.

HENRY CAMPBELL, Pursuer.—*A. M. Mackay.*
OSBORNE & HUNTER, Defenders.

Mar. 8, 1913.

Campbell v.
Osborne &
Hunter.*Process—Jury trial—Transmission of cause for trial at sittings—Failure to lodge papers within time specified in Rolls of Court—Act of Sederunt, 19th November 1910, sec. 3.*

The Act of Sederunt, 19th November 1910, enacts, sec. 3, that where the Lord Ordinary has issued an interlocutor ordering a cause to be tried at the sittings, the process shall forthwith be transmitted to the Clerk of the Division, and that copies of certain papers shall also be handed to the Keeper of the Rolls.

The Lord Ordinary having on 20th February made such an order, the agent responsible tendered the necessary papers to the Keeper of the Rolls on the afternoon of 5th March, but the Keeper refused to accept them, on the ground that, under a notice inserted in the Rolls of Court, midday of 5th March was the latest time at which they could be received.

On a note for authority to the Keeper to receive the papers and include the cause among those to be taken at the sittings, the Court refused to grant that authority, but instead thereof discharged the Lord Ordinary's order, and remitted to him to proceed.

1st DIVISION. ON 12th December 1912 Henry Campbell brought an action of damages against Osborne & Hunter.

Lord
Skerrington.

On 18th February 1913 the Lord Ordinary (Skerrington) approved of an issue, and appointed Friday, 4th July, as a diet for the trial of the cause.

On 20th February the Lord Ordinary, on the motion of the pursuer, the defender not objecting, discharged the diet for 4th July, and appointed the issue to be tried at the sittings in the ensuing vacation.*

On 28th February 1913 a notice appeared in the Rolls to the effect that the sittings of the Divisions for jury trials in the ensuing vacation would begin on 22nd March. A note was appended in which agents were referred to the Act of Sederunt of 19th November 1910, and in which it was intimated that the prescribed papers should be handed to the Keeper of the Rolls of the appropriate Division not later than 12 o'clock noon on the 5th March, and that otherwise the case would not be taken at the sittings.

On the afternoon of 5th March the pursuer's agent tendered the prescribed papers, viz., a copy of the Lord Ordinary's interlocutor and a print of the record and issue, to the Keeper of the Rolls of the First Division, but the latter refused to accept them or to include the cause in the Roll of jury trials for the ensuing vacation.

The pursuer thereupon presented a note in which he prayed the Lord President "to move the Court to grant authority to the Keeper of the

* The Act of Sederunt, 19th November 1910, enacts that where a party has given notice that he wishes a cause to be tried at the sittings, and where the Lord Ordinary has pronounced an interlocutor to that effect, (sec. 3) " . . . the process shall forthwith be transmitted by the agent of the party giving such notice to the Clerk of the Division to which the cause is marked. A copy of the Lord Ordinary's interlocutor allowing the trial to proceed at the sittings along with a print of the closed record and of the adjusted issue or issues shall also be handed to the Keeper of the Rolls of such Division."

Rolls to receive the said copy interlocutor and print, and thereafter ^{Mar. 8, 1913.} to include the present cause in the list of causes for trial at the forthcoming sittings before the First Division, and to publish the name of ^{Campbell v. Osborne & Hunter.} the same in the appropriate Rolls of Court, or otherwise to postpone the hearing in the present cause from the forthcoming sittings for jury trials till a date to be afterwards fixed, and to remit the cause to the Lord Ordinary with power to fix of new a diet for the trial of the cause . . . ; and on 8th March his counsel, in the Single Bills of the First Division (the Lord President being absent), moved for an order in terms of the first crave of the note, or alternatively of the second crave.

THE COURT, without delivering opinions, pronounced this interlocutor:—"Having considered the note for the pursuer, on his motion discharge the order for trial of the cause at the sittings in the ensuing vacation, and remit to the Lord Ordinary to proceed as accords."

ST CLAIR SWANSON & MANSON, W.S., Agents.

MRS FANNY SUSANNAH COPELAND OR BARKWORTH, Petitioner.—

Horne, K.C.—MacRobert.

JOHN EDMUND BARKWORTH, Respondent.—*Wilson, K.C.—*

Lord Kinross.

No. 104.

Mar. 12, 1913.

Barkworth v.
Barkworth.

Jurisdiction—Husband and wife—Access to children—Jurisdiction to entertain petition for access where spouses have foreign domicile—Expenses—Parent and child—Minor and pupil.

In an action at the instance of a husband for divorce on the ground of his wife's desertion, the Lord Ordinary repelled a plea of no jurisdiction and granted decree. Thereupon the wife, who resided in England, presented a petition for access to the minor children of the marriage, whose residence was with their father in Scotland. While the petition was still pending, the Court, on a reclaiming note, recalled the Lord Ordinary's interlocutor in the action of divorce and sustained the plea of no jurisdiction, on the ground that the husband's domicile was English.

Thereafter they *dismissed* the petition for access, *holding* that it followed from the previous decision that they had no jurisdiction to entertain it; but *allowed* the wife her expenses in the petition, on the ground that, at the time she presented it, she was entitled to do so.

ON 26th September 1912 Mrs Fanny Susannah Copeland or Bark-^{1ST DIVISION.} worth, residing in London, presented a petition for access to the children of the marriage between her and John Edmund Barkworth, residing at Edrom, in Berwickshire. It was stated in the petition that the parties were married in 1894, and that there were three children of the marriage, a boy born in 1895 and a boy and a girl born in 1896; that the children were living with their father; and that the spouses had lived apart since 1897. It appeared in the course of the proceedings that all the children were at school in England. Answers were lodged by Mr Barkworth on 16th October 1912.

On 25th October 1911 an action of divorce for desertion had been brought by the husband against the wife. In this action the Lord Ordinary (Dewar), by interlocutor dated 6th February 1912, repelled a plea by the wife of no jurisdiction, and, by interlocutor dated 9th

Mar. 12, 1913. July 1912, granted decree of divorce. The wife had reclaimed against this latter interlocutor at the date when the petition for access was presented.

Barkworth v.
Barkworth.

On 4th February 1913 the First Division, after hearing counsel upon the reclaiming note in the action of divorce, recalled the Lord Ordinary's interlocutors and dismissed the action on the ground of no jurisdiction, the Court holding that the husband's domicile was English.

Counsel were heard upon the petition and answers before the First Division (without Lord Kinnear) on 18th February 1913.

At the hearing the question whether the Court had jurisdiction to entertain the petition was raised by the Court, and it was argued for the petitioner that the Court had jurisdiction, in respect that the home of the father and children, to which the latter returned in their holidays, was in Scotland. No argument on this question was submitted for the respondent, who took no exception to the jurisdiction of the Court.

At advising on 12th March 1913,—

LORD PRESIDENT.—This is a petition at the instance of a married lady, and the prayer of the petition is that the Court should give certain orders as to allowing her access to her children.

When the petition was brought affairs were in this position: An action of divorce for desertion had been brought by the husband against the wife, and on 9th July 1912 the Lord Ordinary, who had previously repelled a plea of no jurisdiction which had been tabled by the defender, pronounced decree of divorce. This petition was boxed upon 26th September 1912. A reclaiming note was taken against the decree of divorce, and when that reclaiming note came up here in the month of February 1913 the interlocutor of the Lord Ordinary was recalled, upon the ground that there was no jurisdiction in the matter, the Division holding that the domicile of the husband was not Scottish but was English.

That fact seems to me to alter entirely the position of affairs when this petition was presented, because we have this petition now at the instance of a lady who has successfully pled, in the action of divorce, that the marriage is not liable to be dissolved by the Scots Court because of want of jurisdiction over the spouses. I think that that fact involves as a corollary the dismissal of this petition, for I think it is impossible that we should have no jurisdiction to settle the question of the marriage and, at the same time, have a jurisdiction to deal with the family arrangements about the children. The parties to this petition are at this present moment married people. If the wife does not choose to live with the husband that is her own matter, but I am quite clear that if she wants any redress upon the question of the children she must apply for it in the Court where the domicile of the spouses is, namely, the Court of England. The only fact in regard to the husband is that he has got a house and lives in Scotland. The children themselves are in England for a large part of the year, because they are at school there. I need scarcely say that if there was any order of the English Court upon the matter we should give the assistance of this Court to see that it was carried out in Scotland, but as matters stand I think the petition falls to be dismissed.

I think the petitioner here is entitled to her expenses. I do not go upon Mar. 12, 1913. any question of the conduct of the parties because that would be deciding Barkworth v. upon a fact as to which I know nothing, but I think that, in the position Barkworth. in which the wife was, namely, a wife divorced for desertion and the husband not seeing eye to eye with her as to what access should be given to her children, she was entitled to bring the petition at the time she did. Ld. President.

LORD JOHNSTON.—I agree with your Lordship.

LORD MACKENZIE.—I also agree.

THE COURT dismissed the petition, but found the petitioner entitled to expenses.

BELL, BANNERMAN, & FINLAY, W.S.—GILLESPIE & PATERSON, W.S.—Agents.

MRS MARY GIBB OR M'EWEN AND OTHERS, Pursuers (Appellants).— No. 105.
Sandeman, K.C.—Hon. W. Watson.
 STEEDMAN & M'ALISTER, Defenders (Respondents).— *Wilson, K.C.—* Mar. 13, 1913.
Paton. *M'Ewen v. Steedman & M'Alister.*

Expenses—Nuisance—Remedial measures—Remit to ascertain effect—Expenses of remit.

During the course of an action for interdict of a nuisance the existence of the nuisance was established, and the defenders then executed certain remedial measures, which, however, the pursuers maintained had been unsuccessful. The Court thereupon remitted the matter to a man of skill, who reported that the nuisance had been effectually removed.

Circumstances in which the Court allowed the defenders the expenses of the remit.

(REPORTED *ante*, 1912 S. C. 156.)

On 6th October 1909 Mrs M'Ewen and others brought an action against Steedman & M'Alister to interdict them from working a gas-engine in premises occupied by them in Ardgowan Street, Glasgow, so as to cause vibration to adjoining premises of which the pursuers were proprietors, and to be a nuisance to the tenants and occupiers thereof.

On 21st November 1911 the Court found the nuisance proved, but, without granting interdict, allowed the defenders an opportunity of taking remedial steps for the removal of the nuisance.*

The defenders thereupon executed certain remedial works, and communicated with the pursuers, who replied that their engineer now "found little or nothing to complain of," but that their factor maintained that "the vibration continues just as before," and that all their tenants had signed a memorandum to the effect that "the vibration is in no way abated."

On 21st February 1912 the defenders moved the Second Division to find that the remedial works were satisfactory, and that in respect thereof it was unnecessary to grant interdict. The motion was opposed by the pursuers, and the Court, on the same date, remitted to Professor Hudson Beare to report whether the remedial measures were effective or not. He reported that the measures were effective.

2D DIVISION.
 Sheriff of
 Lanarkshire.

* Reported *ante*, 1912 S. C. 156.

Mar. 13, 1913. On 13th March 1913 the defenders of new moved the Court to find that the remedial works were satisfactory and that interdict should be refused. They also moved that the pursuers should be found liable in the expenses of the remit.

M'Ewen v.
Steedman &
M'Alister.

The pursuers opposed the motion for expenses and argued;—If the Court delayed granting interdict after the nuisance had been proved in order to give the defenders an opportunity of executing remedial measures, that was an indulgence to the defenders and the pursuers were entitled to be kept *indemnes* until the Court was satisfied that the nuisance had been abated. The method which the Court chose of satisfying itself that the nuisance was abated, was to remit to a neutral expert, and the expenses of that remit should be borne by the defenders.¹ The pursuers acted reasonably in opposing the defenders' motion on 21st February for they had good reason to suppose that the nuisance still continued.

Argued for the defenders;—The expenses of the remit had been occasioned by the improper and ill-founded opposition of the pursuers to the defenders' motion on 21st February, and accordingly these expenses should fall on the pursuers.

THE COURT, without delivering opinions, pronounced an interlocutor finding that the remedial works were satisfactory, and that it was unnecessary to grant interdict, dismissing the petition, and finding the pursuers entitled to additional expenses up to 21st February 1912, and the defenders entitled to expenses since that date, including the expenses of and incident to the report.

CUMMING & DUFF, S.S.C.—GRAHAM MILLER & BRODIE, W.S.—Agents.

No. 106. WATSON, LAIDLAW, & COMPANY, LIMITED, Pursuers (Reclaimers).—*Clyde, K.C.—Sandeman, K.C.—R. B. King.*

Mar. 14, 1913. POTT, CASSELS, & WILLIAMSON AND OTHERS, Defenders (Respondents).—*D.-F. Dickson—Macmillan, K.C.—Normand.*

Watson,
Laidlaw, &
Co., Limited,
v. Pott,
Cassels, &
Williamson.

Patent—Infringement—Measure of damages.

In an action by a patentee for damages in respect of the sale of articles infringing his patent, the measure of damages may *prima facie* be taken to be the amount of profit which the pursuer would have obtained if he had himself effected the sales wrongfully effected by the defender. But the amount of damages so ascertained will be diminished if, and to the extent to which, it appears on a consideration of circumstances such as the nature of the trade, the area of its exercise, the volume of competition, and the defender's energy and skill in pushing trade upon the market, that the pursuer would not have effected these sales himself.

Opinion (per Lord Dundas and Lord Salvesen) that there may be circumstances in which a pursuer may also fairly claim, as an item of damages, that he has been compelled, owing to the defender's illegal competition, to sell some of his patented articles at a lower price than formerly.

¹ Dodd v. Hilson, (1874) 1 R. 527.

(Reported *ante*, on a question of relevancy, 1909 S. C. 1445.)

Mar. 14, 1913.

On 9th March 1907 Watson, Laidlaw, & Company, Limited, engineers, Glasgow, brought an action against Pott, Cassels, & Williamson, Laidlaw, & engineers, Motherwell, and the individual partners of the firm. The Co., Limited, conclusions of the action were (1) for interdict against the defenders v. Pott, Cassels, & Williamson. infringing a patent belonging to the pursuers, and (2) for £5000 in name of damages.

Defences were lodged, in which the validity of the pursuers' patent was challenged. A proof was led as to this matter, the question of damages being by arrangement held over; and on 9th June 1910 the Second Division, on a reclaiming note from an interlocutor of Lord Salvesen, pronounced an interlocutor interdicting the defenders from infringing the pursuers' patent, and remitting to Lord Dewar to dispose of the question of the amount of damages due for the infringement.¹ The defenders having appealed against this interlocutor, the House of Lords was equally divided as to the validity of the patent, and the appeal was dismissed.²

2D DIVISION.
Lord Dewar.

The defenders then made a tender of £1500. This tender was refused, and a proof was led before Lord Dewar on the question of the amount of damages, the import of which appears from the opinions of Lord Dundas and Lord Salvesen, *infra*.

On 30th March 1912 Lord Dewar pronounced an interlocutor decerning against the defenders for payment of £1500 in full of damages.*

Against this interlocutor the pursuers reclaimed, and the case was heard before the Second Division on 27th and 28th February and 1st March 1913.

Argued for the reclaimers;—The Lord Ordinary's award of damages was inadequate. The damages claimed were £5000; and loss to this extent was fully proved. The rule as to assessing damages for the infringement of a patent was stated by Lord Kinnear in the case of

¹ Reported (1910) 27 R. P. C. 541.

² Reported (1911) 28 R. P. C. 565, 48 S. L. R. 782.

* "OPINION.—In the year 1907 the pursuers (Watson, Laidlaw, & Company, Limited) raised this action against the defenders (Pott, Cassels, & Williamson) for interdict against the infringement by the defenders of the pursuers' patent, No. 10,034 of 1903, for improvements in centrifugal machines, and for damages laid at £5000. At an early stage parties agreed by joint minute to reserve proof on the question of damages until a judgment on the question of infringement had been obtained. The pursuers obtained judgment, and thereafter the case was remitted to me to dispose of the question of the amount of damages due by the defenders to the pursuers in respect of the manufacture by them of the improvements on centrifugal machines in infringement of said letters-patent.

"I have now taken the proof and read the whole evidence and documents, and considered the authorities to which counsel referred me, and I am of opinion that the loss which the pursuers have sustained through the defenders' infringement of their patent may be fairly fixed at the sum of One thousand five hundred pounds (£1500). As the question is entirely a jury one, and as there did not appear to be any real dispute between parties regarding the elements to be taken into consideration in estimating the pursuers' loss, I do not think that it is either desirable or necessary to give reasons for fixing the amount of damages at the sum I have named. But as the case may, perhaps, go further, it is right that I should add that the witnesses on both sides gave their evidence frankly and fairly."

Mar. 14, 1913. *United Horse Shoe and Nail Company, Limited, v. Stewart & Company*,¹ and his Lordship's opinion was practically affirmed by the House of Lords on appeal.² The subsequent cases³ illustrated the application of the rule in various circumstances. The rule was that, as every sale of a patented article in infringement of the patent was an injury to the patentee, *prima facie* the measure of damage was the profit the patentee would have gained had he carried through the sales effected by the infringer. A certain deduction had to be made from the figure so arrived at, as it was not certain that the patentee would have secured all the sales which the infringers effected. This consideration, however, was not in the present case entitled to the same weight as was given to it in other cases, because here the market for the patented article was very limited, and the parties had practically a monopoly of it; and the difference which turned the scale in favour of one or other of them was the right to the patent. It was not incumbent on the pursuers in claiming damages to show that the volume of their business had diminished.⁴

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Argued for the respondents;—The pursuers had elected to claim damages and not the profits made by the defenders. It was necessary, therefore, for the pursuers to show what their loss was; and the damages would be measured by the amount of their loss.⁵ There were only three ways in which their business could have suffered:—(1) they might have been compelled to reduce their prices—but any claim on this head was rejected as untenable by Lord Macnaghten in *United Horse Shoe and Nail Company, Limited, v. Stewart & Company*⁶; (2) the volume of their trade might have been reduced; or (3) the expansion of their business might have been checked. The figures proved that none of these consequences had ensued on the defenders' competition. The pursuers had entirely failed to show, therefore, that their business had suffered, and only nominal damages could be awarded. The assessment of the damages was a pure jury question,⁷ and there was no general rule or presumption to be followed. But, even assuming there was, as the pursuers contended, a presumption of loss of profit based on the sales made by the defenders, that presumption was displaced in the present case, because it was shown that both parties had always been competing in the market, that the defenders had the most efficient traveller, and that the purchasers of the machines were not aware of the virtues of the patent. Moreover the respondents had acted in *bona fides* in selling their machines.

¹ (1886) 14 R. 266.

² (1888) 15 R. (H. L.) 45, 13 App. Cas. 401.

³ *Boyd v. The Tootal Broadhurst Lee Co., Limited*, (1894) 11 R. P. C. 175; *Meters, Limited, v. Metropolitan Gas Meters, Limited*, (1911) 28 R. P. C. 157.

⁴ On the question of expenses *Jack v. Black*, 1911 S. C. 691, was referred to.

⁵ *United Horse Shoe and Nail Co., Limited, v. Stewart & Co.*, 15 R. (H. L.) 45, *per Halsbury, L.C.*, at p. 45, *Lord Watson*, at p. 48; *Meters, Limited v. Metropolitan Gas Meters, Limited*, 27 R. P. C. 721, *per Eve, J.*, at p. 731, 28 R. P. C. 157, *per Cozens-Hardy, M.R.*, at p. 161; *Frost's Law of Patents*, (4th ed.) vol. i. p. 520.

⁶ 15 R. (H. L.) 45, at p. 50.

⁷ *Pneumatic Tyre Co., Limited, v. Puncture Proof Pneumatic Tyre Co., Limited*, (1899) 16 R. P. C. 209, *per Lord Russell, C.J.*, at p. 214; *Meters, Limited, v. Metropolitan Gas Meters, Limited*, 28 R. P. C. 157.

At advising on 14th March 1913,—

Mar. 14, 1913.

LORD DUNDAS.—On 7th June 1910 this Court decided the question of infringement in favour of the pursuers, and ordered inquiry as to damages. The defenders appealed to the House of Lords; and on 26th June 1911 the appeal was dismissed, the noble and learned Lords being equally divided in opinion. The case is reported in 27 R. P. C. 541 and 28 R. P. C. 565. Proof as to damages has now been led before the Lord Ordinary, who has assessed them at £1500, an amount which coincides with that of a tender by the defenders; the coincidence, I gather, was not accidental. His Lordship observes that “the question is entirely a jury one.” The case is certainly not one which according to our modern practice would be considered suitable for, or would be remitted to, trial by jury; but one can agree with his Lordship’s observation in the sense, which I suppose he meant, that the assessment of damages in a case of this sort can rarely, if ever, be arrived at by a process of exact arithmetical calculation. The Lord Ordinary, however, adds that “as there did not appear to be any real dispute between parties regarding the elements to be taken into consideration in estimating the pursuers’ loss, I do not think that it is either desirable or necessary to give reasons for fixing the amount of damages at the sum I have named.” The debate at our bar seemed to me to demonstrate that there was a large measure of dispute between the parties as to the principles on which damages ought to be assessed and the elements to be considered in doing so. The pursuers maintained that the figure of £5000 claimed in the summons was fairly supported by the evidence; the defenders, while not reclaiming against the Lord Ordinary’s interlocutor, argued that damages have not truly been established beyond a nominal amount. I am unable upon the proof to discover a basis for arriving at a sum in the region of £1500. I therefore greatly regret that the Lord Ordinary has given us no indication of his own views in regard to the rules upon which damages ought here to be assessed or the method by which he reached the figure of £1500. We are left to assess the damage *de novo* upon the evidence and the arguments before us. If upon these materials I could arrive at a figure not widely differing from £1500, I should consider it improper to disturb the Lord Ordinary’s award; but in the absence of any indication as to how that result was reached by his Lordship, or of any figures given in evidence which would, to my mind, justify it, I am bound to say that, for reasons to be stated, I think the pursuers are entitled to a much more substantial amount of damages than the Lord Ordinary has awarded.

We have to ascertain, it may be by rough and ready methods, the amount of loss the pursuers have sustained as the natural consequence in fact of the defenders’ sales of machines containing the pursuers’ patented invention, which the Court has decided to be a useful and meritorious one. The invention consisted of a conical elastic buffer or buffer-bearing for the spindles of centrifugal machines, combining both support and control. The defenders have admittedly sold a large number of machines containing this invention. Each such sale was a legal wrong, and *prima facie* a ground of damages; and the measure of damage is *prima facie* the amount of profit which the pursuers would have made if they had effected these

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Mar. 14, 1913. sales themselves. This view is, I think, a sensible one, and supported by the authorities to which we were referred. But the *prima facie* aspect in any given case may be, more or less readily, and more or less materially, altered by other considerations arising on a purview of the whole circumstances. For example, the nature of the trade in question, the area of its exercise, and the volume of competition must be considered. If the area of trade competition is very wide and the number of rival competitors in the field very numerous, the less reason will there be for assuming that a pursuer would, if the defender had not sold a given number of his patented article, have himself been in a position to effect as large a number of sales and at his usual profit. Again, the *prima facie* presumption may be greatly weakened if it appears that the number of infringing sales was due largely to the superior business energy, skill, and activity of the defender in pushing trade upon the market. Whether or not a pursuer may fairly claim, as an item of damages, that he has been compelled, owing to the defender's illegal actings, to sell some of his machines at a lower price than usual, is, I think, a question to be decided on the circumstances of each case. In the *United Horse Shoe and Nail Company, Limited*¹—an instructive case upon the whole of this subject—Lord Macnaghten considered the claim inadmissible in the circumstances, as he thought the lowering of the price was not the natural or direct result of the infringement, but arose rather from a timorous and half-hearted policy on the pursuers' part; but the Lord Ordinary (Kinnear), whose interlocutor was restored by the House of Lords, thought the reduction of price a relevant consideration; and in *Meters, Limited*,² a substantial sum of damages was allowed on that head. The Court must in each case consider the whole circumstances, and assess, as best it can, the damages which the pursuer has suffered as the fair and natural consequence of the defender's illegal conduct. I think it unnecessary to refer in detail to the cases cited to us; but I believe that what I have said is in harmony with the decisions.

The pursuers' case has been fully and carefully presented in evidence. We have definite figures proved which afford a basis, not, indeed, for exact calculation, but for reaching some figure which may represent a fair award, viewing the matter broadly, as I suppose a jury might do. The defenders do not present any counter array of figures. I think it is fairly established that the loss of profits which the pursuers might have realised if they had effected all the infringing sales of machines (252 in number), and of spare parts, amounted to very nearly £5000. One must consider what percentage or amount ought fairly to be deducted. A considerable deduction must, no doubt, be made. In the first place, I observe that the market for centrifugal machines of the description in question is a comparatively limited one—mainly the sugar trade, particularly in Java and Barbadoes; and that the active competitors in this market were the pursuers and defenders—other competing persons being few and practically negligible. These facts are important in the question of damages, and show a position stronger for the pursuers than was present, *e.g.*, in the *Horse Shoe and Nail case*.¹ But the

¹ 14 R. 266, *rev.* 15 R. (H. L.) 45, 13 App. Cas. 401.

² 27 R. P. C. 721, *affd.* 28 R. P. C. 157.

defenders argued strenuously that the peculiar feature of the pursuers' special Mar. 14, 1913.
buffer was of little or no moment in regard to the sales in question, and that
centrifugal machines containing the defenders' buffer were equally saleable ^{Watson,}
on the limited market; and further, that the large number of actual sales of ^{Laidlaw, &}
the infringed article was due, entirely or mainly, to the superior energy, skill, ^{Co., Limited,}
and activity of their selling agent, Mr Akkerman. It seems to me that the ^{v. Pott,}
first of these arguments hardly lies in the defenders' mouths to state, look- ^{Cassels, &}
ing to their own rather peculiar course of conduct. It is plain on the proof ^{Williamson.}
that the defenders thought the pursuers' invention so far valuable that they
altered their own machines so as to include it, and copied and circulated
abroad the pursuers' circulars (with illustrations) of their invention; and
even introduced a cable code word to express the pursuers' conical buffer.
The cross-examination of Mr Williamson on these points contains passages
which strike me as scarcely candid evidence. As regards the excellent
business qualities of Mr Akkerman there seems to be only one opinion.
He possesses a high certificate in the fact that he has been taken into the
employment of the De Bromo Company, who purchase and re-sell the pur-
suers' machines in Java. It is not perhaps surprising that a gentlemen of
such aptitude in business should take a somewhat sanguine view of his own
ability to secure custom for any article he chose to put on the market for
sale. I think we must make a substantial discount on Mr Akkerman's
evidence in this respect, when we look at the real evidence contained in the
correspondence produced. The correspondence discloses again and again
that Mr Akkerman (then acting for Mr Hellendoorn, the selling agent in
Java of the defenders' machines) attached peculiar importance in his orders
to obtaining the pursuers' "new style." I do not think it much matters
that their special buffer is not always or often specifically referred to; it is
clear that Mr Akkerman found that machines containing that buffer were
most desired, and ordered them accordingly. I think this goes to diminish
very considerably what I may call the personal equation of Mr Akkerman;
but that factor does remain a material element in the case, and ought to be
so regarded in the assessment of damages.

The defenders made it a point that the volume of the pursuers' sales of
their machines did not diminish during the years 1906 and 1907, when the
infringing sales were made, but on the contrary increased, falling again in
1908 and rising in 1909; and they further pointed to the fact that the
pursuers' sales during 1906 and 1907 showed a marked decrease in water-
driven machines, in regard to which no infringement is said to have taken
place. I am not much impressed by these arguments. It has never, I
think, been held that a pursuer, in order to recover damages for infringement,
must disclose his books to the adversary, the Court, and the public, with
the view of proving that his business as a whole was depressed, and suffered
during the period of infringement. Though the pursuers maintained or
increased the number of their machines sold in 1906-7, it does not follow
that the defenders have done them no business injury. The problem is
complex, and the presumption is against the infringers. But for their illegal
conduct the pursuers might—probably would—have sold more machines
than they actually did.

It remains to consider some minor but not unimportant points of the

Mar. 14, 1913. argument. The defenders contended that from the figure to be arrived at as representing loss of profits which the pursuers would have realised if they had themselves effected the sales made by the infringers, a deduction must be made of £647, because twenty-seven of the machines specified in the list, No. 249 of process, appear to have been bought and sold without particular reference to the pursuers' special buffer. It is to be kept in view, however,

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Lord Dundas. that these machines were in fact supplied by the defenders with that buffer. I do not think the whole sum should be deducted, though probably a material part of it should be. On the other hand, the pursuers claim to add a sum of £808, being loss of profit through reduction of prices in consequence of the defenders' illegal competition. The sum is vouched and spoken to by Mr William Murray. I am not sure that the claim is open to the criticism bestowed by Lord Macnaghten upon an analogous demand in the *Horse Shoe and Nail* case¹; and I consider that to some extent it may fairly be given effect to, though it would be unsafe to allow full weight to it. I have already pointed out that the matter seems, on the authorities, to be one for decision having regard to the circumstances of each case. Speaking in a rough and general sense, these two items of £647 and £808 may probably be set off against one another.

I have now indicated in a general way the elements which I consider ought to be taken into account in assessing damages in a case like this, and my views as to the particular circumstances here present. One must, in familiar parlance, use a broad axe. I am clearly of opinion that the pursuers are entitled to very substantial, and not to merely nominal, damages. I can find no basis in the evidence to support a figure in the region of the Lord Ordinary's award of £1500. The problem is no doubt difficult; but upon the best consideration I can give to the case I think that £1500 is a quite inadequate sum, and that we should not be treating the defenders with any severity, but it may be with some leniency, if we assess the damages payable to the pursuers (as I propose that we should do) at a sum of £3000.

LORD SALVESSEN.—The claim in this case is for damages in respect of the infringement of a patent for improvements in centrifugal machines. The patent has been held valid by a final judgment of the House of Lords, and although two of the noble and learned Lords were of opinion that it was not a valid patent, that circumstance can have no bearing on the assessment of damages, except in so far as it supports the view that the defenders in infringing the patent acted in good faith. The method of assessing damages in such cases has been fixed by a series of decisions. A patentee is entitled *prima facie* to recover from the infringer the profit which he would have made had the infringing machine been supplied by himself. In the present case this is not difficult of ascertainment. Parties are agreed that the defenders made and sold 252 machines which infringed the pursuers' patent, and the profits which the pursuers made upon similar machines have been accurately ascertained from their books. Taking the bare machines without the mixer and frame, which the defenders could have lawfully supplied, the profits on these machines amount to £4557, 9s.

¹ 14 R. 266, rev. 15 R. (H. L.) 45, 13 App. Cas. 401.

Besides the method just indicated, the pursuers have furnished us with two alternative methods of arriving at their loss. Their statement No. 593 of process discloses the loss of profit upon those parts of the machine which included or required to be adapted to the buffer bearings, to which alone the patented improvements applied. On the assumption that the defenders could have supplied their orders by buying these portions from the pursuers and otherwise completing the machines themselves, the loss of profit on the 252 machines would be reduced to £3339, 12s.; but as I read the decision in the case of *Meters, Limited*,¹ the defenders are not entitled to have the damages assessed on this moderate footing. The subject of the patent in that case was only a small part of the mechanism employed in a prepayment gas meter. It was nevertheless held that the profit on the whole meter was the proper factor to take in calculating the amount of the patentee's damages. The circumstances of the present case are such as to make this rule peculiarly applicable. The pursuers and the defenders were rival manufacturers, and between them enjoyed a practical monopoly of the supply of centrifugal machines for sugar factories in Java and the West Indies, which were their chief markets. Accordingly it is very unlikely that the pursuers would have supplied separately the portions of the machines which embraced the "buffer bearings," and as they granted no licences to manufacture their improvements they could practically make sure of getting an order for the whole machine from any customer who desired the patented improvements. Sufficient allowance has, I think, been made in the earlier statement (already referred to) by excluding the mixer and frame from the calculation. The parties here being in keen competition, it may be assumed that the pursuers would not have granted the defenders, if they had endeavoured to place their orders with them directly, the right to manufacture the patented improvements so as to oust them from the market which they hoped to capture by means of their invention.

The second of the two alternative methods of assessing damages is based on the opinion of Fletcher Moulton, L.J., in *Meters, Limited*.¹ After dealing with the method of assessing damages in cases where the patentee has granted licences, and stating that in such cases the measure of damages is the amount of royalty exacted, he says: "I am inclined to think that the Court might, in some cases where there did not exist a quoted figure for a licence, estimate the damages in a way closely analogous to this. . . . I am inclined to think that it would be right for the Court to consider what would have been the price which—although no price was actually quoted—could have been reasonably charged for that permission, and estimate the damage in that way. Indeed I think that in many cases that would be the safest and best way to arrive at a sound conclusion as to the proper figure." Now the pursuers here have given evidence as to what would have been a reasonable royalty to exact, and they say that 10s. per inch of the diameter of the basket was the sum which they might fairly have charged by way of royalty. Mr Laidlaw justifies this by mentioning that the defenders, in a somewhat similar case, made a claim of 20s. per inch of the diameter of the basket. There is no counter evidence, and taking this

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¹ 28 R. P. C. 157, at 164.

Mar. 14, 1913. method of assessment, which has much to commend it, we were informed that their claim would work out at £4384, which is not far short of the figure arrived at by the first method. The pursuers further claim the profits on a number of parts supplied by the defenders to various people, as detailed in the supplementary list No. 249 of process. These items were incurred in connection with alterations and repairs of machinery. The profit which the pursuers lost by not supplying these spare parts, most of which were actually for the patented "buffer," and the rest for alterations necessary to receive it, amounts to £238, 17s. 4d., and is made up in the same way as the claim in respect of loss of profits on the sale of infringing machines. I think this amount falls to be added to the loss of profits on the sales of complete machines.

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The pursuers' *prima facie* loss having thus been satisfactorily ascertained at a figure approaching to £5000, I confess that I have some difficulty in understanding why the Lord Ordinary should have reduced their claim to £1500. Where actual pecuniary loss is claimed, although it may be difficult of precise ascertainment, it is not a satisfactory method to assess the loss as a jury would when fixing compensation for injury to person or character. In such cases there is no principle by means of which the injury done can be transmuted into a money equivalent. It is otherwise where the Court have to deal with the invasion of a right of property, where, although the damages in many cases have to be estimated, the basis of estimation must be disclosed to judge of its fairness. I find that in all similar reported cases the Judges have given reasoned opinions justifying the results at which they arrived, and they have laid down certain broad principles on which the assessment ought to proceed. I distrust an estimate which is arrived at without indicating the mode by which it has been reached, all the more when as here it precisely corresponds with the amount of the defenders' tender. The Lord Ordinary says: "There did not appear to be any real dispute between parties regarding the elements to be taken into consideration in estimating the pursuers' loss." I do not appreciate that observation, seeing that the pursuers maintained their demand for £5000, and the defenders, although not reclaiming against the Lord Ordinary's award, strenuously maintained that only nominal damages were due. On these grounds I do not attach so much importance as I would otherwise have done to the award of the Judge of first instance, more especially as it has not been influenced by any view that one set of witnesses were more reliable than the other.

The number of infringing machines sold by the defenders being definitely ascertained, and the profits which the pursuers would have made had these machines been supplied by them being also sufficiently proved, the only matter that is left in uncertainty is whether, if the defenders had acted within their rights, the pursuers would in fact have sold this additional number of machines. On this point the presumption is in favour of the pursuers, although it is not so strong as if there had been no substitutes already in the market. Where the subject of the patent is an entirely new article—the "Thermos flask," if it had been the subject of a valid patent, occurs to me as an illustration—it could scarcely be denied that every sale of an infringing flask constituted a source of loss to the patentee. Even

in such a case, however, allowance might have to be made by way of a commission to the infringer for pushing the sale and so saving expense to the patentee. The present case is not so strong, for the older type of centrifugal machine had worked reasonably well before the pursuers' improvements were patented. At the same time the defenders are scarcely in a position to deny that the improvements were such as to commend themselves to purchasers, for they took the trouble of copying the circulars which the pursuers issued to the trade. Not merely so, but their leading selling agent, Mr Akkermann, throughout the correspondence expressly ordered all the centrifugal machines he required with the pursuers' latest improvements; and during the period covered by the pursuers' claim not a single machine of the older type was supplied. The same remark applies to Mr Brocklehurst, who represented the defenders in Barbadoes, and who was very insistent that what he called the deeper buffer should be supplied. On the other hand, there is no doubt very strong evidence given by Mr Akkermann, whose credibility can scarcely be impeached, as he is now in the service of the pursuers' selling agent in Java, that his orders were secured largely by personal influence; and that he could have induced his personal friends and customers to take the defenders' machines even although not supplied with the latest improvements. There is also evidence from certain other customers, who seem to have been merely middlemen and had no technical knowledge of the different types of machines, that they were not aware when they were supplied by the defenders with machines to their order that they were fitted with "conical buffers." It was also strongly maintained by the defenders' counsel that the really attractive part of the new design consisted in the ball bearings, admittedly not patented, and not in the buffer bearing. Further, it was said that the pursuers could not have supplied so many additional orders though they had obtained them; and it was pointed out, as controverting their claim, that they supplied more centrifugal machines during the years 1906 and 1907, when the defenders were infringing the patent, than they did in 1908, when the defenders had ceased to infringe. This last argument does not appear to me to be of great weight, seeing that the total number of machines supplied in any given year necessarily depended on the state of the sugar trade and the number of extensions that were being made in sugar factories; and admittedly 1906 and 1907 were specially prosperous years. Any inference which might be drawn from the figures is also displaced by the circumstance that in 1909 the machines supplied by the pursuers rose to a much higher total than in any of the preceding years. Assuming that substantial allowance must be made on the various heads above referred to, I do not see that, taking them all together, it would be reasonable to reduce the pursuers' claim so as to bring it below a sum of £3000, or twice the sum which the Lord Ordinary has awarded.

The pursuers have a further claim of £808, 8s. 10d., which is based on loss of profit through their having to sell their machines at reduced prices in consequence of the unfair competition of the defenders. There is much to be said in support of this claim; but, on the other hand, it was (as I understood) admitted that £647 falls to be deducted in respect of twenty-seven orders in which the conical buffer played no part. These two items may

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LORD GUTHRIE.—The question in this case, namely, the assessment of damages for the loss sustained by the pursuers through the defenders' infringement of their patent of 1903 for improvements in centrifugal machines, is stated by the Lord Ordinary to be entirely a jury question, and he has assessed the damages on this footing at £1500. The Lord Ordinary's view that the question is entirely a jury one is in accordance with opinions delivered by many eminent Judges. For instance, in the *United Horse Shoe and Nail Company, Limited, v. Stewart & Company*,¹ the Lord Chancellor (Halsbury) said: "While I agree with the Lord Ordinary that they (the pursuers) can only recover compensation for the actual loss which they have sustained, the estimate of the particular sum which is to be arrived at when assessing compensation for the injury is purely a matter for a jury, and can rarely be made the subject of exact arithmetical calculation." But, although this is true, it does not follow that the Lord Ordinary should have left us without any means of judging whether the result arrived at by him was a reasonable one. It seems to me that, in this case, we were entitled to know from the Lord Ordinary, in the first place, on what basis his calculation was made—Has he taken, as his starting point, the total number of infringing machines made and sold by the defenders, or, if not, what smaller number? Next, whatever number of machines he may have taken as the basis of his calculation, has he reckoned the whole profit which the pursuers might have made, or, if not, what proportion? Then, on the other side of the account, we were entitled to know what elements of deduction, if any, the Lord Ordinary took into account in arriving at the figure of £1500 brought out by him, although it would not have been necessary for him to state what sums he reached under each head of deduction. Had the Lord Ordinary stated the basis on which he proceeded in arriving at his result I should have felt greater difficulty in interfering with his judgment. Or, again, had the result reached by him varied by a sum of say not more than £200 or £300 from that which seems to me just, I should not have felt warranted in altering the Lord Ordinary's interlocutor. But, in the absence of any indication of how the Lord Ordinary reached his result, and being of opinion as I am that the proper verdict is at least double that found by the Lord Ordinary, I have no hesitation in concurring with your Lordships. I think it has been sufficiently proved that, of the profit of between £4000 and £5000 proved in the evidence, at least £3000 could and would have been earned by the pursuers.

LORD JUSTICE-CLERK.—I concur, but I may add that, if I had been disposing of this case myself, I do not think I would have held £3000 to be an adequate sum of damages.

THE COURT recalled the Lord Ordinary's interlocutor, and ordained the defenders to make payment of the sum of £3000.

WEBSTER, WILL, & CO., W.S.—J. & J. ROSS, W.S.—AGENTS.

¹ 15 R. (H. L.) 45.

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Minor—Capacity to contract—Foreign—Lex loci contractus—Minor with foreign domicile contracting in Scotland—Forisfamiliated minor—Termination of father's guardianship.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58)—Agreement by workman to take compensation—Reduction on ground of minority and lesion.

Process—Proof—Proof or jury trial—Action by workman for reduction of agreement to accept compensation, and for damages for injury.

A minor, whose domicile was Irish and whose father resided in Ireland, took service as a labourer with a firm in Scotland. He was injured by an accident in the course of his employment, for which he agreed, without consulting his father, to accept compensation under the Workmen's Compensation Act, 1906. After compensation had been paid for some time he brought an action of damages for his injury at common law, in which he averred that he had accepted the statutory compensation in ignorance of his common law claim; and contended that, being a minor, he was not bound by the agreement, and that, in any event, it should be reduced on the ground of minority and lesion.

Held (1) that the pursuer's capacity as a minor to enter into the agreement fell to be determined not by the *lex domicilii* (Irish law) but by the *lex loci contractus* (Scots law); (2) (rev. judgment of Lord Ormisdale) that, as the pursuer was forisfamiliated and his father was in Ireland, the agreement was to be regarded as made by a minor who had no curator, and was, therefore, not null and void but reducible if enorm lesion resulted; and (3) that the pursuer was entitled to an inquiry into the facts, but that, the case being unsuitable for jury trial, the inquiry should be by a proof.

Res judicata—Finding in arbitration under Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58)—Finality—Bar to subsequent action of damages at common law.

In an application under the Workmen's Compensation Act, 1906, to end or diminish compensation payable to a minor workman, the arbitrator found that the workman had agreed to accept compensation at a certain rate, and reduced the amount.

The workman having thereafter brought an action against his employers for damages for his injury at common law and for reduction, on the ground of minority and lesion, of the arbitrator's finding that he had agreed to accept compensation, the defenders, on the ground that the arbitrator was final on questions of fact, pleaded that the matter was *res judicata* in respect of his decision.

The Court *repelled* the plea.

ON 14th February 1912 Gilbert M'Feetridge, labourer, Whifflet, with 2^d DIVISION, the concurrence of his father, brought an action against Stewarts & Ld. Ormisdale. Lloyds, Limited, Glasgow. The conclusions of the summons were for payment of £500 as damages for personal injury, and, if necessary, in order that effect might be given to this conclusion, for reduction of a finding, dated 13th November 1911, by the Sheriff-substitute (Glegg) at Airdrie in an application by the defenders under the Workmen's Compensation Act, 1906, in which he found that the pursuer had

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The pursuer averred that he was sixteen years of age and was a domiciled Irishman; and that by the law of Ireland minors had not capacity to enter into binding contracts. He also averred that on 19th April 1911, while in the defenders' employment, he received an injury to his right hand. His further averments were as follows:— (Cond. 6) "On or about 8th May 1911 an agent, who represented the defenders, called upon the pursuer and informed him that he was entitled to compensation. The pursuer's wages at the time of the accident were £1, 0s. 6d. per week, and the said agent stated to him that he was entitled to receive 10s. 3d. per week from his employers while he was disabled, and discussed with the pursuer whether he would accept a lump sum in full of the said weekly payment. The said agent did not inform the pursuer, and the pursuer was entirely ignorant of the fact, that he had any rights at common law, or that he could possibly have any claim in respect of his injuries except what was offered by the said agent. The pursuer had no legal advice, and the said agent did not suggest to him that he should take any. At said interview the pursuer stated that he would consult with his brother who was coming from Ireland as to whether he should take a weekly payment or compound same for the lump sum. He accordingly consulted with his brother, a boy of about eighteen years of age, and thereafter he called at the defenders' works, on or about 12th May 1911, and stated that he would accept the said weekly payment. The pursuer received payment of the said weekly sum of 10s. 3d. for the period from 19th April to 30th June 1911, and on the occasion of each payment he signed a receipt therefor, in the terms presented to him."* (Cond. 7) "On or about 9th August 1911 the defenders presented an application to the Sheriff-substitute of Lanarkshire at Airdrie, under section 16 of the First Schedule to the Workmen's Compensation Act, 1906, in which they craved an order ending or diminishing the said weekly payment. On the said application being served on the pursuer he, for the first time, consulted a solicitor, and on inquiry being made into the facts he was informed that he had a claim for compensation at common law. The pursuer accordingly lodged a defence to the said application, in which he maintained, *inter alia*, that it was incompetent for the Sheriff to decide that he had agreed to accept compensation under the Workmen's Compensation Act; that he had never made any agreement to accept such compensation; and that in any event the alleged agreement was not binding on him in respect he was in minority, and his curator did not give his consent to the acceptance by the pursuer of the said weekly payment as a discharge of all claims competent to him.

* The following was one of the receipts signed by the pursuer, the others being in similar terms:—

"Received this Twelfth day of May 1911 from Stewarts & Lloyds, Limited, British Tube Works, Coatbridge, the sum of One pound fifteen shillings and elevenpence, being weekly Compensation to date under the Workmen's Compensation Act, 1906, under which Act I elect to claim for Personal Injury by Accident sustained by me on or about the 19th day of April 1911.

Witness, Charles J. Smith.
Witness, George Kerr.

Signature, Gilbert M'Feetridge,
Occupation, Labourer.
Address, 13 North Bute St."

After proof in the said application the Sheriff-substitute, on 13th November 1911, found that the defenders had agreed to pay, and the pursuer had agreed to accept, compensation at the said rate of 10s. 3d. per week, and in respect the appellant was no longer wholly incapacitated as the result of the said accident, reduced the compensation payable to him to 2s. per week. The pursuer presented an appeal by way of stated case to the Court of Session * against the said findings, and on 22nd December 1911 the Second Division of the said Court refused said appeal, without prejudice, however, to pursuer's rights to establish a claim at common law, if he should decide to do so." (Cond. 8) "As already mentioned the pursuer, when he agreed to accept the said weekly payment, was in total ignorance of his legal rights. In particular, he did not know, and was not informed, that he had any rights at common law, or that by accepting compensation under the Workmen's Compensation Act he might be held to have waived his common law claim. In point of fact he never elected as between his rights under the Workmen's Compensation Act and his rights at common law, and was never in a state of knowledge which made it possible for him so to elect. He never agreed to accept compensation within the meaning of the said Workmen's Compensation Act. Further, the pursuer being in minority could not without the consent of his curator at law validly elect between his different rights, and he could not and did not elect to accept compensation under the said Act to the exclusion of his common law claim." (Cond. 9) "The pursuer maintains that the finding of the said Sheriff-substitute in the said application at the defenders' instance does not present any bar to the present action; but he submits that, if necessary, the said finding should in the circumstances above stated be reduced. The total of the said weekly sums received by the pursuer amounted to £5, 2s. 6d., and the pursuer is willing, and hereby offers, to repay the same to the defenders."

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The pursuer pleaded, *inter alia*;—(2) The pursuer having been a minor and having become a party to the alleged contract referred to in condescence 6 without the consent of his curator is not bound by the said contract. (3) The pursuer is entitled to set aside the said alleged contract on the ground of minority and enorm lesion.

The defenders pleaded, *inter alia*;—(1) The averments of the pursuer being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (2) The pursuer having accepted of compensation under the provisions of the Workmen's Compensation Act, 1906, in respect of the injuries sustained by him, the present action is incompetent, and the defenders should be assoilized. (3) The agreement of the pursuer to accept compensation having been judicially affirmed by the said judgment of the Sheriff-substi-

* The questions of law in the case were:—“(1) Was it competent in respect that there was no memorandum of agreement recorded for me to decide that the appellant agreed to accept compensation under the Workmen's Compensation Act? (2) Was the agreement binding on the appellant without the consent of his curator? The third question was whether the arbitrator should have assessed the compensation at a different rate from that fixed by him. The Court, on 22nd December 1911, answered the first question in the affirmative, declined to answer the second question, and it being a matter in the discretion of the arbitrator to fix compensation in the circumstances disclosed to him, answered the third question in the negative, and affirmed the decision of the arbitrator.

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tute, and, in the consequent proceedings, no relevant grounds for reduction of said judgment being stated, the matter is *res judicata*, and the present action, so far as it concludes for damages, is incompetent. (4) *Separatim*, the petitory conclusions of the summons being incompetent while the agreement to accept compensation stands unreduced, the pursuer's averments in support of these conclusions should not meanwhile be remitted to probation pending the issue of any competent proceedings for reduction of the agreement. (5) The pursuer having, while employed as a labourer in Scotland, entered into a contract made and to be performed in Scotland which was incidental to and arising out of such employment, the validity and effect of said contract fall to be decided by the law of Scotland.

On 2nd January 1913 the Lord Ordinary (Ormidale) pronounced an interlocutor repelling the second, third, and fourth pleas in law for the defenders, assigning a diet for the adjustment of issues, and granting leave to reclaim.*

* "OPINION.—This is an action raised by a minor with the consent of his curator concluding for a sum of damages in respect of injuries alleged to have been received by the pursuer through the fault of the defenders. The defenders plead—'2. The pursuer having accepted of compensation under the provisions of the Workmen's Compensation Act, 1906, in respect of the injuries sustained by him, the present action is incompetent, and the defenders should be assoilzied.' In answer to this plea, the pursuer, *inter alia*, maintained that he exercised his option to claim compensation under the Act and not to take proceedings independently of the Act without the consent of his father, who is his curator, and that, accordingly, the agreement so to do is null and void, and therefore no bar to the present proceedings.

"The general rule is that deeds granted by a minor having a curator, without the curator's consent, are null. There is nothing in the Workmen's Compensation Act, 1906, which modifies the common law in regard to a minor's capacity to contract—*Stephens*, [1904] 2 K. B. 225. There are, however, certain exceptions to the general rule, and the exception on which the defenders rely is this: that a minor who is engaged in a business can enter into contracts in the line of that business. It is thus expressed by Erskine, Inst. i. 7, 38: 'A minor who betakes himself to any business or profession as trade, manufacture, law, &c., cannot be restored against deeds granted by him in relation to that employment.'—See also *Galbraith*, M. 9027; *M'Donald*, M. 9038; *Heddel*, 5th June 1810, F. C.; *Campbell v. Baird*, 5 S. 335; *Argo v. Smarts*, 1 Irvine, 250; *Stevenson*, 10 Macph. 919; *Dennistoun v. Mudie*, 12 D. 613.

"It was maintained that the agreement in question was, within the meaning of this exception, incidental to the business in which the pursuer was engaged, viz., that of a workman or labourer. I am unable to give effect to this contention. In the first place, I think it is extremely doubtful whether the occupation of a general labourer can be regarded as a business or profession to which a person can be said to have betaken himself in the sense of the passage I have quoted from Erskine, for, in the ordinary case, beyond the initial contract of service, no occasion arises in the relation of master and servant for the workman in the regular course of his work to enter into any further or other agreements either with his employer or anyone else. In the second place the agreement in question had, in my judgment, nothing whatever to do with the proper business of the pursuer which was simply to contribute certain labour in return for an agreed-on wage. It was quite foreign to the scheme or intention of the contract of service and was really independent of it, although the accident which gave rise to the necessity of a new contract or agreement being entered into occurred in the

The defenders reclaimed, and the case was heard before the Second Division on 28th, 29th, and 30th January 1913. Mar. 14, 1913.

Argued for the reclaimers;—(1) Under the Workmen's Compensation Act an injured workman might either claim compensation or proceed under the common law. He had the choice of procedure; but if he chose one mode of procedure he could not afterwards resort to the other.¹ Further, the pursuer could not prosecute this action without first reducing the receipts he had granted; and as he did not propose to do so, the action could not proceed. (2) The plea of *res judicata* was well founded. In the application to vary the agreement as to compensation the question as to the validity of the agreement was necessarily involved, and the arbitrator was bound to determine that question.² If he did so, his decision was final under the Workmen's Compensation Act.³ If he did not, then the respondent was met by the plea of competent and omitted.⁴ The question whether a

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course of the pursuer's employment. But the new contract was not like an order given for goods by a trader, an act performed in the natural and ordinary course of his business and with a view to promote that business. It was concerned with a totally different subject-matter, viz., the ascertainment of compensation. The situation which gave rise to the agreement was unexpected and novel, and it necessitated the exercise of a very different kind of judgment to that which the pursuer had to bring to bear on his day-to-day occupation. Looking to the different results, when measured in money, which might follow according to the way in which the option was exercised and the many considerations which required to be taken into account when weighing the possible advantages of the alternative courses, it was pre-eminently a position in which a minor was entitled, if he had a curator, to get his assistance. Here the pursuer had a curator but did not get his assent to the course he elected to follow. It appears to me a typical case for the application of the rule of Scots law, and that the defenders cannot hold the pursuer to the bargain or agreement entered into by him in the exercise of his own unaided judgment. The averment of the defenders that the pursuer's father had written through solicitors in Ireland does not, as I read the averment, infer the father's consent to or homologation of the option exercised by the pursuer, and, accordingly, I am prepared to hold, without further inquiry, that the pursuer is not barred by his election to take compensation under the Act from insisting in the present action.

"Apart from his incapacity as a minor to enter into the agreement, I should have been prepared to hold that, in the admitted circumstances, the acceptance of the weekly payments for ten weeks does not bar the pursuer from proceeding to recover damages at common law. I come to this conclusion on the ground that, because of his extreme youth and inexperience and the ignorance of his rights thence resulting, the meaning and effect of his accepting the weekly payments made to him was not understood by the lad, and that he was quite unaware that he was exercising an option under the Workmen's Compensation Act. What he was asked by the defenders' clerk or agent to do was to make up his mind between taking compensation in a lump sum or by weekly payments, and that was what he desired to consult and did consult his brother about. It is quite true that, so far as I can see, there was no attempt to rush him into any decision on the matter discussed. It is also true that the receipts signed by him described the

¹ Workmen's Compensation Act, 1906, sec. 1 (2) (b).

² Johnstone v. Spencer & Co., 1908 S. C. 1015.

³ Second Schedule (4) and (17).

⁴ Southhook Fireclay Co., Limited, v. Laughland, 1908 S. C. 831; Nelson v. Summerlee Iron Co., Limited, 1910 S. C. 360.

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Sheriff Court decree could ever support a plea of *res judicata* did not arise here, because the procedure was that laid down in the statute for the determination of questions of this kind. (3) The validity or invalidity of the agreement on the head of incapacity fell to be determined by the *lex loci contractus*, i.e., the law of Scotland. In Dicey's Conflict of Laws¹ the law was correctly stated in these terms:—"A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made." The law of Scotland as to the effect of minority on the power to contract was succinctly stated in Mackay's Manual of Practice, p. 395.² Whether the pursuer had or had not a curator, the contract was saved as falling within the recognised exception in favour of agreements connected with a trade exercised by the minor. Such

payments made to him as weekly compensation under the Workmen's Compensation Act, 1906, 'under which Act I elect to claim for personal injury by accident sustained by me.' But the meaning of this statutory election was not brought home to the pursuer. Indeed, the possibility of his having any right to compensation independently of the Act was not brought before him at all. What was discussed with him was 'lump sum or weekly payments.' All that the defenders say is, that their clerk had a long talk with the pursuer as to the compensation payable to him, and, again, that it was made quite clear to the pursuer that it was compensation under the Act that was being discussed, and that it was explained to him that, if he accepted a lump sum, it would terminate his right to receive any further payments, whereas, if he took weekly payments, he could arrange for having them redeemed afterwards for a single payment. The defenders do not suggest, far less distinctly aver, that they explained to the pursuer that he had any option between accepting compensation under the Act and taking proceedings independently of the Act, or that they satisfied themselves otherwise that he was aware of it. I read their statements as in no way contradicting the pursuer's averments to the effect that what was exclusively the topic of conversation between their clerk and the pursuer was, as I have said, 'lump sum or weekly payments.' Now, it may be that an employer owes no duty towards an employee of full age and ordinary experience to see that he fully comprehends what he is contracting about, but it seems to me to be otherwise in the case of a boy of sixteen, and that a bargain, the effects of which he could not be expected to appreciate without the aid of someone, be it his employer or some third party, ought not to be held to bar him from seeking redress at common law. The result of the decisions in this branch of the law appears to me to be that, if the Court is satisfied that the transaction was not a fair one, it may be ignored, and that the transaction cannot be held to be a fair one when one of the parties to it, through no fault of his own, was honestly in ignorance of his full legal rights. That, in my judgment, giving effect to all that the defenders say on record, was the position of the pursuer in the present action. He was in a position very similar to that of the foreign workman in the case of *Valenti*, 1907 S. C. 695. The pursuer in that case, it was held, being a foreigner, was not, in the ascertained circumstances, in a position validly to exercise the option which he had. Here I think that the pursuer owing to his youth and inexperience was not, in the circumstances disclosed and admitted by the defenders on record, in a position to exercise the option intelligently. Had he been a workman of full age and ordinary experience, the receipts would have brought home to him the nature and effect of

¹ (2nd ed.) 538 (reference was also made to pp. 473 and 534); Fraser on Parent and Child, (3rd ed.) 711, 720, 723, 725.

² Fraser on Parent and Child, (3rd ed.) 452, was also cited.

agreements were not null or reducible.¹ That this contract was connected with the respondent's trade was obvious. It was an agreement that the respondent should take the compensation to which he was, as one employed in that trade, entitled; there was no agreement that he should renounce his common law rights. That result was not agreed on by the parties, but was an incident attached by statute to their agreement. The respondent could not therefore maintain that the contract was null or reducible. Again if the contract was not connected with the pursuer's business, it might be null or reducible according to the circumstances. If a minor who had a curator entered into a contract without that curator's consent, the contract was null. But here the respondent had not a curator; if a parent were either insane or inaccessible his child was held to be without a curator, and on this principle the respondent here must be held to be without a

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what he was doing, but the pursuer, being only a lad of sixteen, and the discussion had by him with the defenders' clerk antecedent to his granting the receipts having been concerned only with the matter of lump sum or weekly payments, the receipts themselves cannot, in my opinion, be taken as conclusive evidence of a deliberate and intelligent resolution to forego any right the pursuer had to take proceedings under the Act.

"It is said, however, that the matter is *res judicata* in respect of the decree or order of the Sheriff dated 13th November 1911. The curator was not a party to the arbitration, and I do not read the order as dealing with the question of the pursuer's capacity to contract at all. It is true that the second question of law stated by the Sheriff for the opinion of the Court is,—'Was the agreement binding on the appellant without the consent of his curator.' That question, however, is not specifically determined by the findings which he pronounced, and the Court, by their interlocutor of 22d December 1911, while dealing with the first and third questions stated for their opinion, expressly declined to answer the second question. In these circumstances I hold that the matter is not *res judicata*. If I am right in so holding, then it appears to me to be unnecessary to pronounce a decree in terms of the reductive conclusions of the summons.

"As I hold that the pursuer being a minor had not, under Scots law, capacity to enter into the agreement without his curator's consent, it is not necessary for me to decide the question which was raised as to Irish law, but I may say that in my judgment, (first) the law is not sufficiently ascertained by the decision in *Cooper v. Cooper*, (15 R. (H. L.) 21), to warrant me in holding that under that law the contract in question was void on the ground of incapacity, and (second) that, assuming that the law is as stated by the pursuer when the contract is executed in Ireland, the application of the law of a foreign domicile is not recognised in our practice as universal in all circumstances, and does not fall to be given effect to in a case like the present, where the contract is executed and falls to be performed in Scotland and does not in any way affect the personal or domestic relations of the minor. I think that to hold otherwise would be against the interests of minors themselves seeking work in this country, and would be unjust to Scotsmen contracting with them, when in *bona fide* ignorance of the foreign law, and when the circumstances were not such as to lay on them any duty to inquire into the matter.

"I shall repel the second, third, and fourth pleas in law for the defenders, and order issues. I shall find the pursuer entitled to the expenses of the discussion in the Procedure Roll and grant leave to reclaim."

¹ Ersk. i. 7, 38; Galbraith v. Lesly, (1676) M. 9027; M'Donald, (1789) M. 9038; Heddel v. Duncan, June 5, 1810, F. C.; Argo v. Smarts, (1853) 1 Irv. 250; Wilkie v. Dunlop & Co., (1834) 12 S. 506; Stevenson v. Adair, (1872) 10 Macph. 919.

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curator. Further, the respondent was forisfamiliarized and was therefore freed from his father's curatory. If, on the other hand, the respondent had a curator, the facts showed that the latter had consented to the contract. It was true that if the pursuer had no curator or had the consent of his curator to the contract, the contract was nevertheless open to reduction; but this was so only if there was enorm lesion, and here there was no averment of enorm lesion, and the Court could see that there was none. In England the test by which the validity of agreements of this nature by minors was determined was whether the contract was for the minor's benefit.¹ Clearly here the agreement was for the respondent's benefit. Again it was suggested on record that this was a seductive bargain, such as was set aside in *Valenti v. William Dixon, Limited*.² But to maintain this point, it was not enough to allege that the respondent was ignorant of his rights. Fraud must be averred, and there was no such averment on record.³ In any event the case was not suitable for jury trial.

Argued for the respondent;—(1) The respondent had not elected as between his statutory and his common law claims. He was ignorant that he had any claim at common law and all that he had been called on to consider was in what form he would take his statutory compensation.⁴ There was nothing that it was necessary to reduce. The receipts were merely *prima facie* evidence of payment and were not probative.⁵ All that could be urged against the respondent was an implied discharge. (2) There was no ground for the plea of *res iudicata*. The respondent did not quarrel the Sheriff-substitute's decision. It was admitted that there was an agreement, but the agreement could be set aside.⁶ (3) The respondent's capacity to contract fell to be determined by the law of his domicile, viz., Ireland,⁷ and by Irish law the contract was null. But supposing Scots law applied, this was a contract by a minor, who had a curator, without the curator's consent, and was therefore null.⁸ The fact that the father was outwith Scotland,⁹ or that the respondent was forisfamili-

¹ *Stephens v. Dudbridge Ironworks Co., Limited*, [1904] 2 K. B. 225; *Cribb v. Kynoch, Limited*, (No. 2), [1908] 2 K. B. 551; *Mulholland v. Whitehaven Colliery Co.*, [1910] 2 K. B. 278; *Gadd v. Thompson*, [1911] 1 K. B. 304.

² 1907 S. C. 695.

³ *Mackay v. Rosie*, 1908 S. C. 174.

⁴ *Dawson's Trustees v. Dawson*, (1896) 23 R. 1006, *per Lord Kinnear*; *Stewart v. Bruce's Trustees*, (1898) 25 R. 965; *Fowler v. Hughes*, (1903) 5 F. 394; *Little v. P. & W. MacLellan, Limited*, (1900) 2 F. 387.

⁵ *Commercial Bank of Scotland v. Rhind*, (1860) 3 Macq. 643; *Crawford v. Bennet*, (1827) 2 W. & S. 608; *The Conveyancing (Scotland) Act*, 1874 (37 and 38 Vict. cap. 94), sec. 38, was also referred to.

⁶ *Robertson v. S. Henderson & Sons, Limited*, (1904) 6 F. 770.

⁷ *Cooper v. Cooper*, (1888) 15 R. (H. L.) 21, *per Lord Watson*, at p. 29, *Halsbury, L.C.*, at p. 25, *Lord Macnaghten*, at p. 30, 13 App. Cas. 88; *Sottomayor v. De Barros*, (1877) 3 P. D. 1, 5 P. D. 94; *De Virte v. Macleod*, (1869) 7 Macph. 347.

⁸ *Stair*, i. 6, 33; *Bell's Com.* (7th ed.) vol. i. pp. 129-31; *Bell's Prin.* (10th ed.) sec. 2088; *Kincaid*, (1561) M. 8979; *Robertson v. Oswald*, (1584) M. 8980; *Bell v. Sutherland*, (1728) M. 8985; *Thomson v. Pagan*, (1781) M. 8985; *Hay v. Grant*, (1749) M. 8973; *Kirkman v. Pym*, (1782) M. 8977; *M'Gibbon v. M'Gibbon*, (1852) 14 D. 605.

⁹ *Scoffier v. Read*, (1783) M. 8936; *Morison v. Stewarts*, (1747) M. 8972; *More's Stair*, vol i. note D. p. xlii.

ated,¹ would not save the contract; it could only be saved by showing that it was incidental to the pursuit of his trade. This could not be alleged of the agreement in question. It was outside the respondent's contract of employment.² The valuing of his injuries was not a task incidental to his service; nor was the discharging of his common law claim for these injuries. In any case, if the contract was not null it was voidable on the ground of enorm lesion. The facts here clearly showed that there was such lesion. The averments on record set forth in every respect a relevant case. The case should be sent to a jury³; but at this stage the respondent was entitled to a finding that the contract was null and void.⁴

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At advising on 14th March 1913,—

LORD JUSTICE-CLERK.—The circumstances which have led to the present summons are peculiar in several aspects, and the way in which the case was originally, and in which it is now, presented, after amendment, is also most peculiar. The pursuer is said to have been a lad of sixteen at the time of his alleged injury. He is Irish, and his father lives in Ireland. The circumstances out of which the injury to him arose were simple enough. He was working as a labourer in the defenders' premises beside a mechanically driven turning-lathe. His account of what happened is, that below the pinions of the machine, which were about 3 feet from the ground, there was a place hollowed out, which was 8 inches deep and measured 3 feet long by 18 inches broad; that he did not know of this hole, accidentally put his foot into it and stumbled, and, on his throwing out his right hand to save himself, it was caught by the pinions, and he lost the little finger and part of the thumb, which were so crushed that they had to be amputated. His averment is that in breach of the Factory Act, 1901, the defenders had failed to fence the pinions, and that it was by the fault of the defenders that he was thus injured.

After he received his injury he was visited by an agent for the defenders, and he avers that the agent informed him that he was entitled to compensation, and that the sum he could claim was 10s. 3d. a week—being half of the wages he was earning—as long as he was disabled from work. He states that he was not informed that he had any right to make a claim at common law; that he had no legal advice; and that the alternatives put to him were to accept the sum offered or to agree with the agent for a lump sum. After consulting his brother, who is a lad of eighteen, he intimated that he would accept the weekly payments. Accordingly he received weekly payments of 10s. 3d. for more than two months, and signed the receipts presented to him by the agent. He does not state what the terms of the receipts were, but there is no doubt as to their terms, and unless the receipts can be set aside on some legal ground relating to the circumstances in which they were obtained from him, or unless they are not binding on him because of his

¹ Dundas v. Allan, (1711) M. 9034; Anderson v. Anderson, (1832) 11 S. 10; Fraser on Parent and Child, (3rd ed.) 499.

² Dennistoun v. Mudie, (1850) 12 D. 613.

³ Campbell v. Caledonian Railway Co., (1899) 1 F. 887.

⁴ Valenti v. William Dixon, Limited, 1907 S. C. 695.

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In August 1911 the defenders applied to the Sheriff-substitute of the jurisdiction for an order under the Workmen's Compensation Act ending or diminishing the weekly payment, and to this the pursuer lodged a defence, in which he maintained that it was incompetent for the Sheriff to decide that he had agreed to accept compensation under the Act; that he had never done so; and that being in minority, and there being no consent by his curator to the compensation paid being in discharge of all claims competent, the Sheriff could not act upon the footing of an agreement. The Sheriff-substitute, after proof, found that there was an agreement, and that as the pursuer was no longer totally incapacitated the compensation must be reduced, and fixed 2s. a week as the sum to be paid. Against this the pursuer appealed to this Court. The Court dismissed the appeal.

This case is now brought to enforce a claim at common law as for fault, and the pursuer maintains that he is entitled to reduction of the judgment pronounced by the Sheriff-substitute or to have it set aside by exception. When the summons was served only two pleas in law were stated by the pursuer, one to the effect that the sum claimed being reasonable decree should be given, the other that "if necessary to give effect to the petitory conclusion, the pursuer is entitled to decree of reduction." These pleas, it was evident, were not such as could raise more than one of the questions which were vital to the case, and amendment was made by adding a plea of incapacity of the minor to contract without consent of his curator, and a second plea based on the ground of enorm lesion.

The Lord Ordinary by his interlocutor has repelled three of the defenders' pleas—the second plea, which attacks the competency of the action on the ground that the pursuer had accepted compensation under the Workmen's Compensation Act; the third plea, which proceeds on the contention of *res judicata*; and the fourth plea, which is directed to exclude proof under the petitory conclusions of the summons pending reduction of the agreement. He has ordered issues.

These being the circumstances under which the case comes up upon a reclaiming note, the Court has had from the bar a very learned and elaborate argument upon several questions, and very numerous authorities have been quoted. Many of these might have an important bearing upon the case at a later stage, if it is to be allowed to go to inquiry upon the facts. And that is really the question for present consideration.

I think it is impossible to doubt that at the time of the accident there was a contract of service between the pursuer and the defenders. He came to them for employment as a labourer, and received employment and accepted wages for his work. He had left his father's house and come to Scotland to take employment upon his own footing, if he could get it, (just as any lad may do), without there being any question whether he might go out as a worker without his father's consent. He left the position of a dependant, and left his home to come to Scotland, and to make his own way in the world, just as lads of his age are doing every day. He obtained employment, he drew the earnings of the employment, and those who employed him paid him the price of his service. As regards that matter, no

question of difficulty arises. Any claim the pursuer can possibly have is and must be based upon the fact that the relation of employer and employed existed between the pursuer and the defenders. The questions which arise do so when the abnormal thing has happened—something which, to use the words of the Workmen's Compensation Act, arises out of and in the course of the employment—a thing which is not within the work of the employment, but, as Lord Macnaghten called it, something “untoward,” raising a claim not for work done, but for injury suffered when engaged at the work of the employment. It is as being a servant at the time of the accident that any claim, whether at common law or under the Employers Liability Act or the Workmen's Compensation Act, is open to the pursuer. If he was not employed, he had no business to be where he was doing work in the defenders' premises.

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But there are several questions raised which are outside the mere question of employment and of accident occurring in the employment. There is the question whether the pursuer, being a minor, could contract to accept compensation on a particular footing as under the rules of Scots law. Then there is the question whether, if he could contract under the law of Scotland, he, being of Irish parentage, is entitled to found upon the law of Ireland, which, it is said, makes a person under twenty-one years of age incapable of contracting. There is the question whether, if the law of Scotland applies, the pursuer is entitled to set aside a contract made by him on the ground that it is to his enorm lesion. Lastly, there is the question whether the judgment of the Sheriff-substitute, an appeal against which was rejected by this Court, must be held to be *res judicata* against the pursuer.

As regards this last, my opinion is clear that there is no ground on which the plea of *res judicata* can be maintained, and that the Lord Ordinary was right in refusing to give effect to it. The pursuer impugns the initial procedure out of which the petition of the defenders to the Sheriff-substitute as arbitrator took its origin. The arbitration proceeded on an agreement which undoubtedly was entered into by the pursuer, but the pursuer is quite entitled to have that agreement and the consequent deliverance of the Sheriff set aside and the whole question of his right to damages at common law opened up, if he can establish grounds for setting aside the agreement by reduction. What has been done in the proceedings before the Sheriff can form no bar to the present summons on the plea of *res judicata*.

Upon the question whether the pursuer could contract without consent of his curator to take employment, it does not appear to me that there can be any doubt. Such a contract is not void. It has not only been held good, but there are cases in which it has been enforced at law against the minor at the instance of the employer. I shall refer to two such cases. One is the case of *Heddel*.¹ In that case a minor, who had engaged himself as a Sheriff-clerk-depute and into whose hands some money had come, applied the money, on the direction of the Sheriff-substitute, as he had no right to do, with the result that it was lost by the bankruptcy of a party to whom it was handed over. The minor was sued for the amount by the

¹ June 5, 1810, F. C.

Mar. 14, 1913. Sheriff-clerk, and the plea was set up for him that the pursuer could not succeed as against a minor. The Court, however, held that it was an established rule of law "that a minor, whenever he undertakes an employment by which he gains a part of his livelihood, becomes responsible . . . for all his acts done in that situation. If the rule were otherwise it would be most hurtful to minors, because if they were free from responsibility nobody would employ them, and they would be shut out from many situations and offices the duties of which they now discharge." Thus in that case the contract was upheld against the minor as fixing responsibility upon him, notwithstanding that there was no consent of curators. The contract was enforced against him. The other case is that of *Argo v. Smarts*,¹ where the Lord Justice-Clerk laid it down that "where a contract is entered into by a young man seventeen years of age, and withal so skilful a workman that he earns 20s. a week in Glasgow, it cannot be said that such protection"—viz, of curators—is necessary. That was a case in which the Court held him so sufficiently bound by his contract that he could not escape from imprisonment for desertion of service, the law at that time allowing such imprisonment. Thus in these cases the contract—a contract of service—was held binding on the minor. But if such a contract is binding on the minor to the effects disclosed in these cases, it plainly cannot be maintained that in a case like this the pursuer shall not be dealt with as capable of contracting.

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Next comes the question whether the pursuer, being an Irishman, the questions between him and the defenders fall to be dealt with according to the law of Scotland or according to the law of Ireland, upon the footing that his domicile is Irish. In other words, is the law of the place of the contract to prevail or the law of the domicile? Upon this question we had a learned and able argument. The opinion at which I have arrived is that the law of the place of the contract must rule. To me it appears that to apply the law of a foreign country in a case of contract for hire of labour would be to relegate such cases to the most inconvenient forum. An employer of labour is not called on to investigate where those who ask him to engage them have their domicile. He engages them because they desire to work in his country, and he is certainly not called on to ascertain what their domicile is and to inform himself as to the law of that domicile. If it were otherwise it would hamper persons coming from other parts of the kingdom in their efforts to obtain employment, for employers would be slow to engage a worker who if an accident happened to him could compel his master to accept an alien law which might be detrimental to his interest. But there is good authority for holding that if such a labourer desires to assert a claim against his employer he must assert it in the Courts of his employer's country and maintain it under the rules of law of that country. Nothing more contrary to reason can be imagined than that he should be entitled to insist that the law of the country he comes from should be applied against the employer who has no relation to him as regards nationality, the relation being only one of employment to do work for the master who is willing to pay him workmen's wages. It would require very clear legal

dicta, laid down by high legal authority, to induce one to hold that a foreign law was to bind the employer because his servant—who came to this country in order to do business here by taking employment—happened not to have lost his domicile. This is not like a case of a son living with his father, or the case of a father being a party to the contract entered into, as where a father enters into a contract of apprenticeship for a son. In the first case the place of the domicile and the place of employment would be the same, and in the second there is much to be said for the law of domicile being applied to any legal questions arising out of or following on the contract. In the case of his living at home with his father, there can be no question. In the case of apprenticeship by the father it is known to the employer that the apprentice's position is that of one still under the protection and supervision of his parent—his natural guardian. The employer accepts the father—as an Englishman or an Irishman as the case may be—as making or being a party to the making of a contract for his unfors-familiated son. In such a case it may fairly be said to be reasonable that the father should be held entitled to found upon the law applicable to him as a contracting party. He presumably is an actor in the transaction. The contract is not one made by the lad himself for his own ends and apart from his father.

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The circumstances of this case are entirely different. The pursuer left his father's house and his own country and came to Scotland, and proffered his services as a labourer to a Scottish employer. He accepted for himself a stipulated sum of wages, by which he supported himself, freeing his father from any burden for his living. Can it be doubted that by so acting he became forisfamiliated, and if forisfamiliated that the *lex loci* must apply to his contractual relation with his master? Were there no authority to be quoted in favour of this view, I should hold it without hesitation, unless some clear authority could be brought forward in support of the opposite view. But in my opinion there is authority in favour of the view I take. Lord Fraser in his work on Parent and Child¹ states the law thus:—"A foreign minor in Scotland can receive here no further or other protection than is accorded by our laws to native minors." And he says that while the importance or character of a proposed contract may reasonably put a party on his inquiry in the case of one appearing to be a minor, yet that any deference which may be paid to the *lex domicilii* "does not necessarily exclude the *lex loci contractus* as to legal capacity from some of the most ordinary contracts of every-day life,"² an expression plainly applicable to a contract for ordinary manual labour. Perhaps as strong a case as can be brought forward in support of this view is one which was not quoted in the debate, but has been brought before us by Lord Salvesen—the case of *Male v. Roberts*.³ In that case the question arose very sharply, as the circumstances were that a young Englishman, being in Edinburgh, induced a friend to supply money to pay a debt for which he was being arrested as *in meditatione fugæ*. The lender sued him for repayment, and he pleaded that, being an Englishman and not major, he was in law an infant, and could not

¹ (3rd ed.) p. 720.

² *Ibid*, at p. 723.

³ (1799) 3 Esp. 163, 6 Rev. Rep. 823.

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If the case is to be dealt with according to Scots law, the next question is whether the contract is to be held null and void on the bare ground that the pursuer was a minor. The Lord Ordinary has so held, in respect that there was no concurrence of the pursuer's curator. This might be sound if it could be maintained that he had a curator, whose consent should have been obtained, namely, his father. But his father was resident in a different country; he was not in a position to exercise, and was not exercising, any protective control over him. Persons entitled to the office of curator who are in other lands cannot give their aid to the minor, and there may be no knowledge of their existence on the part of the contracting party. There seems to be no authority for holding that in such circumstances an agreement between employer and employed can be held to be null and void because entered into without a curator's consent. Apart from this there is the fact that the pursuer is, as I hold, *forisfamiliatus*, and that this implies the practical extinction of the curatorial position of his parent. I differ, therefore, from the Lord Ordinary when he holds *de plano* that the pursuer is entitled to decree.

The last question is whether it is open to the pursuer, when an agreement has been made by him as a minor, to impugn that agreement on the ground that it is to his enorm lesion. It is difficult to see any ground on which he can be held to be excluded from taking up such a position. If he is held bound to submit himself to the law of Scotland, as regards the contract of service into which he entered, can he not take advantage of the law of Scotland in so far as it protects minors from being held bound by agreements which can be impugned on the ground of lesion? Here the pursuer's contention is that he has a claim at common law against his employer for fault causing him injury, and that an agreement by which he accepted compensation under the Workmen's Compensation Act, was to his enorm lesion. His right to have that allegation inquired into seems to admit of no doubt.

There must therefore be an inquiry. The pursuer desires to have that inquiry by a jury trial, which, in the ordinary case of a trial for injury by fault, would be the appropriate mode. But in the present case, I am of opinion that the Court should exercise the power it possesses to send cases to proof instead of to jury trial. The fact that it is not merely a case of damages, but that it involves inquiry into a question relating to the setting aside of an agreement as preliminary to the consideration of the question of fault and damages, appears to me to make it a case not appropriate for being tried upon issues before a jury. And although it is a case which may in

the end involve a question of quantum of damages, that is a very simple matter. There has been complete restoration to health, and the only question could be, what is the diminution of capacity for labourer's work caused by the loss of a part of one hand. This is a very simple matter, dealt with every day by Judges in the Sheriff Court, and by this Court in review of Sheriff Court cases.

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My opinion, therefore, is that the interlocutor of the Lord Ordinary should be recalled, that the second and third pleas of the defenders should be repelled, and that a proof before answer should be allowed.

LORD DUNDAS.—Various questions were argued to us at the discussion. I shall content myself with stating briefly the conclusion I have reached in regard to each of them.

1. The defenders plead *res judicata* in respect that, on 13th November 1911, the arbitrator in an application at their instance under the Workmen's Compensation Act found, *inter alia*, that they agreed to pay, and the pursuer agreed to accept, compensation at the rate of 10s. 3d. per week. In a case stated to this Division a question was (among others) put to us: "Was the agreement binding on the appellant" (pursuer) "without the consent of his curator?" We declined to answer that question. We considered that the arbitrator had not decided that the agreement was valid; that it was not for us, in disposing of the stated case, to determine whether it was valid or invalid; and that that question would be open for decision in the action which we were then informed the pursuer was in course of raising against his employers for damages at common law. In these circumstances it seems to me plain that the defenders' plea of *res judicata* must be repelled.

2. The pursuer, a minor, avers that he is a domiciled Irishman, and that by the law of Ireland minors have not capacity to enter into binding contracts. The defenders say that, assuming the law of Ireland to be as stated, it is not applicable to the circumstances of this case. I think the defenders are right. The pursuer's domicile was in Ireland, but the contract was entered into and performed in Scotland. In these circumstances I think Scots and not Irish law must rule the case. Good sense and expediency point strongly to that conclusion; and cases to which Lord Salvesen has referred me—they were not cited at the bar—satisfy me that it is correct and sound in law.

3. The pursuer argued that, assuming Scots law to be applicable, the contract was null as being entered into by a minor without consent of his curator. The general rule of law to that effect was not disputed, but there are exceptions to it upon which the defenders founded. They relied (1) on the statement of Erskine,¹ supported by many decisions, that "a minor who betakes himself to any business or profession, as trade, manufacture, law, &c., cannot be restored against deeds granted by him in relation to that employment"; and (2) on the fact that the pursuer, at and prior to the date of this contract or agreement, was forisfamiliar, residing in a different part of the United Kingdom from his father, and earning his own livelihood. I am not satisfied that the receipts produced might not reasonably be regarded as

¹ Inst. i. 7, 38.

Mar. 14, 1913. deeds granted by the pursuer in relation to his employment ; but I find it unnecessary to decide that question, because I consider that the defenders' second point, based on forisfamiliaration, is well founded, and ought to be given effect to.

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4. The defenders argued that the summons is radically defective and incompetent, because the pursuer does not ask for reduction of the receipts, but only of the decree or finding by the arbitrator. I do not think this objection can be sustained. It is, or was, certainly quite common for careful pleaders to crave reduction (if and in so far as necessary) of such documents as these receipts ; but I do not think it is strictly obligatory to do so.

5. The next question is whether or not the pursuer is entitled to prove enorm lesion. It is said with considerable force that though he has a plea in law based on lesion, he has no averments to support it. The pursuer should have made his condescendence specific on that head. But I am not prepared to throw the case out on this ground : there are, I think sufficient (barely sufficient) indications on the record of the pursuer's case of lesion, though it may be a very difficult one for him to establish. Assuming the relevancy of his averments, I see no sufficient reason why he should not be allowed an opportunity of endeavouring to establish it.

6. I think the Lord Ordinary has gone altogether too fast in practically deciding the case, so far as the grounds for reduction are concerned, upon the record. There must, in my judgment, be inquiry into the facts. Here we are confronted with a question of some difficulty in regard to procedure. It was, I think, admitted that the pursuer has stated a relevant case for damages, if he is entitled to go into that matter ; and the questions as to the defenders' liability, and the amount of damages if liability were established, would, in ordinary course, be referred to a jury. The preliminary questions raised by way of bar would, on the other hand, be ordinarily disposed of by a proof. But these cannot, so far as I see, be expiscated, in the peculiar circumstances of this case, without necessarily raising and determining the questions as to liability and (if liability be proved) damages. The pursuer's case of lesion would fail entirely if the defenders are not liable in any damages for fault or negligence at common law ; and it might equally fail, unless the damages were assessed at a pretty substantial figure. The whole parts of the case must therefore, I apprehend, be tried together. It would, I think, as a whole, be one obviously unsuited for jury trial. The alternative, and I consider in the circumstances the preferable, course is that the whole case should go to proof before the Lord Ordinary.

On these grounds I am for recalling the interlocutor reclaimed against, repelling the defenders' second and third pleas in law, and sustaining their fifth plea ; and *quoad ultra*, remitting to the Lord Ordinary to allow the parties a proof, before answer, of their respective averments in ordinary form.

LORD SALVESEN.—The most interesting question in this case is—By what law does the contract between the pursuer and defenders, under which they agreed that he should receive compensation under the Workmen's Compensation Act, fall to be governed ? The domicile of the pursuer is said to be Irish, but the contract was entered into in Scotland and fell to be performed there. According to the law of his domicile it would appear

—and at all events it is averred—that the contract was a nullity. Accord—Mar. 14, 1913. ing to the law of Scotland, on the other hand, a minor has a certain capacity to contract, and his contract is not necessarily a nullity. There is an almost infinite divergence of opinion amongst the writers on international law on this subject. As I read them, however, there seems to be a general agreement between the tribunals of Scotland, England, and America that the law of the place where the contract was made must prevail. The considerations which support this view are mainly those of good sense and expediency. A foreigner who contracts in Scotland with a native of that country must *prima facie* be held to intend that the law of Scotland shall be held to apply to the transaction. The Scotch contracting party cannot be presumed to know the law which regulates the capacity of the foreigner with whom he contracts. Indeed he has no reason to know that the foreigner has not become domiciled in Scotland; for if he is resident there this is a matter which may be known only to himself. In the case of a minor the reasonable view seems to be that he should have such protection in respect of his minority as the country in which he contracts would extend to a native, but that he should have no higher or different rights. In an early case in England, *Male v. Roberts*,¹ the identical question which we have to consider here came under the notice of Lord Eldon. There the plaintiff and defendant were performers at the Royal Circus. While performing in Edinburgh the defendant had become indebted to a Scotch creditor for supplies. He was arrested *in meditatione fugæ*, and being unable to pay, induced the plaintiff to pay the account for him. An action was afterwards brought to recover the money so paid as money paid to his use. The defence relied on was that he was an infant when the money was so advanced. It was contended on his behalf that the contract fell to be governed by the law of England, but this view was set aside. Lord Eldon said:—"The law of the country where the contract arose, must govern the contract." This case was referred to with approval in *Sottomayor v. De Barros*² by Sir James Hannen. The same rule applies in America, or at least in certain of the states of that country (see Story's Conflict of Laws, 8th ed., chap. IV.), and while in Scotland it does not seem to have been laid down in such absolute terms, the general trend of the decisions is in the same direction (see *Scoffier v. Read*,³ where the minor son of an Englishman who contracted in Scotland was found entitled to restitution on the ground of minority and lesion). The case of *Cooper v. Cooper*⁴ affords little guidance, because there the law of the domicile and of the contract was one and the same; and it was held that the validity of the contract fell to be regulated by that law, especially as it could not be predicated that the contract (being one of marriage) was necessarily to be performed in another country. In modern times, when so many foreigners have taken up their residence in Scotland for the purpose of making their livelihood, although they may retain their original domicile for purposes of succession or the like, it would be highly inconvenient both for them and for Scotsmen with whom they contracted if contracts could not be made as freely with them

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¹ 3 Esp. 163, 6 Rev. Rep. 823.

³ M. 8936.

² 5 P. D. 94.

⁴ 15 R. (H. L.) 21.

Mar. 14, 1913. as with natives. I have accordingly reached the conclusion that the law of Scotland is the law which applies to the capacity of the pursuer in this case.

M'Feetridge v. Stewarts & Lloyds, Limited. The Lord Ordinary, proceeding on this assumption, has held that the contract which the pursuer made was null because it was made by a minor having a curator without that curator's consent. If the premises be sound the conclusion is not disputed; but the question remains, Had this Irish lad of sixteen a curator whose consent the defenders ought to have obtained to the transaction? It is true his father was resident in Ireland and would presumably have been his curator according to Scots law if he had been resident in this country; but I cannot hold that a minor who is resident in Scotland must be treated as a minor having a curator, because his father happens to be alive, though resident in some other part of the world. It is of no moment in this question of law whether he is or is not easily accessible. The principle must be the same whether he is resident in Poland or in Ireland, or whether his residence is not known at all. The reason why a minor who has curators cannot act without them is because he is under their protection or supervision, a fact which is presumably known to the person with whom he contracts; but curators who are absent from the country are not capable of giving any protection, nor has the person with whom the minor contracts any reason to know of their existence. The common case where the curator's consent is indispensable to validate the minor's actings is where the minor is living in family with his father; but the principle has also been applied where he was serving an apprenticeship in a town different from that in which his father lived but under a contract of apprenticeship entered into on his behalf by his father.¹ There is no case, so far as I know, where a minor's contract has been held to be null because it was entered into without the consent of a curator who was permanently absent from the country. In one case where the curators were abroad the Court appointed a curator *ad litem* to a minor, a step which would not have been competent if they had been resident within the country and not disqualified from acting. There is another ground upon which it may well be held that this minor, according to our law, had such capacity to contract as belongs to a minor who has no curators. He had left his father's house and country; he was earning his own livelihood in Scotland, and very probably a larger income than his father. He was thus *forisfamiliated*; and it is a principle of our law that the curatory of a father ceases after the minor has become *forisfamiliated*.

Assuming, then, that the pursuer is to be dealt with as a Scottish minor who had no curators, it is quite settled that the contract into which he entered with the defenders was as effectual as if he had had curators and had acted with their consent.² The contract is accordingly not null, although it may be reducible on the ground of enorm lesion. The same remedy is granted to a minor without curators as to one who has acted with the concurrence of his curators. It was strenuously maintained by the defenders that, while this is the general law, it does not apply to the case where a minor has betaken himself to business or trade. But the exception does not apply to deeds which are not incident to the employ-

¹ Anderson v. Anderson, 11 S. 10.

² Erskine, i. 7, 33.

ment or business which the minor has embarked upon.¹ Now it is true that the pursuer could have made no claim under the Workmen's Compensation Act unless there had existed between the defenders and him the relation of employers and employed; but I cannot hold that it is incident to the contract of employment that the workman should discharge a claim for personal injury due to the negligence of his employer, whether such discharge is express or results by operation of law from a contract which he has made. Accordingly I am of opinion that he is still entitled to set aside that contract if in fact he can show that it was to his enorm lesion. In *Robertson v. S. Henderson & Sons, Limited*,² the contention, which the defenders also pressed, was rejected that "the whole question of minority and lesion was excluded by the Act of Parliament, because the Act of Parliament brings the employer and the injured workman necessarily into the position of bargaining with one another, and this implies that once that bargain is made it must be carried out and receive full effect."³ In that case the transaction sought to be set aside was one in which a lump sum had been accepted in full settlement of a weekly claim for compensation. But in the case of *Stephens*⁴ the material facts were the same as here; and the Court held that the Act, by including an apprentice under the general word "workman," did not alter the law in reference to contracts by infants. These two decisions seem to be conclusive on this point.

Although, therefore, I am of opinion that the pursuer is not barred from obtaining restitution on the ground of minority and lesion, I am unable to agree with the Lord Ordinary in holding that the contract which he entered into can be set aside *de plano*. Enorm lesion may be inferred without proof, as, for instance, when a gratuitous discharge has been granted by a minor of valuable patrimonial rights or when he has entered into a cautionary obligation; but the transaction here was not of that nature. On the contrary, it may be that the minor acted with prudence and discretion in electing to take compensation under the Workmen's Compensation Act. If, on the facts, it turns out that his claim at common law was not well founded, or if the advantages which he secured under the Act were comparable to the amount which might reasonably be awarded him as compensation at common law, enorm lesion would obviously not be established. Parties are not agreed that the defenders would have been liable at common law, nor as to the extent to which the pursuer's injuries have permanently unfitted him for his ordinary work. These are matters for inquiry, and are best disposed of by a legal as distinguished from a lay tribunal. I therefore agree that we should recall the interlocutor of the Lord Ordinary and remit to him to allow the pursuer a proof of his averments, excluding those relating to Irish law.

On the other matters noticed in Lord Dundas's opinion, and upon which I have not touched, I agree with the conclusions at which he has arrived.

LORD GUTHRIE.—The defenders plead *res judicata*. I agree with the

¹ Mackenzie v. Fairholm, (1666) M. 8959.

² Per Lord Kinnear, at p. 774.

³ 6 F. 770.

⁴ [1904] 2 K. B. 225.

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Lord Ordinary in thinking that this plea is not maintainable, either in respect of the proceedings before the Sheriff-substitute of Lanarkshire at Airdrie mentioned in cond. 7, or in respect of what took place in the appeal by way of stated case to this Division of the Court. Even if the question of the effect of the pursuer's minority could have been competently determined by the Sheriff-substitute in an application under paragraph (16) of the First Schedule to the Workmen's Compensation Act, 1906, which I do not think it could, the points now relied on by the pursuer, founded on Irish law and on minority and enorm lesion, were not maintained before the Sheriff. The only ground on which it was said that the alleged agreement was not binding was that the pursuer was in minority and his curator did not give his consent. In this Division the position taken up by the pursuer was the same. The second question in the stated case is thus expressed: "(2) Was the agreement binding on the appellant without the consent of his curator?" But it is enough to say that the Court refused to answer this question.

If the questions raised by the pursuer are open, he maintains that he is entitled either to decree that the agreement in question was *ab initio* null, or that it is reducible on the ground of minority and enorm lesion. He maintains that the agreement was *ab initio* null on two grounds. First, the case, he says, falls to be dealt with under Irish law, according to which minors have not capacity to enter into binding contracts; and, second, if Scots law applies the same result follows, because the pursuer was in minority, and his curator did not give his consent. I think the Lord Ordinary has come to a sound conclusion in rejecting the pursuer's contention founded on the applicability of Irish law, but that he has erred in affirming the second ground on which the pursuer maintains that the agreement was null.

In regard to the question of Irish law, it was maintained by the pursuer that, by the law of Scotland, the question of capacity on the part of a foreign minor to enter into contracts in Scotland must in all cases be determined by the law of the foreigner's domicile, even if the contract falls to be performed in Scotland; while the defenders argued that, in all cases of contracts entered into between Scotsmen and foreign minors in Scotland¹ to be performed there, the law applicable must be the law of Scotland. It does not seem to me necessary to decide this broad question. It may be that, in the case of contracts like marriage-contracts, affecting permanently the personal or domestic relations, the law of the domicile would be held to apply. *Cooper v. Cooper*,¹ in which an *obiter dictum* of Lord Macnaghten was expressed, on which the pursuer strongly relied, was a case of that kind. In such cases it might be held that it was the duty of the Scotch party to the contract, in view of the character and effect of the contract, to inquire into and have in view the law of the foreigner's domicile. But it does not seem to me that any such difficulties arise in the present case. I think the present case falls under the class discussed by Lord Fraser in Part VIII. of *Parent and Child*, in which, while conceding "deference in general to the *lex domicilii* on the whole questions relative

¹ 15 R. (H. L.) 21.

to minority," he considers that the law which is applicable is not the law of the foreigner's domicile, but the law of Scotland. This view is in accordance with the opinions of many jurists. For instance, Froland is quoted by Story in his fourth chapter of the Conflict of Laws, section 55a, "If the question is purely as to the state of the person, abstracted from all consideration of property or subject-matter, in this case the law which first commenced to fix his condition (that is, the law of the domicile of his birth) will preserve its force and authority, and follow him wherever he may go. Thus, if, by the law of the domicile of his origin a person attains his majority at twenty years, and he goes to reside in another place where the age of majority is twenty-five years, he is held to be of the age of majority everywhere; and, notwithstanding he is under twenty-five years, he may in his new domicile sell, alien, hypothecate, and contract as he pleases, and *vice versa*. But when the question is as to the ability or disability of a person who has changed his domicile to do a certain thing (*à faire une certaine chose*), then that which had governed his power (that is, the law of his original domicile) falls, and fails entirely in this respect, and yields its authority to the law of his new domicile. Thus, if a married woman, by the law of the country of her birth, is not allowed to pass property by will without the consent of her husband, and she acquires a new domicile in another country where no such restriction exists, she has full liberty to dispose of her property in the latter country by will without the consent of her husband, and *vice versa*."

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But, if the Scots law applies, the pursuer says that the agreement in question is void, because entered into without consent of his curator. This contention implies that, at the date of the agreement, the pursuer had a curator, namely, his father. But this is a mistake in fact, because, on the admitted facts, the pursuer was forisfamiliar, and the agreement must therefore be dealt with as if it had been entered into by the pursuer with consent of his curator—that is to say, not as a null agreement, but as voidable on proof of minority and enorm lesion. If so, the defenders say that the pursuer is not entitled to inquiry, under the head of minority and enorm lesion, because no such case is made on record. I think there is considerable force in the defenders' contention. It is evident that the record was originally framed on the footing of getting rid of the agreement as null on the ground that it was entered into by the pursuer, a minor, without his curator. The question of Irish law has been properly raised by amendment both in the condescendence and pleas in law, while the only direct reference to enorm lesion is in plea 3. But I am prepared to concur in the view taken by Lord Dundas that, in the absence of any prejudice to the defenders, the pursuer's pleadings on the question of enorm lesion, although not satisfactory, may be allowed to pass, to the effect of entitling him to inquiry.

On the mode of inquiry, I concur that this is a case peculiarly unfitted for jury trial, and one in which special cause has been shown why the whole matter should be remitted to probation before a Judge.

THE COURT recalled the Lord Ordinary's interlocutor, repelled the second and third pleas in law for the defenders, sustained

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their fifth plea in law, and remitted the cause to the Lord Ordinary to allow the parties a proof before answer of their respective averments, and to proceed therein as accords.

ALEX. MORISON & Co., W.S.—R. & R. DENHOLM & KERR, Solicitors—Agents.

No. 108. THE HIGHLAND DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF THE
COUNTY OF PERTH, Pursuers (Respondents).—*Horne, K.C.—Lippe.*
Mar. 18, 1913. WILLIAM RATTRAY, Defender (Appellant).—*Macmillan, K.C.—*
J. G. Jameson.

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District
Committee of
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Rattray.

Road—Extraordinary expenses—Recovery by road authority—Requisites of surveyor's certificate—Road of less than statutory width—Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. cap. 51), sec. 57.

Sec. 57 of the Roads and Bridges Act, 1878, provides that "where by the certificate of their surveyor or district surveyor it appears to" the road authority "that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred" in repairing damage caused by extraordinary traffic, the road authority may recover the amount of the expense from the person responsible for the traffic.

In an action to recover the expense of repairing damage done to a road by extraordinary traffic, *held* that it was not essential that the surveyor's certificate should bear to have been framed, or should in fact have been framed, with regard to the average expense of repairing highways in the neighbourhood; but *observed* that it was the duty of the road authority, before bringing the action, to have regard to such average expense.

Opinion (per Lord Salvesen) that a road authority is not barred from recovering damage done to a road by extraordinary traffic merely because the road is of less than the width prescribed by statute.

2D DIVISION.
Sheriff of
Perth.

ON 26th October 1911 the Highland District Committee of the County Council of the County of Perth brought an action in the Sheriff Court at Perth against William Rattray, wood merchant, there, for payment of £1010, 10s.

The pursuers averred that they were the road authority for the Highland District of the county of Perth, and as such were vested with the management of (1) the road from Tay Bridge by Coshieville to Tummel Bridge; and (2) the road from Logierait by Clunie Bridge to Daloist. That the defender was a wood merchant, who, between April 1910 and June 1911, transported heavy loads of timber by means of traction engines from Foss to Aberfeldy over the roads above mentioned, and thereby severely damaged them. (Cond. 9) ". . . The total extraordinary expenses incurred by the pursuers in repairing the said roads in consequence of defender's operations has amounted to £965, 10s. The total distance of roads damaged is 7 miles and 945 yards or thereby. The average annual cost for the past five years, *dealing with all the roads within the pursuers' district*, of maintaining the said roads in repair sufficient for the purposes of the ordinary traffic resorting thereto has been (1) road—Foss to Daloist, £8, 13s. 4d. per mile; and (2) road—Daloist to Coshieville, £11, 17s. 1d. per mile. *The said extra sums of expenditure incurred by pursuers in respect of the repair of said roads are extraordinary expenses within the meaning of*

the section of the statute quoted in article 2 of the condescendence,* and they were incurred by reason of the damage arising from the excessive weight and extraordinary nature of the traffic of the defender during said period. In dealing with the expenses of repairing said damage to said roads and in estimating the amount of said extraordinary expenses the pursuers have had regard to the average expense of repairing highways in the neighbourhood. None of said highways are entirely comparable with the roads in question, but the following roads are the most similar, viz.:—*Aberfeldy and Amulree Road; Glenbrerachan Road, Moulin to Dirnanean; Ardrannoch Burn by Dumfallowlandy to Logierait; Tenandry, Strathgarry, and Inverack Road; Lochtay South Road.* Looking to the nature of said highways as well as to the other highways in the neighbourhood, and the traffic which they carry and the average expense of their maintenance, the sums now sued for are fair and just estimates of the amounts which the pursuers are entitled to recover as extraordinary expenses within the meaning of said section incurred in respect of the roads in question. The surveyor's reports for the past five years are produced and referred to."† They averred further that other damage to bridges and a culvert was done by the extraordinary traffic conducted by the defender, amounting to £45, which, together with the above-mentioned sum of £965, 10s., made up the sum of £1010, 10s. sued for.

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Together with the initial writ the pursuers produced a certificate from the road surveyor of their district in these terms:—"I hereby certify that much damage has been done to the road and bridges from Coshieville to Foss sawmill through excessive weights passing along the road, or extraordinary traffic having been conducted thereon, in the haulage of timber to Aberfeldy by Mr William Rattray, and that extraordinary expenses amounting to One thousand and ten pounds ten shillings beyond the ordinary cost of maintenance has been expended in repairing the damage, being £965, 10s. in repairs on roads; £24 in repairs to Blair Rannoch Bridge; £15 in repairs on Whitebridge; and £6 in repairs on the culvert at the seventh milestone."

The defender averred that the second mentioned road from Logierait to Dalolst was formerly a statute labour road, that it was nowhere of the width of 20 feet, and that the average width of clear passable road was about 9 feet. The pursuers stated that the average width of the road was 11 feet.

The pursuers pleaded, *inter alia*;—(1) The pursuers having incurred

* The statute referred to was the Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. cap. 51), which, by sec. 57, enacts:—"Where by the certificate of their surveyor or district surveyor it appears to the authority which is liable to repair any highway that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same or by extraordinary traffic thereon, such authority may recover in a summary manner before the Sheriff (whose decision shall be final), from any person by whose order the excessive weight has been passed, or the extraordinary traffic has been conducted, the amount of such extraordinary expenses as may be proved to the satisfaction of the Sheriff to have been incurred by such authority by reason of the damage arising from such excessive weight or traffic as aforesaid."

† The averments printed in italics were added by amendment during the debate before the Second Division.

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extraordinary expenses in repairing the highways, bridges, and culvert mentioned in the condescendence in consequence of the extraordinary traffic and excessive weight conducted thereon by the defender, are entitled to decree against the defender for payment thereof as craved. The defender pleaded, *inter alia*;—(1) The certificates by the district surveyor being awanting in specification and disconform to the requirements of the statute, the action should be dismissed. (2) The pursuers' averments being irrelevant, the action should be dismissed. (3) The alleged damage not being "the consequence of any particular building contract or work extending over a long period," within the meaning of section 24, subsection (b), of the Local Government (Scotland) Act, 1908, the action cannot be maintained, except under the first part of that subsection in respect of the damage alleged to have been done within twelve months prior to the commencement of the action. (4) The road between Foss and Daloist being one which it was illegal for the pursuers to maintain, as it was short of the statutory width, they can have no cause of action in respect thereof.

On 16th July 1912 the Sheriff-substitute (Sym) pronounced this interlocutor:—" . . . Repels the defender's first plea so far as excluding the action: As to the defender's fourth plea, finds that the fact—assuming it to be fact—that the pursuers have not a road 20 feet wide of passable width from Daloist to Foss does not exclude them from maintaining an action against one who is said to have caused wrongful damage to such road, and to that effect and extent repels the said fourth plea: *Quoad ultra* before further answer allows to the parties a proof of their respective averments on record. . . ."

The defender appealed to the Sheriff (Johnston) who, on 3rd January 1913, affirmed the interlocutor of the Sheriff-substitute.

The defender, having obtained leave, appealed to the Court of Session.

The case was heard before the Second Division (without Lord Guthrie) on 20th, 21st, and 22nd February and 11th and 12th March 1913.

Argued for the appellant;—(1) The action was incompetent because the surveyor's certificate did not state that the surveyor had considered the average expense of repairing highways in the neighbourhood, and also because in fact he had not taken that matter into consideration. The requisites of a surveyor's certificate were considered in the case of *Billericay*,¹ and the opinions there expressed supported the view maintained by the appellant. It was impossible for the surveyor to certify that the traffic had been extraordinary, and that extraordinary expenses had been incurred, unless he had had regard to the standard of traffic in the district² and the cost of repairing highways other than the one in question.³ The *dicta* in *Milne*⁴ should be reconsidered in the light of the more recent English decisions, in particular the case of *Billericay*.¹ The decision of Mr Justice Bigham sitting as a single Judge in *Epsom Urban District Council v. London County Council*⁵ was wrong, and should not be fol-

¹ *Billericay Rural Council v. Poplar Union and Keeling*, [1911] 2 K. B. 801, *per* Fletcher Moulton, L.J., at p. 812.

² *Wallington v. Hoskins*, (1880) 6 Q. B. D. 206.

³ *Colchester Corporation v. Gepp*, [1912] 1 K. B. 477.

⁴ *Milne & Co. v. Aberdeen District Committee*, (1899) 2 F. 230.

⁵ [1900] 2 Q. B. 751 at p. 757.

lowed. This flaw in the certificate was fatal to the pursuers' case. Mar. 18, 1913.
Prima facie the public were entitled to use the roads freely and according to their necessity. Any restriction was statutory, and the statutory formalities must be strictly observed. (2) The average width of the Dalroist Road was conceded to be under 20 feet, contrary to the provisions of the Highway (Scotland) Act, 1771,¹ under which the pursuers were bound to keep it 20 feet wide.² The defenders being in breach of their statutory obligations, could not enforce their statutory rights. The two matters were closely connected, for if the road had been of the proper width, the traffic would have been spread over a greater area, and the extraordinary damage would not have been done.

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Argued for the respondents;—(1) The object of the certificate was "to inform the highway board of the fact that extraordinary expenses had been incurred upon certain highways within their jurisdiction."³ But it was nowhere laid down that it was the duty of the surveyor to "have regard" to the average cost of repairing highways in the neighbourhood, or to state in his certificate that he had done so. If anyone was bound to do that, it was the road authority.⁴ The contrary construction would imply that the surveyor was final as to the choice of comparable roads and that the road authority had no duty except to take the figures which he gave them. The surveyor was entitled to issue his certificate on any grounds which seemed to him sufficient. (2) There was no necessary connection between the width of the road and the damage so as to prevent the pursuers recovering on the ground of extraordinary traffic. It was absurd to suggest that, merely because the road was not of statutory width, the defender was entitled to damage it to any extent he pleased.

At advising on 18th March 1913,—

LORD DUNDAS.—A good many questions of general interest and importance were fully and ably argued at our bar; but I have come to the conclusion that it is neither necessary nor desirable to decide all of them at this stage of the case.

1. The defender's first plea in law seems to be directed in some measure against the relevancy of the action, but also largely against its competency. The latter aspect of the plea we ought to deal with here and now; and I think the learned Sheriff-substitute, whose interlocutor was affirmed by the Sheriff, is right in repelling it "so far as excluding the action." The point involved is whether the surveyor's certificates are disconform to the statute, so as to be no certificates at all, in respect that they do not bear *ex facie* to have been framed by him "having regard to the average expense of repairing highways in the neighbourhood." I do not think that upon a just construction of section 57 of the Roads and Bridges (Scotland) Act, 1878, in which the words quoted occur, it is a necessary qualification of a

¹ 11 Geo. III. cap. 53, sec. 1.

² *Gray v. St Andrews and Cupar District Committees of Fifeshire County Council*, 1911 S. C. 266; *Walkinshaw v. Orr*, (1860) 22 D. 627, 23 D. 80.

³ *Wirral Highway Board v. Newall*, [1895] 1 Q. B. 827, *per* Lawrence, J., at p. 831.

⁴ *Epsom Urban District Council v. London County Council*, [1900] 2 Q. B. 751, at p. 757; *Milne & Co. v. Aberdeen District Committee*, 2 F. 220.

Mar. 18, 1913. surveyor's certificate that it should include these words. I do not see what good their mere inclusion would do to the defender or to anybody concerned. I shall say something presently as to what I conceive to be the place and function of the certificate in a statutory proceeding of this nature. But so far as authority goes, it appears that, though it is usual for the certificate to bear that regard has been had to the average expense of repairing highways in the neighbourhood, it is not essential that it should do so. This was directly decided in a considered judgment by Lord Mersey (then Bigham, J.) in *Epsom Urban District Council*.¹ It was there argued that "the surveyor's certificate is not in proper form, because it does not show that the average expenses of repairing all the roads in the district have been taken into account, and not those merely of repairing the roads along the line of traffic." The report shows that the certificate expressly bore that the surveyor had had "regard to the average expenses of repairing highways along the line of traffic." His Lordship said: "I think nothing of this point. I am quite satisfied that the certificate did make it appear to the plaintiffs" (the road authority) "that extraordinary expenses within the meaning of the section had been incurred; and if it did that, it was a certificate which complied with the requirements of the law." This point was discussed in the Scots case of *Milne & Company*²; and also the further point—which I think we ought now to decide—whether or not it is necessary that the surveyor should, in fact, have regard in framing his certificate to the neighbouring highways. The certificates there did *ex facie* bear that regard had been had to the average expense of repairing highways in the neighbourhood, but the pursuers sought reduction of the certificates, and of the Sheriff's decree (which at that time was not subject to appeal), in respect that the former were false and fraudulent to the knowledge of the road authority, and were granted without any such "regard" being had in fact. The pursuers argued, *inter alia*, that the certificates were an essential preliminary to the action; and if they were not truly in terms of the statute, the whole proceedings were bad. But their action failed; and I think the opinions of the learned Judges, which I shall presently refer to in some detail, were clearly to the effect that it is not an essential preliminary to the action—a condition *sine qua non* of its competency—that the surveyor in granting his certificate should have had regard to the average expense of repairing highways in the neighbourhood. I should myself have reached the conclusion, upon a construction of the statute and apart from authority, (1) that it is not essential that the certificate should bear on its face that the surveyor had had regard in framing it to neighbouring highways, or that he should in fact have had such regard, and (2) that it is sufficient that the road authority should, with the certificate before them, and before raising action, have regard to the average expenses of repairing highways in the neighbourhood. The production of a certificate by the surveyor is certainly an essential condition precedent to an action like the present. It is, as Mr Macmillan put it during the discussion, the pursuers' ticket of admission to the law Court. But it is not easy to define precisely the place and function of the certificate in the matter,

¹ [1900] 2 Q. B. 751.

² 2 F. 220.

or to realise the exact object of the Legislature in making it a condition precedent of legal proceedings, and in introducing the words already quoted with reference to neighbouring highways. It is not necessary at present to commit oneself to a concluded opinion as to the object of the Legislature, or what amount of safeguard, and to whom, it designed to provide by referring to highways in the neighbourhood. But I agree with the learned Judges in *Milne's* case¹ in holding, upon a construction of section 57 of the Act of 1878, that it is not essential that the surveyor in framing his certificate should in fact have had regard to the expense of repairing highways in the neighbourhood, although the road authority themselves, before commencing action, must have regard to it, whatever the precise nature and limits of such regard may be. The Lord Ordinary (Low) thought that one object of the words already quoted from the statute "was to secure that the only basis for determining whether there had or had not been extraordinary expenditure should not be the cost of repairing the road upon which extraordinary traffic had arisen." His Lordship considered that the words used were "designedly very general words, so as not to lay down any hard and fast rule, but to give considerable latitude so as to meet the varying circumstances of different cases." The Lord President (Kinross) thought that the direction in section 57, to have regard to the average expense in the neighbourhood, "is addressed, in the first instance at all events, to the road authority, and they are not enjoined to accept it as a final standard, but only to consider it—possibly along with other evidence bearing upon the question whether the expenses incurred by them in repairing the highway in question are or are not extraordinary." Lord M'Laren attached no importance to the argument relating to the certificate, which, he observed, "is not a formal legal document at all." Lord Kinnear was of opinion that "the surveyor's certificate is only necessary to set the local authority in motion." I am aware, however, that the views I have quoted are not in harmony with opinions expressed by some learned Judges in England, particularly with some *obiter dicta* by Lord Moulton (then L.J.) in the *Billerica* case.² For present purposes it is sufficient to decide that the action is not incompetent although the certificate does not bear on its face to have been framed, and may not in fact have been framed, "having regard to the average expense of repairing highways in the neighbourhood"; and to indicate the opinion that it is the duty of the road authority, before commencing an action like this, to "have regard" to the matter indicated. As to the extent and quality of such "regard" which it is necessary for them to have, or to what highways in the neighbourhood regard must be had, or in what fashion, I express no opinion. These questions may arise for decision if the case comes before us again on an appeal after the evidence has been taken. I think the Sheriff-substitute dealt rightly with the defender's first plea in law.

2. The defender's second plea is that "the pursuers' averments being irrelevant, the action should be dismissed." The argument on this head was in two branches. Mr Macmillan contended, in the first place, with great force, that the pursuers' own record made it quite clear that neither

¹ 2 F. 220.² [1911] 2 K. B., at p. 812.

Mar. 18, 1913. the surveyor, in framing his certificate, nor the pursuers themselves, before bringing the action, had in fact had any regard at all to the average expense of repairing highways in the neighbourhood. In the second place, he maintained that the record did not contain sufficient specification—equivalent to the “particulars” in an English suit—in regard to the two different roads with which the action is specially concerned. Mr Horne has now relieved the situation by making amendments on his record which go far, at all events, towards meeting both objections. The pursuers now aver that they have had regard to the average expense of repairing highways in the neighbourhood, and they state a number of particulars. The proof allowed is “before further answer,” and the plea to relevancy will be neither sustained nor repelled *in hoc statu*. If the defender should consider himself entitled to any further particulars, the Sheriff-substitute can deal with the matter before the proof.

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3. The defender's third plea in law raises a question as to the time limit applicable to the action in respect of section 24 of the Local Government (Scotland) Act, 1908. The argument at our bar indicated that the state of judicial decision (at least, of judicial opinion) in England—there seems to be no Scots authority—is somewhat unsettled and uncertain, and that questions of considerable difficulty may arise in this case upon a construction of the statute. But for myself I decline to decide *ab ante* an abstract question of construction without accurate knowledge of the facts, and I agree with the learned Sheriffs that these must be inquired into before a decision in law on this head of the case can be satisfactorily arrived at.

4. The defender's fourth plea in law is a somewhat singular one. It would, if sustained *de plano*, exclude the action so far as it relates to the road between Foss and Dalquist. The theory is that that road, inasmuch as it does not afford a clear passable space at all parts of at least 20 feet, does not comply with the statutory obligation imposed on road authorities in Scotland, and therefore the pursuers are not in a position to recover from the defender any pecuniary loss they may have sustained from his use of it by way of excessive weight or extraordinary traffic. *Prima facie* this argument appears to involve something of a *non sequitur*, and the learned Sheriff indicates an opinion that the defence is irrelevant. But expiscation of the facts, as to which the parties do not seem to be agreed, may throw light upon the matter, and as there is to be a proof, I am content to let this point be included in its scope for what it is worth.

For the reasons stated, I think we should affirm the interlocutors appealed against, and remit the case to the Sheriff Court for proof.

LORD SALVESEN.—This action raises questions as to the construction of section 57 of the Roads and Bridges (Scotland) Act, 1878, the language of which has been borrowed from an English statute, and which has already been the subject of much judicial comment in England, and at least on one occasion in Scotland. There is a general consensus of opinion with regard to one point, viz., that the certificate of the surveyor or district surveyor is a condition precedent to an action being raised by a Local Authority for recovery of extraordinary expenses incurred in repairing a highway. The important question is whether the surveyor in granting it must have had

"regard to the average expense of repairing highways in the neighbourhood," and must so state in his certificate. It was said with much apparent force, and the view has the support of so eminent a Judge as Lord Justice Fletcher Moulton, that it cannot appear to the Local Authority which has to consider the matter that extraordinary expenses have been incurred, having regard to the average expense of repairing highways in the neighbourhood, unless that can be gathered from the certificate itself. If this is a statutory solemnity and the certificate is a nullity in consequence of its omission, then it would seem to follow that the whole proceedings must be commenced *de novo*; with the necessary consequence that the time limit would operate very much to the defender's advantage.

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I do not stop to consider what the object of the Legislature was in providing that the certificate of the surveyor should be a condition precedent to the Local Authority raising any action. Various suggestions have been made, more or less conjectural. None of them seem to me to indicate that the certificate performs any really useful function. It may be assumed that a Local Authority would not embark upon litigation unless, at least, they were backed up by the official whom they appoint to supervise the roads within their jurisdiction. Perhaps the draughtsman may have thought the surveyor was some independent official whose views might act as a check upon the rashness of the Local Authority. If so, he undoubtedly proceeded on a misapprehension. This much may be said, that if the surveyor in his certificate is to perform the functions that the defenders say the statute has laid upon him, he has an extremely difficult task. He has in the first place to consider what is the meaning of "average expense." Over what period is the average to be taken? Is it the average of the period in respect of which the claim is made, which may be a broken period of a few months; or is it to be an average extending over a period of years, and if so, how many? He has next to consider what is meant by the term "highways." Are all the roads to be included, or is it only similar or comparable roads to which he is to have regard, as the Court of Appeal held in the *Billerica* case¹? And what if there be no similar or comparable highways, as may well happen in a thinly populated district where there is only one main road and the rest are side roads differing entirely in width, formation, and solidity? Lastly, what is meant by the phrase "in the neighbourhood"? Does it extend to highways under a different jurisdiction with which the surveyor has no acquaintance, as where the road injured is very near the limit of his jurisdiction? And what area is to be covered by the phrase? All these matters the surveyor must apparently consider if the defender's argument is sound, and must come to a right legal result with regard to them if his certificate is not in the end to be treated as a nullity. I do not think that it was the intention of the Legislature that such a burden should be cast upon the surveyor. The object of inserting the clause that I have referred to seems rather to be by way of warning to the Local Authority before taking action and to the Judge who has ultimately to decide the case, that it is not to be rashly concluded, because there has been more expense incurred in repairing a particular highway in

¹ [1911] 2 K. B. 801.

Mar. 18, 1913. one year than another, that therefore that highway must have been injured by extraordinary traffic or excessive weights. Regard must be had to all the circumstances that may have affected similar highways in the district and that in a given year may have increased the amount expended on repairs. In short, the words "having regard to" might, I think, be translated "in view of," in which case it is the Authority which must consider the figures stated in the certificate, and compare them with the general charges for maintenance incurred on comparable roads in the vicinity.

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This construction is supported by the fact that the amount recoverable against the person by whose extraordinary traffic the road has been damaged is not measured by the difference between the actual cost of repairing the road in controversy and the average expense of repairing similar roads in the neighbourhood for the same mileage. It is also, in my judgment, settled by authority both in England and Scotland. The exact point was decided by Bigham, J., in *Epsom Urban District Council*,¹ and also, I think, impliedly in the case of *Milne*² (a decision which is binding on this Court), and the *Colchester Corporation*.³ In the last two cases the certificate granted by the surveyor contained the formal words of the statute; but in each of them it was admitted that the surveyor had done no more than he certified in the present case—that is to say, that he had only ascertained what had been the average expense of repairing the highways in respect of which the claim was made, and had not applied his mind to the average expense of repairing similar highways in the neighbourhood. Now, I cannot conceive that the formal statement that compliance has been made with the statutory provision, when in fact it is admitted that that statement is untrue, can make a certificate, which would otherwise *ex hypothesi* be a nullity, a good and valid certificate; or that a certificate should be any the worse because it did not contain an admittedly false statement. When a surveyor has accurately ascertained over a period of years the average expense of repairing the roads affected by the alleged extraordinary traffic, I think both he and the Local Authority may well draw the conclusion that this will fairly represent the average expense of maintaining similar roads; for they cannot be similar if their annual upkeep is not approximately the same. Further, it may be assumed that the local authority as well as the surveyor will have a general knowledge of what it has cost them to repair similar roads per mile; and if it is found that the expense of repairing a particular road has been out of all proportion to the ordinary expense of its maintenance, I think it may well appear to the Local Authority, "by the certificate," to use the statutory language, that they have a *prima facie* cause of action. It is not to be left out of view that the surveyor in this case did certify that extraordinary expenses had been incurred; and the figure at which he stated these expenses might well justify the Local Authority in thinking that they were in duty bound to the ratepayers in the district to take proceedings for their recovery. On these grounds I have reached the opinion that even if the matter were open, as I conceive it is not, the certificate of the surveyor is not a nullity because it does not contain a statement that he has had regard to the expense of repairing similar highways in the

¹ [1900] 2 Q. B. 751.

² 2 F. 220.

³ [1912] 1 K. B. 477.

neighbourhood, or because he has not in fact applied his mind directly to Mar. 18, 1913. the question at all.

The only other matter which it is necessary to decide at this stage is that which is raised by the defender's fourth plea in law. It was decided by this Court in *Gray*¹ that road trustees are in breach of their statutory duty if they have failed to provide in the case of a statute-labour road a clear passable road of not less than 20 feet in width. I see no grounds for doubting the soundness of that decision; although it may be that road trustees have in many cases not strictly conformed to their statutory duty. But it is one thing to say that they may be liable as for negligence where an accident arises through their failure to provide a road of the statutory width; it is a totally different thing, and does not by any means follow, that they cannot recover for damage caused to a road of less than the statutory width by reason of extraordinary traffic. The statute does not impose any obligation upon them to have the road metalled so as to carry heavy traction-engines for any particular width. If it had, I could have seen some plausibility in the argument maintained. As matters stand I am prepared to hold—agreeing on this point with the Sheriff—that it is irrelevant for the defender to plead that the road was not of the statutory width. It is admitted that logically the argument would be precisely the same although the road was 19½ feet at only a single point throughout its course and for the rest complied with the statutory conditions. The argument for the defender seems to have been drawn from the domain of the law of contracts, and to have no application to a case such as the present. I am content, however, as the facts are in dispute, that this point and the others to which Lord Dundas has more fully referred should meantime be included in the inquiry, and should not be made the subject of formal decision.

Lord Dundas intimated that the LORD JUSTICE-CLERK, who was absent when the case was advised, concurred in the judgment proposed.

LORD GUTHRIE was present when the case was advised.

THE COURT affirmed the interlocutors appealed against, remitted the cause to the Sheriff-substitute to proceed with the proof allowed by him, including the averments of the pursuers added by amendment, and found no expenses due to or by either party since the date of the Sheriff's interlocutor.

ERSKINE DODS & RHIND, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

¹ 1911 S. C. 266.

No. 109. WILLIAM LAWSON THOMS, Pursuer.—*Morison, K.C.—W. T. Watson.*
 Mar. 12, 1913. THE CALEDONIAN RAILWAY COMPANY, Defenders.—*Macmillan, K.C.—Wark.*

Thoms v.
 Caledonian
 Railway Co.

Reparation—Damages—Excess of damages—Damages for personal injury—Process—Proof—Jury trial—Motion for new trial.

Circumstances in which the Court refused to set aside, on the ground of excess of damages, the verdict of a jury awarding £4000 to a farmer (the profit of whose farm amounted to about £350 a year) in respect of personal injuries sustained by him in a railway accident.

1st Division.
 Ld. President
 and a Jury.

ON 20th May 1912 William Lawson Thoms, the tenant of an agricultural and dairy farm in the neighbourhood of Dundee, brought an action against the Caledonian Railway Company in which he concluded for the sum of £5000 as damages for personal injuries sustained by him owing to the fault of the defenders.

The cause was tried before the Lord President and a jury on 30th December 1912, and the jury unanimously found for the pursuer, and assessed the damages at £4000.

On 28th January 1913 the Court granted a rule on the pursuer to show cause why the verdict should not be set aside and a new trial granted, on the ground that the damages were excessive.

The effect of the evidence, so far as material to the question of damages, was thus set forth in the opinion of Lord Johnston:—

“The pursuer in this case met with an accident, due to careless shunting at Invergowrie Station of a couple of horse-boxes, in one of which he was seated in attendance on valuable horses belonging to him, which were being conveyed to a show at Perth. The pursuer is a man of thirty-six, and when a boy he suffered from tuberculous disease of the spine, which occasioned curvature of the spine in the lower dorsal region, and the consequent ossification of three of the vertebræ, but from which he had completely recovered and become an exceptionally athletic, active, and hard-working man in his vocation of farming. Unfortunately the blow which he received by being thrown back in his seat involved the spot in the spine where the stiffening from the old ailment existed, and re-started the tubercular condition, and in the course of a very few days it became manifest that his condition was serious. The Railway Company candidly admit liability, and the only question in dispute is the measure of damages. A jury has brought in a verdict for £4000 damages, and we are asked to set aside this verdict and order a new trial, solely on the ground of excess of damages.

“The case presents features which are too seldom met with in questions of compensation. On the unanimous and unqualified testimony of the very eminent surgeons examined on both sides, the pursuer has presented his case without exaggeration in regard to his injuries, his suffering, or his present condition. It must be added that, as was to be expected from the character and position of the professional witnesses, there is no trace of exaggeration in the scientific evidence on either side. If I may respectfully say so, the perusal of the medical evidence leaves one with the satisfaction of feeling that the aim of the medical witnesses was not to advocate a cause, but genuinely to assist the Court with the best opinion they could individually give. Moreover, in the matter of pecuniary loss sustained,

the evidence of the pursuer himself and of the accountants engaged on Mar. 12, 1913. both sides is conspicuously fair and honest. But while it is eminently satisfactory to have a case so presented, it does not make it any the easier for the Court to determine whether a jury has been swayed beyond reason by their natural sympathies.

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"The date of the accident was 5th August 1911. From 12th August 1911 to January 1912 the pursuer was kept in a recumbent position, and did not leave his bed. From January to March 1912, as there was apparent improvement, he was allowed to be up for a time each day, and from March to May 1912 he was sent to Crieff Hydropathic for change. He was under the charge of Dr Dalgetty of Liff, his family doctor, in consultation with Professor McEwan of Dundee. But the apparent improvement of the early part of 1912 did not continue. He was accordingly, in June 1912, on the advice of Professor McEwan and of Dr Chalmers Watson of Edinburgh, again obliged to resume the recumbent position. In November, satisfactory progress not being made, he was brought over to Edinburgh and placed in a nursing home, to be more immediately under Dr Chalmers Watson. The trial took place on 30th December 1912, and I need hardly say that the pursuer was not present. There is a consensus of opinion among the doctors on both sides that he must, on returning home after a couple of months under Dr Chalmers Watson in Edinburgh, remain on his back for the whole of the current year 1913 if he is to be restored to health. The crucial question is, What are the prospects of such restoration?

"[His Lordship then examined the medical testimony for both the parties, and summarised its effect as follows]:—The points of agreement between the doctors examined were that the pursuer was an excellent subject and an excellent patient—a man in good general health, which was well maintained throughout the long confinement to bed, and of equable temper, who bore that confinement with exemplary patience; that there was no symptom of the spinal cord being affected; that what was affected was the bony matter of the vertebræ and the adjoining tissues, in which there was inflammation, causing pressure on, or otherwise affecting, the sensory and not the motor nerves; and that absolute quiescence and open-air treatment for a long continuance, not less than a year, were essential to recovery. The points of difference between the doctors were that the pursuer's advisers found marked extension of the pain both downward and upward from the seat of the old affection, and from this and other symptoms deduced the conclusion that more vertebræ had been attacked, and consequently, though taking a hopeful, took a more doubtful, view of ultimate recovery; while the doctors examined by the defenders were of opinion that the tubercular disease had not spread, and, accounting for the wide area of the pain in other ways, they took a decidedly hopeful view of recovery.

"I have read the medical evidence with great care, and I am glad to say that it has left on my mind the impression that the pursuer's prospect of recovery is very hopeful. But its certainty no one can predict. And that is, I think, the situation which the jury had to regard. [After further citations from the medical evidence his Lordship continued]—The state of the evidence therefore leaves to the jury, recovery to a satisfactory extent, hopeful, but not assured, and the degree of recovery unlikely in the best event to amount to restoration.

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"In performing the duty of assessing damages the jury had these further data before them. The pursuer was tenant of the farm of Benvie on the estate of Gray, with the small additional farm in the neighbourhood called Graystones. The area was 300 acres, and the rent, under a lease having still twelve years to run, £565. The land was good, and less than six miles from the centre of the town of Dundee. It was worked mainly as a dairy farm of forty cows, but otherwise for general cropping. This farm the pursuer personally carried on, superintending everything, and doing most of the important work himself. He was also a successful breeder and skilful breaker of Clydesdales. His average profit on this farm was put at £300, or even £350, a year, and, though we may not accept either figure, it must, in any view, be admitted to be substantial. There was, then, in the first place, an accepted expenditure in connection with medical treatment, from the date of the accident to the end of 1913, when that treatment was assumed to cease, of £420. There was also a realised loss during the same period, arising from the necessity of employing others to carry on the farm, which was reckoned at £597. I think that I should myself have estimated it at probably £100 less. But there was evidence, which it was quite open to the jury to accept, for the larger figure. These two sums together make £1017."

Counsel were heard upon the rule before the First Division (without Lord Mackenzie) on 7th March 1913.

Argued for the pursuer;—In order to be justified in setting aside the verdict of the jury on the ground of excess of damages the Court must be satisfied not merely that the damages awarded are in excess of the sum which they themselves would have considered sufficient, but that they "exceeded that latitude which any reasonable men could be permitted to indulge,"¹ that the verdict was perverse,² or that the award was so extravagant that no jury could be expected to repeat it.³ Looking at the nature of the evidence in this case it could not be said that the award was so excessive as to satisfy the tests laid down in these cases. It was shown that medical expenses incurred and to be incurred amounted to £420, and a realised loss upon the working of the farm of £600 had been proved, these two sums amounting to £1020. The jury were entitled to take from the evidence the view that the pursuer's injuries would result in disablement for life; £1500 was a reasonable sum as compensation under this head. Allowing £1000 as compensation for suffering, past and future, there remained a balance of between £400 and £500, which was not an unreasonable sum to award as *solatium*. In any case, these sums were not so grossly excessive as to justify the Court in disturbing the verdict. Nor was the sum awarded larger in proportion to the pursuer's income than sums which had been allowed in previous cases.⁴

¹ Landell v. Landell, (1841) 3 D. 819, *per* Lord Fullerton, Lord Mackenzie, Lord Jeffrey, and Lord Murray, at p. 825.

² Reid v. Morton, (1902) 4 F. 438, *per* Lord Kinnear, at p. 441.

³ Shields v. North British Railway, (1874) 2 R. 126, *per* Lord Deas and Lord President Inglis, at p. 128; Young v. Glasgow Tramway and Omnibus Co., (1882) 10 R. 242, *per* Lord President Inglis, at p. 245; Casey v. United Collieries Co., Limited, 1907 S. C. 690, *per* Lord President Dunedin, at p. 692, and Lord Pearson, at p. 694.

⁴ M'Kechnie v. Henderson & Son, (1858) 20 D. 551; Duthie v. Caledonian Railway Co., (1898) 25 R. 934.

The evidence showed a net profit of £350 on the working of the farm, Mar. 12, 1913. and the jury were entitled to add to this sum not only the amount expended by the pursuer on premiums of life insurance, but also the upkeep of his house; and thus to fix his income at about £600. The award hardly exceeded six times this sum, whereas in the cases last cited, fifteen times and ten times the incomes of the respective pursuers were held to be proper compensation for disablement for life.

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Argued for the defenders;—It was not the province of the jury in awarding damages, or of the Court in exercising their power of restraining that award, to put the pursuer in the financial position which he might have occupied but for the accident. What the Court was bound to see was that a reasonable proportion existed between the amount awarded and the loss sustained.¹ Deducting from the award the £420 which was admitted as due for medical treatment, there remained a balance of £3580 awarded in respect of the pursuer's sufferings and of his prospective loss of income. This sum was altogether an excessive award to one whose income was only £350. The cases of *M'Kechie*² and *Duthie*,³ cited for the pursuer, concerned workmen earning only a few shillings a week, and could be no guide to what was reasonable compensation for a person in the position of the pursuer. In *Wallace v. West Calder Co-operative Society, Limited*,⁴ the Court held that £800 was about twice as much as should have been awarded to the widow of a builder whose income was £150.

At advising on 12th March 1913,—

LORD KINNEAR.—I see no reason for disturbing the verdict of the jury in this case. The ground upon which it is challenged is that the damages are excessive, and I think we must keep in view what is the true position of the Court upon an application of that kind. I think that is established by the judgment of the Whole Court in *Landell v. Landell*,⁵ and we must take it that the law laid down by the majority of the consulted Judges there is sound. What Lord Fullerton, Lord Mackenzie, Lord Jeffrey, and other Judges say is this (at p. 825): it is not enough "to bring the damages within the description of excessive, that they are more, and even a great deal more, than the amount at which the injury sustained might have been estimated, in the opinion of the individual members of the Court to whom the application is made. Indeed, if that were enough, the Court would just be called upon to review the verdict of the jury, in a matter peculiarly within their province, and that upon a comparatively imperfect view of the evidence. It is clear that, in order to warrant the application of the term 'excessive,' the damages must be held to exceed, not what the Court might think enough, but even that latitude which, in a question of amount so very vague, any set of reasonable men could be permitted to indulge. The excess must be such as to raise on the part of the Court, the moral conviction that the jury, whether from wrong intention, or incapacity, or some mistake, have committed gross injustice, and have given higher damages than any jury of ordinary men, fairly and without gross mistake exercising

¹ Taff Vale Railway Co. v. Jenkins, [1913] A. C. 1, per Lord Atkinson, at p. 7.

² 20 D. 551.

³ 25 R. 934.

⁴ (1888) 15 R. 307.

⁵ 3 D. 819.

Mar. 12, 1913. their functions, could have awarded." Now, if that be the rule upon which we are to proceed, I must say I come to the conclusion that there is nothing in the award of the jury in this case so excessive as to justify its being said that they have gone beyond what any reasonable men, fairly exercising their functions, would have done.

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Lord Kinnear.

It is not the province of this Court to estimate damages, and therefore, when I come to be of opinion that the award of the jury is not excessive in the sense explained in *Landell v. Landell*,¹ I do not, for myself, consider it to be within my province to estimate what the true amount of damage might be if the jury's amount were wrong. I accept their award. But then, I think it is nevertheless quite reasonable to consider what were the elements upon which the award of damage was properly to be estimated, because one can hardly say that a particular sum is not excessive without having some idea of what a reasonable award would be.

Now, I do not think it at all desirable to examine the evidence in any detail so as to enable one to fix the precise sum which should be due for each particular item of injury and then arrive at the conclusion by summing up the whole. I think it is enough for the present purpose to see generally what the elements were upon which damage should be awarded. In the first place, there was a certain amount of pecuniary loss which the jury necessarily took into account; and then, in the second place, there was the prospect of the pursuer being unable to carry on his business as he had hitherto done and to earn the amount of income, or anything like the amount of income, which he had earned when in sound health. These are items of damage or injury which the jury might reasonably find proper matter for more or less accurate calculation in money. But then I think, in this case, there was an element of much greater difficulty to deal with—I mean the probable effects upon the man's future life of the injury he has sustained. That is a question of some difficulty in itself, but it is also a matter upon which there can be no precise data for estimating damages. In addition to that, I think there is a still more troublesome element, and that is the damage, which the pursuer is entitled to have taken into account, for personal pain and suffering and loss of health which he has endured.

Now, it is impossible to read the account of this man's history and his present position without seeing that no amount of damages could ever be considered as real compensation for the personal injury he has suffered. It is obvious that that is not a consideration which can be pressed to any logical conclusion, because the result of it would be that the defender, in a case of personal injury, might be ruined, and yet the pursuer not compensated. And therefore that cannot be treated as a ground for any exact or logical estimate of damage, but I think it is a consideration which may fairly lead us to think that, upon a question of this kind, a larger latitude, within the bounds of reason, is to be allowed to a jury than upon matters which are capable of anything like exact calculation.

In this particular case I think the jury had all the advantage which the skill and the experience of medical men could give them for arriving at a reasonable and just view of the extent of the bodily injuries of the pursuer

¹ 3 D. 819.

and his prospects of total recovery, because not only is the pursuer's own evidence altogether moderate and reasonable, but the evidence of the medical witnesses on both sides is entirely free from anything like a taint of partisanship or excess of opinion one way or another. The question could not be presented to the jury in a more moderate or in a clearer or more lucid form.

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I am therefore of opinion that there is no ground for saying that this jury has gone beyond a figure which any jury of reasonable men, properly informed, as to the question which they were to decide, could have reached. On the whole, therefore, I am of opinion that there is no ground for disturbing the verdict.

LORD JOHNSTON.—[After the narrative quoted *supra*, in which he stated that the loss incurred by the pursuer up to the date of the action might be taken at £1017]—Of the sum which the jury found as damages there is left to be accounted for £3000. This is an exceptionally large sum. I do not think that I should have myself given so much by £1000. But I cannot say that it is so extravagant that no reasonable jury would repeat it, or that the Court cannot find any reasonable proportion between the amount awarded and the loss sustained. I think that the jury had a very difficult task to perform. They had to consider what would be due in event of recovery, what in the event of non-recovery, and then to strike a mean between these two on weighing the probability of one or other of these events. I do not mean to say that they actually went through these three mental operations. But when the question is looked at as we have to look at it, it is really that mean which the jury had to fix. Now, their difficulty was threefold. First, there was a certainty that the pursuer had endured much, and there was the uncertainty whether he might not have to endure more and longer, and particularly to endure the hard fate to an active man of finding himself reduced from activity to decrepitude. Second, there was the problem of the pursuer's recovery, and of the degree of his recovery, both uncertain, however hopeful the most skilled opinions might be, and the bearing of this problem upon the pursuer's patrimonial interests; and, third, there was the peculiarity of the pursuer's occupation. He was involved in the lease of a farm, which he could not get rid of except by the grace of the proprietor, and which, if he had to get rid of it, would leave him without means of livelihood, for it was being carried on on borrowed capital. He was under obligation for a rent of £565 a year, which is no light matter even for a farmer in full vigour, and able to attend to everything himself. While there was evidence, already alluded to, which the jury might fairly accept, that the pursuer was making a fair return off his farm, the continuance of that rate of profit clearly depended upon his substantial recovery. Whereas, if he became entirely incapacitated, the loss would conceivably be more disastrous than can be measured by loss of profit. There is, then, in the present case so much of contingency in the question which the jury had to face, that, a substantial sum being justified, I do not think that it would be in accordance with the practice of the Court to disturb the award of the jury in a matter which is peculiarly their function, except on a very clear manifestation of extravagance, leading to the conclusion that they were guided not by consideration of facts but by sentiment. Such manifestation I cannot

Mar. 12, 1913. say that I have found here after the best consideration I can give to the evidence. I agree with the view expressed by Lord Shand in *Young v. Thoms v. Caledonian Railway Co.* *Glasgow Tramway Company*,¹ that the way in which compensation should be estimated is by the jury taking into their consideration the whole circumstances of the case. The circumstances which they had here to consider were complex, and although they have given as much as £1000 more than I would have given myself, I cannot confidently say that my verdict would meet precisely the justice of the case, and that theirs is therefore unreasonable, far less extravagant.

I therefore agree with your Lordship that the rule should be discharged.

LORD PRESIDENT.—I confess that when I heard the award at the trial the impression I formed at the time was that it was too large, and indeed was so excessive that it would have to be reviewed. So far as the inclination of my own mind was concerned, that impression was not removed by the speeches we heard upon the rule; but in view of the opinions that your Lordships, coming with fresh minds to the consideration of the whole circumstances, have both expressed, I do not feel justified in pressing my own inclination to a dissent. I only add one word—that my difficulties arise entirely upon the question of figures. I myself think not only that the jury was entitled to take the very gravest view of the ultimate results of this accident, but I can go further and say that, if I myself had been a jurymen, that is the view I would have taken. Upon the actual amount of money awarded, however, my own impression was that it was too large.

We shall discharge the rule and apply the verdict.

THE COURT discharged the rule.

MACPHERSON & MACKAY, S.S.C.—HOPE, TODD, & KIRK, W.S.—Agents.

No. 110. THE LOCHGELLY IRON AND COAL COMPANY, LIMITED, Appellants.—
Macmillan, K.C.—Hon. W. Watson.

Mar. 18, 1913. WILLIAM CRAWFORD (Surveyor of Taxes), Respondent.—
Sol.-Gen. Anderson—J. A. T. Robertson.

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Revenue—Income-tax—Profits of trade—Deductions—Money wholly expended for purpose of trade—Levy paid to Coalowners' Association and expended by it in members' interests—Deduction of levy by individual member of association—Conciliation Board expenses—Subscription to Mining Association of Great Britain—Expense of experiments—Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule (D), First Case, First Rule applying to First and Second Cases.

The funds of the Fife and Clackmannan Coalowners' Association were derived from voluntary subscriptions or "levies," collected by the association from its individual members, and were expended, *inter alia*, on the following objects, viz. :—(1) Expenses of the Conciliation Board, (2) Subscriptions to the Mining Association of Great Britain, and (3) Experiments on the explosive properties of coal dust made at the request of the Government.

Held that an individual member of the Association in stating the

¹ 10 R., at p. 244.

profits of his business for the purpose of income-tax, was entitled to Mar. 18, 1913. deduct that proportion of the levy paid by him to the association, which effected to the first of the above objects, but not the proportions thereof effecting to the second or third, in respect that a payment towards the first of these objects was, whereas a payment to either of the latter was not, one which, had it been made by the individual member directly, could have properly been deducted by him as money wholly expended for the purpose of his trade.

ON 23rd July 1912 a case was stated by the Income-Tax Commissioners for the opinion of the Court on an appeal by the Lochgelly Iron and Coal Company, Limited, under the Taxes Management Act, 1880, against William Crawford, Surveyor of Taxes, Fife. 1st Division.
Exchequer
Cause.

The case stated that the appellants appealed against an assessment for the year 1912 made upon them under the statutory provisions noted below,* in respect of the profits of their concern, and proceeded :—

“The only point in dispute is as to the admissibility or non-admissibility of the deduction—for income-tax purposes—of the following sums which have been debited in the profit and loss accounts of the appellants in respect of their contributions in the form of levies to the Fife and Clackmannan Coalowners’ Association of which they are members :—

“Year ended 31st May 1906,	. . .	£22.
” ” 1907,	. . .	£74.
” ” 1908,	. . .	£59.
” ” 1909,	. . .	£74.
” ” 1910,	. . .	£720.

“ . . . The following facts were admitted or proved :—(1) The Fife and Clackmannan Coalowners’ Association (hereinafter called the association) consists of thirteen collieries in Fife and Clackmannan. (2) During the five years entering into the average on which the assessment under appeal was based, the association, which was formed many years ago with the object—*inter alia*—of discussing methods and arriving at conclusions tending to the more economical working of the whole of the collieries concerned, was purely mutual,

* Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 60, Schedule A, No. III., Rule 2, and sec. 100, Schedule D, as amended by Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), and the Revenue Act, 1866 (29 and 30 Vict. cap. 36), sec. 8.

The Income-Tax Act, 1842, enacts :—Sec. 100. “The duties hereby granted contained in the following Schedule marked (D) shall be assessed and charged under the following rules . . .

“Schedule (D).

“First Case.—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other Schedule to this Act . . .

“Second Case.—

“Rules applying to both the preceding cases :—First. In estimating the balance of profits or gains to be charged according to either of the first or second cases no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains for any disbursements or expenses whatever, not being money wholly or exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern. . . .”

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voluntary, and informal, possessing no rules, regulations, or constitution of any kind, and had no legal power to recover payment of any levy from its members. The appellants along with the other members of the association have now formally adopted certain rules and regulations. These are set forth in a deed of agreement which became operative as from 1st January 1912, and from which it appears that the objects of the association now are to provide mutual protection to its members in matters affecting their general interests, and to indemnify members for loss of output in cases of a strike or restriction of output on the part of the workmen. . . . (3) Meetings of the association have been held from time to time, at which all proposed levies from its members, and the manner in which such levies should be expended, were discussed and agreed to. (4) The appellants produced . . . abstracts of income and expenditure of the association covering the whole of the five years, on the average of which the assessment on the appellants was based, viz.":—from May 1905 to December 1910. These abstracts contained the items of expenditure referred to in article 5, *infra*. "During the above periods the income of the association consisted almost entirely of the proceeds of the levies made on its members, and the accounts show the precise manner in which the proceeds of the levies were expended. (5) The £59 debited in the appellants' accounts for the year ended 31st May 1908, already referred to, represented their share of a special levy calculated at the rate of £60 per million tons of output, for the purpose of experimenting at the request of His Majesty's Government in coal dust, with a view to preventing, so far as possible, explosions in mines. Of the levy of £720 debited in the accounts for the year ended 31st May 1910, £435 thereof related to a special levy of one-tenth of a penny per ton of 1908 output levied on the appellants in common with the whole of the collieries in Scotland . . . The total levy so raised was paid over to the treasurer of the Scottish Coal Trade Association (formed for this purpose only), and applied to fighting before the Railway and Canal Commission, on behalf of all the collieries concerned, the principal Scottish railways in connection with a dispute *re* demurrage and siding rents. A portion of the levies was expended in subscriptions to the Mining Association of Great Britain, in meeting Conciliation Board (Scotland) expenses, and in installing a central rescue station consequent on the passing of the Mines Accidents (Rescue and Aid) Act, 1910."

The case then proceeded to give a statement of the contentions which were made for the parties before the Income-tax Commissioners at a meeting on 16th January 1912. The question which was debated at this meeting was whether the whole of the contributions, in the form of levies, paid by the appellants to the Fife and Clackmannan Coalowners' Association, were sums laid out exclusively for the purposes of trade, and whether, as such, they were properly allowable as deductions in arriving at profits assessable under the Income-Tax Acts. The undernoted authorities were referred to.¹

The Commissioners, on consideration of the facts and arguments submitted to them, were of opinion that the contributions (*i.e.*, levies)

¹ For the appellants.—Rhymney Iron Co., Limited, v. Fowler, [1896] 2 Q. B. 79; Inland Revenue v. Stewarts & Lloyds, Limited, (1906) 8 F. 1129; Guest, Keen, & Nettlefolds, Limited, v. Fowler, [1910] 1 K. B. 713. For the respondent.—Strong & Co. v. Woodfield, [1906] A. C. 448.

in question were not admissible deductions under the Income-Tax Acts in arriving at the profits liable to income-tax. Mar. 18, 1913.

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Counsel were first heard upon the appeal before the First Division (consisting of the Lord President, Lord Johnston, and Lord Cullen) on 30th October 1912, when it was argued for the appellants;—The test to be applied in order to discover whether an item of expenditure did or did not form a proper subject for deduction was whether the expenditure was an outlay made in order to earn profits or was an application of profits already earned.¹ Where, as here, a member of an association sought to deduct the amount of contributions levied upon him by the association for the purpose of meeting its expenditure, the question was whether the expenditure of the association was of such a character that, if it had been incurred by an individual, it would have formed, in his case, a proper deduction, judged by the above test. If the expenditure of the association satisfied this test, then the proportion of the association's expenditure levied upon the individual member formed a good deduction in his individual case.² It might be that part only of the association's expenditure satisfied the test, in which case a proportionate part of the levy paid by the member would be a proper deduction.

Counsel for the appellants was proceeding to analyse the accounts of the association with a view to showing that, on the above principles, the levies made by the association on the appellants formed good deductions in arriving at the appellants' income for the purpose of income-tax, when the Court, having expressed their agreement with these principles, and having ascertained that they were not to be disputed by counsel for the respondent, suggested that the case should be continued in order that the parties might ascertain to what extent they could agree as to which of the items of expenditure of the Coalowners' Association were such as would have formed proper deductions in the case of an individual trader.

The parties thereafter lodged a statement showing:—(1) Items in the accounts of the Coalowners' Association which, they had agreed, formed admissible deductions; (2) items which the appellants had waived their claim to deduct; (3) an item to which the respondent waived his objection to the appellants' claim to deduct; and (4) items which the respondent held to be non-admissible deductions. The latter items were described as (a) "Conciliation Board expenses," and (b) "Subscriptions to the Mining Association of Great Britain." Appended to the statement was a note to the effect that "respondent also holds that the levy of £59, debited in appellants' accounts for the year ended May 1908, for the purpose of experimenting in coal dust at the request of the Government, is not an admissible deduction."

Counsel were heard upon the appeal and statement on 18th March 1913 before the same Court.

Argued for the appellants;—The sums expended by the Association on the items still in dispute were outlays made in order that the individual members might earn additional profits according to the test laid down in *Inland Revenue v. Stewarts & Lloyds, Limited*.³ The

¹ *Inland Revenue v. Stewarts & Lloyds, Limited*, 8 F. 1129, per Lord President Dunedin, at p. 1134.

² *Guest, Keen, & Nettlefolds, Limited, v. Fowler*, [1910] 1 K. B. 713, per Bray, J., at p. 723.

³ 8 F. 1129.

Mar. 18, 1913. Conciliation Board was designed to prevent the losses which would arise from trade disputes. The Mining Association of Great Britain was an association of business men and was designed to further the interests of coalowners in the conduct of their business. The experiments with coal dust were made with a view to increasing the safety with which the business of mining might be conducted, and were therefore made with a view to perfecting the profit-earning machine.

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Counsel for the respondent was called upon to reply only upon the item of Conciliation Board expenses, and argued that the effect of the operations of the Board upon the earning of profits by individual members of the association was too remote to justify a deduction of the appellants' levy effeiring to this item of expenditure.¹

LORD PRESIDENT.—This special case raises the question of certain deductions claimed by the Lochgelly Iron Company which were not allowed by the Commissioners of Inland Revenue. These were deductions of levies made by and paid to the Fife and Clackmannan Coalowners' Association. When the case was before your Lordships on the last occasion it became evident that it did not really contain the materials for the proper determination of the questions raised, because the levy of the Coalowners' Association was made in the form of a slump sum, and that sum was, with other sums received by the Coalowners' Association, applied to several separate purposes, and it became apparent that some of these purposes might involve amounts which, if charged in the account of the individual member, would be proper deductions, as being expenses undertaken with a view to earning profits, whereas others might not. Accordingly the case was continued. The parties have met together and arranged the matter in obviously the most reasonable spirit. The result is that your Lordships really have only three very small questions to determine; upon the others the parties have agreed. The first of these questions is whether payments to the Conciliation Board expenses are a good deduction. I am of opinion that they are. The Conciliation Board is a piece of machinery by which disputes between the workmen and the employer may be settled, and by that means expenses kept down and more profits earned, and although in any one particular year there may be no work for the Conciliation Board to do, yet it is a piece of machinery which the coalowners are entitled to keep up—just as one who was entitled to employ a legal secretary might properly charge the expenses of this employment even in a year in which he was fortunate enough to have no litigation or other legal expenses.

The next question concerns a subscription to the Mining Association of Great Britain. That, I think, is an expense which cannot be deducted, because the Mining Association is an association which keeps a watchful eye on mining affairs all over the country, no doubt to the benefit of mining interests generally, but without that character of particular service which I think is prominent in a Conciliation Board.

The third question concerns an item of £59 which was expended in experiments in coal dust. It is explained that the experiments were made on the explosive properties of coal dust at the instigation of the Home

¹ Reference was made to Strong & Co., Limited, v. Woodfield, [1906] A. C. 448.

Secretary, who wished certain experiments made before embarking on new legislation. It was a voluntary and very proper act of the Company to help him in the matter, but not an expense they undertook for the purpose of earning more profit in that or in any other year. It was paid out of profits, and not with a view of earning profits.

That is my view on these three items. The precise way in which the matter will be carried out in the answer we give in the case will depend on the proportions which the admitted items bear to the admitted expenditure, and no doubt will be worked out by the parties, who have shown themselves so reasonable in the matter.

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LORD JOHNSTON and LORD CULLEN concurred.

THE COURT pronounced the following interlocutor:—"Allowed as a deduction in ascertaining the appellants' profits, in addition to the proportions of the appellants' contributions to the Fife and Clackmannan Coalowners' Association which effeired to the items admitted in the said print of documents to be admissible as deductions, that proportion of the appellants' contributions to the said Association which effeired to the Conciliation Board expenses: Refused the appellants' claim to deduct the proportion of their contributions to the said Association effeiring to the subscriptions to the Mining Association of Great Britain and to the expenses connected with experimenting in coal dust."

WALLACE & BEGG, W.S.—SIR PHILIP J. HAMILTON GRIERSON,
Solicitor of Inland Revenue—Agents.

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| MRS MATILDA FERGUSON STIVEN OR JACKS AND OTHERS (William Jacks's Trustees), First Parties.— <i>Hon. W. Watson.</i> | No. 111. |
| MRS MATILDA FERGUSON STIVEN OR JACKS, Second Party.— <i>C. H. Brown.</i> | Mar. 18, 1913. |
| MRS ELIZABETH JONES OR JACKS AND OTHERS, Third Parties.— <i>C. H. Brown.</i> | Jacks's Trustees v. Jacks. |
| THE UNIVERSITY COURT OF THE UNIVERSITY OF GLASGOW, Fourth Parties.— <i>Ramsay.</i> | |
| WILLIAM WRIGHT AND OTHERS, Fifth Parties.— <i>D. P. Fleming.</i> | |
| RICHARD JACKS AND OTHERS, Sixth Parties.— <i>D. Anderson.</i> | |

Succession—Election—Equitable compensation—Provision "in full of" jus relictae—Claim for jus relictae—Right of widow to revert to testamentary provisions on amount of jus relictae being restored to estate.

By a general settlement a husband made certain provisions for his wife which he declared should be "in full of all her claims of terce, *jus relictae*, and others legally competent to her" against his estate, but there was no declaration that the provisions should be forfeited if she claimed her legal rights.

Question whether her election not to accept the provisions of the settlement in her favour, but to claim her legal rights, resulted in her forfeiting her testamentary provisions finally, or merely gave rise to a claim of equitable compensation to the estate.

Macfarlane's Trustees v. Oliver, (1882) 9 R. 1138, and *Gray's Trustees v. Gray*, 1907 S. C. 54 discussed, and the latter doubted.

Mar. 18, 1913. *Succession—Election—Effect of election—Approbate and Reprobate—Provision of liferent to widow, with power to accelerate payment of legacies—Jus relictæ claimed and liferent surrendered—Right thereafter to exercise power of accelerating.*

Jacks's Trustees v. Jacks.

Succession—Vesting—Legacy—Legacies conditional and unconditional payable on death of liferentrix—Surrender of liferent—Acceleration of payment.

A testator in his settlement directed his trustees to pay to his widow the income of the residue of his estate in full of her legal rights, but with power to her "to consent to payment of all or one or more of the legacies" thereafter bequeathed, ". . . so as to admit of payment thereof during her life." He then directed the payment of a number of legacies "upon the death of my said wife, or should she surrender her liferent over any part thereof so as to admit of payment, then for payment of such part on such surrender." Some of the legacies were unconditional, others were bequeathed subject to a clause of survivorship and conditions in favour of the issue of the legatees. He also directed that any surplus of residue after payment of legacies should be at the disposal of the trustees to apply in augmenting all or any of the legacies, or in helping institutions akin to those to which legacies had been given.

After the husband's death the widow elected not to accept the provisions of the settlement in her favour, and claimed her legal rights, and thereafter executed a formal deed in which she confirmed this election and surrendered her whole rights under the settlement, and consented, so far as she competently could in exercise of the power conferred upon her in the settlement, to the immediate payment of the whole of the legacies.

Held (1) that the widow, having surrendered the whole of the provisions of the settlement in her favour, was debarred from exercising the power of consent; (2) that the unconditional legacies having vested indefeasibly at the death of the testator, were, owing to the surrender of the liferent, payable immediately, provided the trustees had sufficient funds to pay all the other legacies; (3) that the contingent legacies, in which vesting was postponed until the death of the widow, were not payable until that event, the period of vesting being in no way accelerated by the surrender of the liferent; *diss.* Lord Johnston, who was of opinion that the whole of the legacies were immediately payable, vesting having taken place in all simultaneously either at the death of the testator, or, at latest, on the surrender of the liferent by the widow.

Succession—Legacy—Condition—Purification—Undertaking to satisfy condition.

A testator bequeathed the liferent of the residue of his estate to his widow, and directed the payment of certain legacies on his death. He further provided that his widow might consent to the payment of any or all of the legacies during her life, and that, should she surrender her liferent, his trustees might make payment of the legacies, in whole or in part, on such surrender. One of the legacies was to the University of Glasgow, for the endowment of a chair, and was made subject to the declaration that "should either I or my wife endow any chair in the Glasgow or other University before the death of the survivor, then this bequest shall fall." The testator's widow surrendered the liferent and other provisions of the settlement, elected to take her legal rights, and executed a formal deed in which she confirmed this election and surrender, and consented, so far as she competently could, to the immediate payment of the whole legacies, and further bound herself "not to endow any chair in the Glasgow or other University now or at any time here-

after." *Held* that the condition attached to the legacy had not been satisfied, and that payment thereof could not be made until after the death of the widow.

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ON 31st January 1913 a special case was presented for the opinion and judgment of the Court as to the effect of certain testamentary provisions of the late William Jacks. 1st DIVISION.

Mr Jacks died on 9th August 1907, survived by his widow, Mrs Matilda Ferguson Stiven or Jacks, the second party to the case. There were no children of the marriage. Mr Jacks left a trust-disposition and settlement, dated 18th December 1905, with certain addenda and codicils thereto, by which he directed his trustees, *in the first place*, to pay debts, fulfil any unimplemented marriage-contract provisions, and pay trust expenses. *In the second place*, to pay to his wife (1) £1500, free of duty, for mournings for herself and servants, and for household purposes; and (2) £1000 free of duty for purchasing mournings for relations. *In the third place*, to pay to his wife a legacy of £10,000, free of duty, at the first term of Whitsunday or Martinmas following his death. *In the fourth place*, to pay, free of duty, to his testamentary trustees who should accept and act, £1000 equally among them. *In the fifth place*, to give, free of duty, small mementoes to personal friends therein named, or to be afterwards named in any memorandum he might leave.

The settlement proceeded:—" *In the sixth place*, for payment to my said wife of the free annual interest or income of the residue of my estate, payable said income half-yearly or in the option of my trustees, as received; but with power nevertheless to her to consent to payment of all or one or more of the legacies hereinafter bequeathed, or part of all or one or more of them, so as to admit of payment thereof during her life, and subject to or free of duty; and, *in the last place*, for payment of the several following bequests upon the death of my said wife, or should she surrender her liferent over any part thereof to admit of payment, then for payment of such part upon such surrender, viz.:—(first) to Elizabeth Jones or Jacks, widow of my brother, Thomas Jacks, if she has not married again, a legacy of Seven hundred and fifty pounds; (second) to the children of my brother, the late Richard Jacks, the following legacies, viz.:—[here followed a list of these legacies]; (third) to the children of my sister Isabella the following legacies, viz.:—[here followed a list of these legacies]; Declaring that in the event of any of my said nephews and nieces, children of my brother Richard and sister Isabella, dying before the date of vesting leaving issue then surviving, such issue shall be entitled to the legacy which their parent would have taken on survivorship; . . . (sixteenth) to the University Court of the University of Glasgow, to endow a Chair of Modern Languages, to be called the 'Chair of William Jacks,' principally for commercial education as distinguished from classic, a legacy of twenty thousand pounds, as also such portions of my library (foreign and other books) as my trustees may consider appropriate and likely to prove useful in connection with that endowment: Declaring that should either I or my wife endow any chair in the Glasgow or other University before the death of the survivor, then this bequest shall fall. . . . Declaring that while all bequests in favour of my said wife and my trustees shall, in any event, be free of duty as aforesaid, the duty on the other bequests (except any duty paid on a surrender by my wife as aforesaid) shall

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be paid by my trustees out of residue, only if the residue be sufficient to pay the whole duty thereon: Declaring further that should the residue be insufficient to pay in full the legacies unpaid at the death of my wife, all such legacies shall be rateably reduced; as also that should there be a surplus of residue, such surplus shall be at the absolute disposal of my trustees, original and assumed, who may apply it as they think fit in augmenting all or any of the bequests herein to persons, institutions, or associations, or in helping kindred institutions or associations in Glasgow or elsewhere just as I myself might have done if in life; which provisions in favour of my said wife shall be in full to her of all claims of terce, *jus relictæ*, and others legally competent to her against my estate upon my decease. . . ."

Under the remaining heads of the last purpose the testator directed the payment of a large number of legacies to individuals and to public or charitable associations or institutions, for the most part unconditionally or subject to conditions which had been purified before his death, and without any substitution or destination-over in the case of failure of the legatees named.*

The case stated:—

"4. By the testator's marriage-contract with the second party,

* The following legacies are referred to more particularly in the opinions of the Judges, *infra*:—" (Fifth) to my niece, Thomasina Jacks Armstrong or Wilson, wife of the said Henry Arnold Wilson, whom failing her issue a legacy of Eighteen thousand five hundred pounds; (sixth) to the said Henry Arnold Wilson a legacy of One thousand pounds; (seventh) to my sister-in-law, Mrs Emily Stiven or Barrie, wife of the said Andrew David Barrie (*first*) a legacy of One thousand pounds, and (*second*) an amount equivalent to any estate, heritable or moveable, which may be bequeathed to me by my said wife, should she predecease me; (eighth) to the children of the said Emily Stiven or Barrie the following legacies, viz.:—[Here followed a list of these legacies]; . . . (tenth) to Mrs Margaret Anderson or Lee, residing in Edinburgh, in liferent till her son William Jacks Lee attains the age of twenty-one years, and then to him absolutely a legacy of Three hundred pounds, which legacy shall be held by my trustees for said purpose, but providing that if the said William Jacks Lee should die before attaining said age survived by his mother she shall at his death become absolutely entitled to said legacy, but should he be the survivor and not reach said age, the capital at his death shall revert into residue, the income being in the interim applied for his benefit; (eleventh) to Cecilia Jameson, my wife's maid, a legacy of One thousand five hundred pounds; . . . (fifteenth) to each of my domestic servants at the date of my death (except the said Cecilia Jameson), including outdoor servants, and to each of the clerks of my firm at the date of my death for every complete year they have been employed by me or my firm, Twenty pounds, but not more than Two hundred and fifty pounds to any one, and declaring that the total of these legacies is restricted to Five thousand pounds, and that if at the above rate of Twenty pounds for each year with said maximum that sum be exceeded all shall be rateably reduced; . . . (seventeenth) to the following Institutions, viz.:—The Royal Hospital for Sick Children, Glasgow, a legacy of One thousand five hundred pounds . . . (twenty-first) to the minister of the Established Church of Scotland, Callander, if I am a member of his Church at the date of my death, or to the minister of such other Church as I am a member of at the time of my death, a legacy of Two hundred and fifty pounds, and to J. Wilson Crawford, Pastor of the Congregational Church, Dumbarton, a legacy of Two hundred and fifty pounds . . ."

which is dated 19th October, and registered in the Books of Council and Session 7th November, both in the year 1878, an immediate life-rent of a dwelling-house (7 Fitzroy Place, Glasgow), and of the furniture therein was conferred on the second party, and it was provided that in the event of her surviving her husband, the furniture was to become her absolute property. The second party did not, by the marriage-contract, expressly discharge any of her legal rights, but by accepting the said life-rent of house and furniture, her claim for terce was excluded by virtue of the Act 1681, c. 10.

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"5. By the trust-disposition and settlement the provisions in favour of the second party were declared to be in full to her of all claims of terce, *jus relictæ*, and others legally competent to her against the testator's estate upon his decease. By letter dated 16th December 1907, addressed to the first parties, the second party claimed her legal rights other than terce, and large payments have been made by them to her to account of these claims.

"6. By deed of ratification, surrender, and consent, dated the 27th day of January 1913, which is printed in the appendix hereto, and held to form part of this case, the second party has ratified her election of her legal rights and irrevocably surrendered the whole life-rent and other provisions conferred upon her by the said trust-disposition and settlement. Said deed further provides:—'And I consent (so far as I competently can) in exercise of the power of anticipation conferred on me in the sixth place in said trust-disposition and settlement, and every other power enabling me, to payment being forthwith made (free of or subject to duty as the trust funds permit) by said trustees of the whole legacies bequeathed in the last place under the purposes of said trust-disposition and settlement as amended by said codicils: Further and as regards said legacy to the University Court of the University of Glasgow, I hereby undertake, irrevocably and absolutely, not to endow any Chair in the Glasgow or other University now or at any time hereafter.'

"7. The first parties have paid the trustor's debts and paid or distributed the legacies bequeathed under the fourth and fifth purposes of the trust-disposition and settlement, and are now in a position to pay the balance of the second party's claims. They have moreover sufficient trust funds now available to pay, with or without duty, the legacies bequeathed in the last place, which amount in all to the sum of £76,250, but questions have arisen as to whether they can competently pay all or any of said legacies now or during the lifetime of the second party, and, if so, what interest, if any, falls to be paid thereon.

After the hearing the parties lodged a minute, in which it was stated:—"(1) That the whole trust fund held by the first parties as at 13th March 1913 was of the value of £79,276, 11s. 8d. or thereby, the same being subject to the expenses of the trust and of realisation and any increase or diminution of value on realisation; (2) that the amount of the legacy-duty still unpaid may be taken at £5000; (3) that the total amount of the whole legacies bequeathed in the last purpose of the trust-disposition and settlement is £76,250, and that interest thereon at the rate of 3½ per cent per annum from 27th January 1913 (the date of the deed of ratification, surrender, and consent by the second party) up to 15th March 1913 amounts to £343, 13s."

The parties to the case were—(first) Mr Jacks's testamentary

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trustees ; (*second*) Mrs Jacks, the testator's widow ; (*third*) the legatees named in the first, second, third, and fifth heads of the last purpose, being Mrs Elizabeth Jones or Jacks, whose legacy was subject to a condition which had not been purified at the death of the testator, and the children of his brother Robert and sister Isabella, to whose issue there was a destination-over in the case of failure of the parent before the date of vesting ; (*fourth*) the University of Glasgow ; (*fifth*) the whole remaining or unconditional legatees ; and (*sixth*) the issue of the children of the testator's brother Robert and sister Isabella.

The first parties contended :—"That by electing to take her legal rights, the second party is not in a position to exercise the power conferred on her by the sixth purpose of the trust-disposition and settlement to consent to payment during her lifetime of any of the legacies thereafter bequeathed ; that, in the absence of such power, all said legacies are payable rateably and contemporaneously, and the second party's election to take her legal rights cannot accelerate the date of payment of any of said legacies, in particular as regards the legacies bequeathed in the 1st, 2nd, 3rd, 5th, and 16th places of the last purpose, these legacies being subject to conditions which fall to be determined at the date of the second party's death, the deed of ratification, surrender, and consent by the second party being invalid and ineffective in so far as the second party purports to debar herself from endowing a university chair. In the event of its being held that any of the legacies are now payable, the first parties maintain that no interest is due thereon, or, in any event, that such interest should not exceed the rate earned by the general trust-estate."

The second party and the third parties contended :—"That, the second party having surrendered her right to any part of the liferent of the estate, the legacies bequeathed to the third parties by the last purpose of the trust-disposition and settlement fall to be paid now, with interest from the date of said deed of ratification, surrender, and consent. Alternatively, the second and third parties maintain that by electing to take her *jus relictæ* the second party has not forfeited her right to exercise the power conferred on her by the sixth purpose of the trust-disposition and settlement to consent to payment during her life of any of the legacies thereafter bequeathed, and, the second party having exercised her said right, the legacies bequeathed to the third parties by the last purpose of the trust-disposition and settlement fall to be paid immediately, with interest as aforesaid. They further maintain that, apart from the exercise of said power, the legacies to the third parties are in the circumstances payable now, with interest as aforesaid."

The fourth and fifth parties' contentions were similar to those of the second and third parties, the fourth party further contending :—"That the second party has, by the said deed of ratification, surrender, and consent, validly and irrevocably debarred herself from endowing now or at any time hereafter any chair in the Glasgow or other university."

At the hearing it was stated that the age of the second party was about 70.

The questions of law were :—" (1) Do all or any of the legacies bequeathed in the last purpose of the trust-disposition and settlement as amended by said codicils fall to be paid now by the first parties, and if so, which of them ? or (2) Is payment of all or any of said legacies postponed until the death of the second party, and if so,

which of them? (3) In the event of the first question being answered Mar. 18, 1913. in the affirmative, (a) does interest on said legacies fall to be paid out of the estate from the date of the deed of ratification, surrender, and consent, and if so, (b) at what rate?" Jacks's Trustees v. Jacks.

The case was heard before the First Division (without the Lord President) on 13th March 1913.

Argued for the second and third parties;—The first parties were now entitled and bound to pay to the third parties the legacies bequeathed to them. The last purpose of the settlement expressly provided that this should be done in the event which had happened, viz., the surrender of her liferent by the widow. This was purely a question of construction of the settlement; it was clearly the intention of the testator that payment should be made on the surrender of the liferent, and this intention should receive effect unless there was anything in the settlement that necessitated further postponement.¹ The sole purpose of postponing the period of payment was to protect the liferent; that purpose having now lapsed there was no obstacle to immediate division of the estate in terms of the testator's directions.² This argument was quite consistent with the decisions in the cases of *Elder's Trustees*³ and *Hughes v. Edwardes*,⁴ for the intention that payment should be postponed was inferred, in the former case from the express direction to the trustees to hold until the death of the liferenter, and in the latter from the fact that there still remained another alimentary life interest to protect. Further, the widow had not forfeited the right to exercise the power conferred upon her in the sixth purpose, and had validly exercised that power. There was no declaration that she should forfeit her rights under the settlement if she elected to claim her legal rights. The only provision in this respect was that the conventional provisions should be in full of her legal rights. In these circumstances the effect of the widow's election was not to forfeit all her rights under the settlement, but only to bar her from enjoying the conventional provisions until equitable compensation was made to the estate for the funds of which it had been depleted.⁵ The widow had therefore not become a stranger to the trust to the effect of barring her from exercising this power. As to the rate of interest payable on the legacies, *Inglis's Trustees v. Breen*⁶ was referred to.

Argued for the fourth parties;—These parties adopted the argument for the third parties, and further argued that the declaration attached to the legacy bequeathed to the University of Glasgow must be read out of the settlement as being inconsistent with its general scheme, viz., that the whole of the legacies might be paid during the life of the widow, if the trustees obtained the necessary funds for that purpose through the surrender of the liferent. In any case the

¹ *Muirhead v. Muirhead*, (1890) 17 R. (H. L.) 45, per Lord Watson, at p. 50.

² *Alexander's Trustees*, (1870) 8 Macph. 414; *Lucas's Trustees v. Trustees and Patrons of Lucas Trust*, (1881) 8 R. 502.

³ *Elder's Trustees v. Treasurer of the Free Church of Scotland*, (1881) 8 R. 593.

⁴ (1892) 19 R. (H. L.) 33.

⁵ *Macfarlane's Trustees v. Oliver*, (1882) 9 R. 1138; *Gray's Trustees v. Gray*, 1907 S. C. 54.

⁶ (1891) 18 R. 487.

Mar. 18, 1913. undertaking not to endow any other chair granted by the widow in the deed of surrender must be taken to purify the condition attached to this legacy.

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Argued for the fifth parties;—These parties had that vested indefeasible interest in their legacies which entitled them to immediate payment.

Argued for the sixth parties;—Granted that the period had arrived at which the unconditional legacies had vested and were payable, this was not the case with regard to those bequeathed to the children of Richard and Isabella. It was clearly the intention that the period of vesting of these legacies should not be until the death of the widow. There were no words of gift beyond the direction to pay at that date, and the conditional institution of the contingent legatees must be referred thereto.¹ The widow had no power to accelerate the date of vesting; to allow her to do so would be to allow her to reform the settlement. The only power conferred upon her was, in certain circumstances, to accelerate payment, and this power could only be exercised with regard to legacies which had already vested and in which the beneficiaries had an indefeasible interest.² The opportunity for equitable compensation could not arise if the argument for the third parties were sound, for in that case the estate would fall to be immediately wound up. In any case this was not a practical consideration in the present case, for it was impossible, in view of the age of the widow, that the trust could remain in being long enough to allow the estate to be fully compensated.

Counsel for the first parties referred to the undernoted authority³ upon the question whether they were bound or entitled to pay any of the legacies until they had in their hands sufficient funds to pay the whole legacies in full.

At advising on 18th March 1913,—

LORD KINNEAR.—The question in this case arises from the action of the widow, who has declined to accept certain testamentary provisions made for her by her husband in full of all her claims for *terce*, *jus relicte*, and others legally competent to her against his estate, and it regards the legal consequence of her rejection of the conditions of the will, and of her successful claim to have her legal rights.

The terms of the settlement are, so far as regards this question, to be found in the sixth purpose of the trust-deed, by which the trustees are directed to hold in trust "for payment to my said wife of the free annual interest or income of the residue of my estate, payable said income half-yearly or, in the option of my trustees, as received; but with power nevertheless to her to consent to payment of all or one or more of the legacies hereinafter bequeathed, or part of all or one or more of them, so as to admit of payment thereof during her life and subject to or free of duty; and, in the last place, for payment of the several following bequests upon the death of my said wife, or should she surrender her liferent over any part thereof to admit of payment, then for payment of such part upon such

¹ Bryson's Trustees v. Clark, (1880) 8 R. 142.

² Muirhead's Trustees v. Muirhead, 17 R. (H. L.) 45, *per* Lord Watson, at p. 50.

³ Haldane's Trustees v. Haldane, (1895) 23 R. 276.

surrender." And then there follow a number of special legacies in favour of different persons, of which, without examining them in detail in the meantime, I shall only say that some of them are plainly absolute legacies to the legatees named, without any substitution or destination-over of any kind; and others are legacies to a certain class of persons subject to a clause of survivorship and to conditions in favour of the issue of such persons.

Upon the widow, Mrs Jacks, claiming her *jus relictæ*, she executed a certain deed of ratification, surrender, and consent by which she ratified her election of her legal rights and irrevocably surrendered the whole life-rent and other provisions conferred upon her by the trust-disposition and settlement, and further purported to consent, so far as she competently could, "in the exercise of the power of anticipation conferred on me in the sixth place in said trust-disposition and settlement and every other power enabling me, to payment being made forthwith (free of or subject to duty as the trust funds permit) by said trustees of the whole legacies bequeathed in the last place under the purposes of said trust-disposition and settlement."

The question is whether, by reason of the lady's surrender of her life-rent, with or without the special consent which she has given in making that surrender to the anticipation of payment, the legatees are entitled to immediate payment during her life, notwithstanding that, in terms of the will, the legacies are to be paid only on her death.

It appears to me that that depends entirely upon the legal effect of the lady's claim to take her legal rights and to reject the settlement. The bequests in her favour are given under the express condition that they are to be taken in full of her *jus relictæ* and all other legal rights. She has rejected the condition, and therefore she has rejected the bequest. She cannot claim under the deed to take a benefit given to her under an express condition so long as she refuses to comply with the condition upon which it was given. It would follow that we are to consider the question of payment solely with reference to the other conditions of the will which regulate vesting and the period of payment, on the footing that the life-rent provided for this lady was as completely and absolutely out of the way as if she had died.

But then it is said that that is not exactly the position, because she has not only surrendered her life-rent in the meantime but she has exercised a power given to her by the will to consent, if she should think fit, to the anticipation of payment of all or any of the legacies. I am of opinion—and I must say without doubt—that the exercise or the existence of that power makes no difference whatever to the question. She is still in the position of having rejected the condition upon which she took benefit under the will. She cannot approbate and reprobate the will, and she cannot say, "I will not take my life-rent myself, but I will authorise you to pay the accruing income, which would have gone to me, for the benefit of any particular persons, or to make over to them the capital upon which such income would have accrued for my benefit if I had chosen to take it." I think she is completely outside the will, and can no more exercise this power than claim payment of the life-rent.

It is said that she is not finally excluded from the benefits of the will,

Mar. 18, 1913. because the only effect of her rejection of the conditions is that the liferent given to her must go to compensate for the amount of money which she has taken away in name of her *jus relictæ* and that, as soon as that compensation has been completely effected, she may come back again and claim under the will. I do not think it necessary for the purposes of this case to express any definite opinion as to whether she could, in any circumstances, come back and claim benefit under the will upon that ground; and, if it is not necessary, I do not think it is desirable to do so, because the question has not yet arisen, and it will be time enough to decide it when it does arise. But since it has been raised, I venture to express my opinion that, whatever the ultimate decision of it may be, the claim put forward for the widow can find no support whatever in the case which was cited to support it, namely, *Macfarlane's Trustees v. Oliver*,¹ because the vital point in *Macfarlane's Trustees v. Oliver*,¹ which was held by the majority of the Court to distinguish the case from that of a forfeiture of a legacy in favour of persons, like a wife or children, who took their legal rights in place of the legacy was this: that there was no express condition in the will that the provision given to a child should be taken in full of legitim or under a condition of any declaration of forfeiture. It was on that ground, and, as I think, on that ground alone, that the majority of the Court held that, in that particular case, a child who had claimed legitim might nevertheless come back and take benefit from the bequests in his favour as soon as the whole legitim which he had taken away had been recouped in the course of the administration of the trust. That is stated, with the greatest clearness, by Lord President Inglis in his opinion, where he says this²: "If a provision is given by will in lieu of legitim or on condition of the legatee renouncing his claim of legitim, of course the condition must receive effect, and the provision cannot be claimed either in whole or in part without a complete surrender of the legitim. But the provision is not affected in the present case by any express condition or any declaration of forfeiture. There is an implied condition arising from the legitim fund being embraced in the settlement, and disposed of to the effect that no one can claim both the provision and the legitim, because that would be to take double payment at the expense of the other legatees." Then his Lordship goes on to say: "The important question is, What is the nature and extent of this implied condition? When a condition is implied in a will, though not expressed, it must be because, without such implication, the will cannot be carried into practical effect according to the mind of the testator. This is the reason why the law implies the condition. But the implication must not be extended beyond the reason for it. The two must be commensurate." And then he goes on to say that that is the foundation of the doctrine of equitable compensation (a doctrine now established in the law of Scotland), which is not merely something short of forfeiture but something entirely different in principle. That was the ground of judgment in *Macfarlane's Trustees v. Oliver*,¹ and I think it is the ground plainly implied in the opinions of the majority of the consulted Judges and expressed in Lord M'Laren's opinion, although it is nowhere expressed so

¹ 9 R. 1138.² At p. 1166.

explicitly and so clearly as by the Lord President. I have no doubt that Mar. 18, 1913. the majority of the Judges consulted proceeded upon that ground, that they were not dealing with any expressed condition that a legatee should not take ^{Jacks's Trusts} Jacks's Trusts, legitim, but only with the implied condition which arose from the mere fact ^{Lord Kinneir} Lord Kinneir. of the testator having included his whole estate in his will.

Now, if that were conclusive, I should not see so much difficulty in disposing of the question which I have said has been raised. But then a difference of opinion has certainly been expressed and made the ground of judgment in the case of *Gray v. Gray*.¹ I do not think the present Court is in a position to overrule or reconsider the unanimous judgment of the Second Division; and therefore I should have thought, if it was necessary to decide the question now, it should be decided by a larger Court. But in the meantime I do not think it is necessary, because assuming, contrary to my own opinion, that this lady has the right to come back, although she has already announced that she has completely surrendered the whole benefits under the will, she has not come back yet; and until the condition upon which it is said she may claim some benefit under the will is purified, she is plainly not in a position to exercise any right or any power given by the will. If, at this moment, she were professing to exercise the power of anticipation given to her, she would, in my opinion, be plainly approbating and reprobating the deed, which I think she cannot do. And I think it is perfectly obvious that she could not claim a right to regulate in any way the disposal of the income which she has refused to accept without contradicting her explicit rejection of the will.

It is admitted for her that she cannot have the income now accrued upon the funds in the hands of the trustees, because she refuses to take her life-rent, preferring to take her legal rights. Well, then, if she cannot take it herself, how is it to be said that she can dispose of it in favour of somebody else? The whole force and effect of this peculiar power given to her by the testator to authorise anticipation arises from the fact that the prejudice which will be caused by anticipation of any payment is a prejudice to the life-renter. It is because it is her money that is in question that she is allowed to consent to payment which releases the whole or part of the capital to other people. If she is entitled, as the argument supposes, to stand by in the meantime until the income of the estate, which would have gone to her if she had taken the life-rent, is accumulated so as to make up for the money she has taken away, she cannot at the same time say, "But, while that money is being accumulated, so as to enable me to plead equitable compensation, you are to hand over the capital so as to prevent any income accruing at all." She cannot reject the life-rent and exercise a power over it which, in effect, is a power to dispose of it for the benefit of other people.

Therefore, it appears to me to be quite clear that, the life-rent being out of the way, the only question is what is the effect of the testator's other directions as to payment of legacies. Now, I think that the general principles upon which that question has to be decided are very clearly settled. What remains of the deed when the life-rent is taken out of the way is a direction to pay upon the death of the life-renter, and it is quite clearly settled in law

¹ 1907 S. C. 54.

Mar. 18, 1913. that, if there be nothing to postpone the direct and absolute payment of a legacy, except a necessity for meeting a life rent or an annuity, there is nothing in that necessity to prevent immediate vesting in the legatee. The effect, therefore, of the bequests, subject to this life rent, in favour of individuals, without any additional institution or destination-over, is to give an absolute right to these individual legatees.

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But then, on the other hand, it is settled equally clearly that, where the vesting of a legacy is dependent on the death of a life renter, the mere surrender of the life rent, so as to withdraw the life renter's claim, will not accelerate vesting, and therefore cannot accelerate payment. The law is very clearly expressed by Lord President Inglis in the case of *Bryson's Trustees v. Clark*,¹ where he says: "When nothing is expressed in favour of a beneficiary except a direction to trustees to pay to him on the occurrence of a certain event, and not sooner, and failing him, to pay to certain other persons as substitutes or conditional institutes to him, then, if he does not survive the period, he takes no right under the settlement." I have substituted the word "pay" for "convey" in making that citation, because the particular case was concerned with heritable estate and not with money; but that makes no difference in the expression of the principle so far as regards vesting.

Now the result, to my mind, is that, where there is an absolute and indefeasible right vested in a legatee, the disappearance of the life renter will entitle him to claim payment, even although payment is, in words, directed to be made at the life renter's death, because there is no testamentary interest to interfere with his immediate payment; but, on the other hand, where vesting and not mere payment is dependent upon the death of the life renter, nothing that the life renter does in the way of abandoning his or her right can accelerate the period of vesting, because the testator has fixed it finally, and it is not for anybody else to make a new will for him.

I have referred to the case of *Bryson*,² but then I think the law is just as clearly laid down in the House of Lords by Lord Watson, for he says, in *Muirhead v. Muirhead*:³ "I see no reason to doubt that, in cases where the final distribution of a trust-estate is directed to be made on the death of an annuitant and it clearly appears that in postponing the time of the division the testator had no other object in view than to secure payment of the annuity, it may be within the power of the Court, on the discharge or renunciation of the annuitant's right to ordain the immediate division. But in order to the due exercise of that power it is, in my opinion, essential that the beneficiaries to whom the trustees are directed to pay or convey shall have a vested indefeasible interest in the provisions." So far, therefore, he described one of the cases which, I think, arises here—the claims of legatees who have an indefeasible vested interest.

But then he goes on to say that, in the particular case under consideration, if the testator's widow had not repudiated the provisions made for her in his settlement, he thought it not doubtful that the vesting of the fee would have been suspended until her decease. And then he says: "There are three

¹ 8 R. 142, at p. 145.

² 8 R. 142.

³ 17 R. (H. L.) 45, at p. 48.

considerations the concurrence of which, in my opinion, necessarily leads to Mar. 18, 1913. that conclusion—(1) the bequests to children and their issue are not conceived in the form of a separate gift with a subsequent direction as to the time of payment, but are, for the first time, implied in the direction to pay on their mother's death." I do not think that that, of itself, would be conclusive. It is one of the circumstances that has to be taken into account, and the other two are what are more important to consider; "(2) there is a gift over to the respective issue in the event of any of the testator's children predeceasing that date; and (3) there is a clause of survivorship, which, in the event of any child and his or her issue failing before the widow's death, gives their provisions to the surviving children. . . ." The conditional gift to issue in the event of children dying before payment, and a conditional institution of survivors in the event of some members of a favoured class failing before payment, are, according to this opinion of Lord Watson, conclusive against the notion of immediate vesting during the lifetime of a life-renter or annuitant.

Now I think that in this will we find both classes of legacy as I have already said. I think it is plain enough that those legatees who have an absolute right given to them, without a condition in favour of anybody else, have, in terms of law, an indefeasible interest in their legacies; but then, on the other hand, a gift in such terms as, for example, the gift to his nephews and nieces under this declaration: "That in the event of any of my said nephews and nieces dying before the date of vesting leaving issue then surviving, such issue shall be entitled to the legacy which their parent would have taken upon survivance," appears to me to satisfy exactly the condition laid down by Lord Watson for a suspension of vesting notwithstanding the abandonment or surrender of the life-renter's claim.

It is said that you cannot impute to the testator the intention of making two different periods of vesting, but that he must be supposed to have conceived one uniform scheme of vesting according to which all legacies would vest at the same time and under the same condition. I cannot say that I see any reason in law or in ordinary notions of the purpose and effect of a testament to support that argument. There is no reason why a testator should wish all his legacies to vest at the same time; and accordingly it is perfectly familiar, in very many cases, that testators give some legacies which are to be paid immediately, notwithstanding the subsistence of life-rents, and others, which are not to be paid and not to vest until the life-rents expire, and that for perfectly clear and natural reasons. A testator may give legacies to a class of persons, and that will naturally suggest questions of predecease and survivorship; he may give legacies to his own near relations and his interest in them will extend to their children, and therefore he may think it reasonable and natural to make provisions for the issue of his legatees as well as for the legatees themselves. But there are other cases in which his interest is confined to the particular legatee whom he desires to benefit. In this case, besides bequests to relations, there are bequests to the testator's servants. Well, he wishes to regulate the interests of his near relations; but he takes no concern in the person who may take an interest through the legacy to his servant—his only concern is in the servant himself. I can see no reason why the Court should interpose an artificial period of vest-

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Mar. 18, 1913. ing if we find a clear direction in the will which implies the vesting of one legacy at the death of the testator himself and another at the death of an annuitant or liferenter who should survive. I think that that disposes of the question of immediate payment; but in the answers which we give to the present case it will be necessary to define more particularly than I have done, the particular legacies which fall within the one class, and those which fall within the other.

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Lord Kinnear.

But then there is another question, suggested by the third question which is put to us, arising out of a claim for interest from the date of the liferenter's deed of surrender and consent. I do not think it is seriously disputed, I rather understood it was not disputed at all, that if there were money enough and if there were legacies payable now—that is vesting *a morte testatoris*, and payable as soon as it appeared that the liferent was not to be maintained as the obstacle to immediate payment—then such legacies would be payable with interest from the date specified. But then that raises a question whether such payment can be made without prejudice to other interests, and the trustees have put in a minute which shows that there may be some risk of prejudice to the legatees whose legacies are not to be paid immediately if those who are entitled to immediate payment get both capital and interest now. But there is a different question which suggests itself upon the consideration that no payment can be made before the date of payment specified in the will that will prejudice any interest for which the testator intended to provide, because such payment is not in direct obedience to the testator's directions. An obstacle to payment has been removed, but it still remains to see that his will is carried out as the funds will enable the trustees to carry it out in the interest of all the legatees.

Now if the liferent which the widow has rejected were to be accumulated from this moment, of course it would go to any other legatees whose legacies would be held to cover it; it would go to payment of the special legacies, and in so far as there was anything beyond what was necessary for them, it would go to residuary legatees. And if there were here a bequest of residue to definite persons who had an interest in the whole estate which was not expressly bequeathed by special legacies, we should have to consider whether they were or were not entitled to object to immediate payment to the effect of preventing an accumulation which might ultimately have been for their benefit. But then there are no such legatees in this case. There is a gift of residue to the trustees, by which the testator says that the surplus residue shall be at their absolute disposal, and "that they may apply it as they think fit in augmenting all or any of the bequests herein to persons, institutions, or associations, or in helping kindred institutions or associations in Glasgow," as he might himself have done if in life. There is no definite person who can claim under that, unless and until the trustees have given him or her an interest to make the claim. In the meantime, therefore, the residuary legatees are the trustees; and it is for them to consider whether there is anything in the claim of the legatees who, I think, should be held entitled to immediate payment that will prejudice that, or any other interest which they are bound to protect. I am therefore of opinion that any answer which we may give, which will sustain a right

to immediate payment, must be made subject to the right or duty of the trustees to retain such funds as may be necessary to carry out the whole of the other provisions of the will. Mar. 18, 1913.
Jacks's Trustees v. Jacks.

There is another question, of a different kind, which is not put specifically but is covered by the second part of the general question, "whether payment of all legacies is postponed until the death of the second party, and, if so, which of them," and that is the question as to a bequest in favour of the University Court of the University of Glasgow, "to endow a Chair of Modern Languages, to be called the 'Chair of William Jacks' . . . Declaring that should either I or my wife endow any chair in the Glasgow or other University before the death of the survivor, then this bequest shall fall." Now the question is whether it is possible to get rid of the plain words of that bequest. The bequest is given conditionally upon no other chair being endowed during the lifetime of the survivor of the spouses. It is quite true that this lady has said, and it was right and proper for her to say it in the position in which she is, that she did not mean to endow any other chair. But that cannot be taken as a complete satisfaction of the testator's condition that this bequest is to fall in an event which may or may not happen during the lifetime of his widow. Lord Kinnear.

LORD JOHNSTON.—The testator, Mr Jacks, by his settlement declared the sixth purpose of the trust thereby created to be "for payment to my said wife of the free annual interest or income of the residue of my estate, payable said income half-yearly or in the option of my trustees as received," and the last purpose to be "for payment of the several following bequests upon the death of my said wife, or should she surrender her liferent over any part thereof to admit of payment, then for payment of such part upon such surrender." This alternative date of payment depends upon a clause which was added to the gift of the residuary income immediately after the words which I have quoted, viz., "but with power nevertheless to her (his said wife) to consent to payment of all or one or more of the legacies hereinafter bequeathed, or part of all or one or more of them, so as to admit of payment thereof during her life, and subject to or free of duty."

The legacies under the last purpose of the settlement, which were as many as twenty-one in number, for Mr Jacks left a large estate and no issue, were not by any means uniform in their conception. They fall into classes of which the following are samples—[His Lordship here quoted the terms of the legacies bequeathed under the first, second, fifth, sixth, eleventh, fifteenth, seventeenth, and twenty-first heads of the last purpose of the settlement]. There are two legacies of an exceptional character, Nos. 10 and 16 in the list contained in the settlement, which it would only cumber the general question to refer to at present, but which I will deal with separately later.

The residue of his estate Mr Jacks left to the absolute disposal of his trustees, either for the augmentation of any of the legacies to persons or institutions named by him or for the help of kindred institutions. Mrs Jacks, the testator's widow, survived him, and claimed her *jus relictae*, which was not excluded by marriage-contract. And I think it right to say, in justice to her, that I interpret her action and what has followed on it as

Mar. 18, 1913. dictated by no antagonism to her husband's settlement, but by a wish to allow all his legatees to come into immediate enjoyment of their legacies, consistently with justice to herself. Mr Jacks's residuary estate is sufficient to pay out his widow her *jus relictae*, to pay the whole legacies in full, and to leave a small resulting residue. Had Mrs Jacks surrendered her liferent in part, in precise terms of the will, she would, in the circumstances, have reduced her income by one-half, without any compensation in capital. By the course she took she surrendered her whole income (at any rate for the time) and took compensation in capital, but equally she allowed her husband's will to take full effect at once *quoad* the legacies, which amount to the large sum of £76,250. But it must here be noticed that the settlement of Mr Jacks contained this declaration, "which provisions in favour of my said wife shall be in full to her of all her claims of terce, *jus relictae*, and others legally competent to her against my estate upon my decease."

After Mrs Jacks's election to take her *jus relictae*, she executed a deed of ratification, &c., by which, on a narrative of her husband's settlement, of her having claimed and taken her legal rights, of the trustees being in a position after settling with her to pay his whole legacies, and of her personal desire that such payments should be made forthwith, she ratified her election, surrendered irrevocably her liferent and whole other provisions (the latter, though unnecessary to mention in detail were of very considerable value), and concluded thus: "And I consent (so far as I competently can) in exercise of the power of anticipation conferred upon me in the sixth place in said trust-disposition and settlement and every other power enabling me, to payment being forthwith made" of the whole legacies bequeathed, &c.

The main question in the case is whether all or any and which of the legacies above referred to fall to be paid now or to be postponed till the death of Mrs Jacks the testator's widow. I have carefully examined the whole of Mr Jacks's settlement in the above detail, because I do not think it is possible to come to a sound conclusion on the above question without considering its whole scope and bearing.

The first point to which I shall advert is Mrs Jacks's claim to *jus relictae* and its effect. I have always understood that where a provision or bequest by settlement is declared to be in full, in satisfaction, or in full satisfaction (for they all come to the same thing) of legitim or of *jus relictae*, a claim by a beneficiary to such legal rights involved absolute renunciation or forfeiture, from whichever side the claim is looked at, of the testamentary provision. It appears to me that the very terms of such a provision involve that the bequest is conditional, and I cannot myself understand a right being satisfied by a provision, and at the same time the right being exigible and the provision merely suspended or postponed. The law is thus emphatically stated by the late Lord President (Inglis) and Lord Mure in *Macfarlane's* case.¹ In that case Lord Mure says: "The law is, I apprehend, quite settled, to the effect that the beneficiary electing to take his legal rights as against the will is held to have forfeited everything the will gave him beyond the amount of those rights," and the Lord President in different words regards the declaration of satisfaction as a condition to receive effect as matter "of

¹ 9 R., at pp. 1166-7 and 1176.

course." The point, however, was not alluded to by the other Judges, and Mar. 18, 1913. it is maintained that the above observations were not necessary for the deter- Jacks's Trus- mination of the case, and do not enter into the grounds of judgment, and tees v. Jacks. must therefore be taken as having no further weight than other *obiter dicta*. Ld. Johnston. Your Lordship has spoken regarding the judgment in *Macfarlane's case*¹ as one of the Court which was concerned in its decision; I find that I occupied to the case a humbler, but to the law and to the profession a responsible, position, viz., that of the reporter, and, as it happens, I have an exceptionally distinct recollection of the case. In it for the first time the doctrine of equitable compensation, which although it had been long established in England, and although it may be said to have been adumbrated in Scotland, had never, so far as I am aware, *eo nomine* been accepted here, was adopted as part of the law of Scotland. The case was one which aroused much interest, and was the subject of much discussion in the Parliament House as well as before the Court, and was the subject of an exhaustive argument in this Division, and afterwards of written papers laid before the whole Court, and I can say with perfect distinctness of recollection that the doctrine laid down by the two Judges whom I have quoted was the basis of their judgment and of those who concurred with them, but who did not think it necessary to repeat it. Much in a case of such importance passes in the discussion before the Court, which cannot appear in the report, and I can have no doubt that it was made quite clear that the judgment of the Court upon the question at issue justified the general, which is found to preface the special, rubric. But the matter does not enter the actual judgment, and we were referred to the case of *Gray*,² where the doctrine referred to was repudiated by a direct decision to the contrary. While I do not regard the reasoning, whereby the expressed opinion of Lord President Inglis and Lord Mure is avoided by the only Judge who makes reference to it, as satisfactory, and while I think the question deserving and requiring reconsideration, I must accept the case as settling the law for the purpose of this case. In fact from my point of view, though I should have come to the same conclusion in the present case on an opposite view of the law, if the law be as determined in *Gray's case*,² it only makes this case the more easily decided.

I accept therefore that Mrs Jacks's claiming and receiving her *jus relictæ* did not involve total surrender or forfeiture of her testamentary provision, but left it open to her yet to claim and receive the latter, on equitable compensation having been made to all others affected by her taking the former. It may be that, humanly speaking, at Mrs Jacks's age equitable compensation cannot be looked for, but legally it must be regarded as possible, and her claim to her provision of a liferent as capable of again emerging. In fact *ex hypothesi* the radical right to it remains with her. And this legal fact affects materially her deed of ratification and surrender. From being a document having no avail whatever, it becomes one having an important bearing upon the present case.

What, then, is the date of vesting of Mr Jacks's legacies? This question must be first considered on the footing that the settlement took effect

¹ 9 R. 1138.

² 1907 S. C. 54.

Mar. 18, 1913. in terms, and was in no way interfered with by the action of the widow.
Jacks's Trustees v. Jacks. It was maintained on the authority of *Bryson's case*¹ that, as there was no gift apart from a direction to pay, there could be no vesting until payment, and that, as there can be no vesting till a contingency is purified, there could be no payment in this case till the contingency is purified, where the legacies are coupled with a contingency or destination-over. But then those who maintain this position find themselves in this dilemma, that, if the will takes its normal course, there can be no payment until the widow's death; that the legacies are roughly of two classes—those personal and without contingency or destination-over, and those coupled with a contingency or a destination-over—and that they have to maintain a different scheme of vesting for those two classes in order to determine the result of the widow's surrender of her life interest with a view to anticipate payment. The conclusion to which they would have us come is that the personal legacies vest at the date of payment, whether that is the date of the widow's death or of her consent to anticipation of payment, but that the contingent legacies and legacies with a destination-over cannot vest in any case until the widow's death, because these contingencies and destination-over are assumed to depend upon that date. For a different date of vesting of the different classes of legacies, I hold that there is no ground in this case. It is against the whole indication of the testator's intention, as deduced from the terms of this purpose of his settlement. It is hardly conceivable that the testator intended that a legacy to his wife's maid or to his minister should vest on acceleration of payment, irrespective of his widow's death, and one to his brother's widow remain contingent with the risk of lapsing, or one to his brother's son remain contingent and either go over to his issue or lapse on failure of issue, should his brother's widow or his nephew predecease his own widow. Moreover, the contention takes no regard of the terms of the widow's power of anticipation. She may consent to the payment "of all or one or more" of the legacies. There is no distinction whatever between the different classes of legacies, whereas the contention above referred to would introduce a very marked distinction.

I can conceive it possible in this case to hold that vesting of the legacies took place *a morte testatoris*. I can also conceive it possible to hold that they vested at the date of payment, whether normal or anticipated. But I cannot understand its being maintained that some vested at such anticipated date of payment, and that vesting of some was postponed till the widow's death, notwithstanding that she consented to payment being anticipated. Between the two dates of vesting, which I conceive to be possible, opinions, I concede, may differ. My own opinion is that in this case vesting is not dependent on the date of payment, whether normal or anticipated. I think it took place at the testator's death, and that no other conclusion can harmonise the whole of the sixth and seventh provisions of the settlement. Moreover, I find no difficulty in the case of *Bryson's Trustees v. Clark*,¹ or in the opinion of the late Lord President Inglis. In the first place, the settlement there was one of heritage, and the destination was one in accord with

¹ 8 R. 142.

the subject; in the second place, the Lord President expressed his opinion Mar. 18, 1913. thus: "It is in vain to review the authorities in a question of this kind, *Jacks's Trustees v. Jacks.* but I think they amount to this, that *when nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event, and not sooner, and, failing him, to certain other persons as substitutes or conditional institutes to him, then, if he does not survive the period he takes no right under the settlement.* I think that is settled law, and applicable to this case." I accept it as settled law. But is it applicable to *this* case? I think not. I think there is virtue in the words I have underlined, and that something is both implied and expressed in this case which makes the general doctrine inapplicable—implied in the general scope of this wide range of different legacies, and expressed *in gremio* of the power and condition of anticipation. Ld. Johnston.

To revert more particularly to the different classes of legacies enumerated at the outset:

The 1st to a widow, if she has not married again, vested, I think, *a morte*, subject to defeasance on remarriage before the date of payment, and was not held up, it might be for the whole of the widow's life, until Mrs Jacks's death, and in that case possibly to lapse. As to the 2nd and 3rd, where the testator speaks of the date of vesting, he gives no aid to determine the date of vesting, nor does he indicate that he had any personal conception of what the date of vesting would be. He leaves it as simply the date of vesting, whatever that may be. Had he said the date of payment, he would probably have fixed the date of vesting. But that would not suit the construction which I am venturing to dispute, for it would have then fluctuated according as payment was accelerated or not. I can then find no grounds in this particular case for postponing vesting in the nephews and nieces beyond the date of the testator's death, or for postponing payment of these legacies during the whole of the widow's life, in any and every event, for behoof of their possibly unborn issue. And such was not, I think, when the whole provision in question is looked at, the testator's intention. Nor did he intend so to hold up the legacies of the class 4th, 5th, 6th, 7th, and 8th, but meant them, I think, to vest *a morte*, the postponement of payment being intended not to suspend vesting in any case, but being necessary merely for protection of the widow's liferent.

I have so far dealt with the case as if things had taken their normal course under the settlement, and Mrs Jacks had either died or surrendered in part her liferent, to admit of payment being made, which might have happened not immediately at her husband's death, but at any time between that date and her own death. In the normal case, as I think, neither Mrs Jacks's surrender of her liferent nor her death would have had any effect on the vesting of the legacies. Predecease of either of these events would not have cut off a legatee to whom there was a gift over any more than a personal legatee to whom there was none. It would merely have accelerated the date of payment. Such, as I have said, I believe to be the result of a consideration of the general scope of this fasciculus of legacies.

But things have not taken their normal course. Mrs Jacks has claimed her *jus relictae*, and has executed a surrender *valeat quantum* of her liferent.

Mar. 18, 1913. If the law is as determined by *Gray's* case,¹ Mrs Jacks was in a position to surrender in terms of the will, to admit of immediate payment, for legally Jacks's Trustees v. Jacks. her liferent was still radically hers, though now dormant to admit of equitable compensation being made, and was not either renounced or forfeited. Ld. Johnston. Again, if *Gray's* case¹ does not fix the law applicable to this case, then it appears to me that the forfeiture of Mrs Jacks's liferent, by reason of her claim to *jus relictæ*, which must then have ensued, inasmuch as it involves the same result as her voluntary surrender of her liferent, has by implication the same effect as her voluntary surrender. To hold otherwise would be, I think, to thwart the obvious intention of the testator. The case is entirely distinguishable in its circumstances and the nature of the interests involved from *Edwardes's* case² and *Haldane's Trustees*³ to which we were referred.

But assuming that I am wrong in preferring the death of the testator as the general date of vesting, the alternative view of vesting which I have suggested commends itself to me with almost equal force, and it is one which is equally effectual to dispose of the case, in the circumstances as they have turned out. Assume that vesting did not take place at the death of the testator, it can, I think, hardly be disputed that it took place at the date of payment, else how could payment be made of a legacy not vested? And payment is to be made if the widow chooses to surrender her liferent not of a limited class or classes of the legacies, but of "all or one or more" of them. This would lead, it is said, to the result that vesting would be made to depend on the act of a third party. And the case of *Muirhead*⁴ was referred to as a conclusive authority in favour of the impossibility of Mrs Jacks's surrender resulting in the immediate vesting of the contingent legacies or those with a destination-over. I read it as an authority for a diametrically opposite conclusion. This case is just the exception which proves the rule of *Muirhead's* case.⁴ As Lord Watson (at p. 50) puts it, "It is impossible to hold as matter of principle that the act of any person outside of and hostile to the trust can *per se* effect an alteration of the truster's dispositions with regard to the vesting of interests in his estate. Such an act may be of material importance if the testator has either expressly or by implication signified his intention that upon its occurrence the period of vesting shall shift." I cannot ignore the guarded manner in which his Lordship's statement of the general principle is made. The widow's act is not here founded on *per se*, but in relation to an indication of the testator's intention of what should flow from that act, expressed, if the authority of *Gray's* case¹ is accepted, implied, if the law be as stated by the Lord President and Lord Mure in *Macfarlane's* case.⁵ I can have no doubt, therefore, that, whatever view may be taken of vesting *a morte*, vesting did take place at latest at the date to which the act of the widow shifted the payment, and vesting not of certain of the legacies merely, but of the whole. For I cannot draw any distinction in their effect, according to the intention of the testator, between the widow's voluntary surrender and her forfeiture of her annuity.

¹ 1907 S. C. 54.² 19 R. (H. L.) 33.³ 23 R. 276.⁴ 17 R. (H. L.) 45.⁵ 9 R. 1138.

I noted in passing that there were two legacies in a special position, viz., Mar. 18, 1913. the 10th and the 16th. The 10th is in favour of Mrs Margaret Anderson ^{Jacks's Trustees v. Jacks.} or Lee and her son, William Jacks Lee. Whenever payment can be made Mrs Lee's liferent of this legacy commences, but for some reason the fee ^{Ld. Johnston.} intended for her son is to go to his mother if he does not attain twenty-one, and failing her is to revert to residue. The fact that the testator here provides exceptionally for a reversion to residue is, I think, the most important confirmation of the view that he regarded all the other legacies where a lapse is contemplated as vesting at his death. The 16th presents more difficulty. It is a bequest to the University of Glasgow for the endowment of a Chair of Modern Languages, and it is subject to a declaration that should either "I or my wife endow any chair in the Glasgow or other university before the death of the survivor, then this bequest shall fall." Like the reversion of William Jacks Lee's legacy, this provision is exceptional. But the declaration that it shall lapse in a certain event, distinguishing it from the remaining legacies, cannot affect them, except by way of confirming the conclusion already reached regarding them. The peculiarity of this legacy must be met by either retaining it at interest, or taking security for its repetition in the event conditioned.

I am therefore for answering the first query in the affirmative as regards all the legacies, with the exception of that to Glasgow University, and making a special arrangement regarding it, and the third query (a) in the affirmative, and (b) at 3 per cent per annum. It is, in my view, unnecessary to answer the second query.

LORD MACKENZIE.—The testator's widow elected to take her legal rights, with the result that she is not, at all events at present, entitled to draw the free annual interest or income of the residue of the truster's estate bequeathed to her under the settlement. It is being applied on the principles of equitable compensation to make up the capital sum paid to her in full of her legal rights. It is not necessary for the purposes of this case to consider or decide what the right of the widow will be after compensation has been made. I take the case on the assumption that if and when the capital sum paid to the widow is replaced during her lifetime, her right to the liferent would, under the terms of the settlement, revive. She has, however, executed a deed of ratification, surrender, and consent, by which she has surrendered irrevocably the whole liferent and other provisions conferred upon her by the settlement.

The question is whether payment of all or any of the legacies bequeathed in the last purpose of the settlement can now be made by the trustees. There is a power under the settlement given to the widow to consent to payment to all or one or more of the legatees in question during her life, and the direction in the last place is as follows:—"For payment of the several following bequests upon the death of my said wife, or should she surrender her liferent over any part thereof to admit of payment, then for payment of such part upon such surrender." The widow, under the deed of ratification, surrender, and consent, consents so far as she competently can to payment being forthwith made of the whole of the legacies, but I think it plain that the trustees cannot proceed upon this as a warrant to

Mar. 18, 1913. them to make payment to the legatees. The widow cannot approbate and reprobate the settlement. Having claimed against the settlement, she cannot exercise a power conferred by it. The operative direction therefore is to the trustees to pay the bequests in question upon the death of the widow. On the authority of *Muirhead v. Muirhead*,¹ the widow's repudiation of her liferent has no effect on the vesting of the legacies, although it has an effect as regards the payment of those legacies which have already vested. As Lord Watson says, "it is impossible to hold as matter of principle that the act of any person outside of and hostile to the trust can *per se* effect an alteration of the truster's dispositions with regard to the vesting of interests in his estate." The testator here had no other object in view in postponing the time of payment than to secure the liferent to the widow. That liferent being now at an end, partly through the compulsory application of the doctrine of equitable compensation, and ultimately, if the occasion arises, through the surrender of her liferent right by the widow, there is no reason why the trustees should not make an immediate division (always provided the state of the funds permits it). This division, however, must be limited to those who have a vested and indefeasible interest in their legacies. In the case of those whose legacies are contingent, where there is a clause of survivorship, or destination-over, the rule laid down in many cases, of which *Bryson's Trustees v. Clark*² is probably the most often quoted example, is that the beneficiary who does not survive the period for payment prescribed by the testator takes no right under the settlement. All the elements indicative of suspended vesting mentioned by Lord Watson in *Muirhead*¹ are present here.

The third parties are the contingent legatees. In my opinion they are not entitled to immediate payment. In the case of one of the third parties, Mrs Elizabeth Jones or Jacks, the contingency is created not by a destination-over, but by a condition in regard to remarriage. This, in my opinion, continues during the lifetime of the testator's widow. The fifth parties are the legatees in whose case there is no gift over or contingency. These, in my opinion, are entitled to immediate payment, if and when the trustees have in hand sufficient funds to make full payment, with interest, of the whole legacies whether vested or contingent. Until then the trustees are neither bound nor entitled to make payment to any of the legatees. Interest on the legacies will be at the rate the money has earned, and runs on the legacies which are vested from the date of the deed of ratification. On the legacies which have not vested it will not begin to run until the period of payment has arrived.

This leaves only the question in regard to the bequest of £20,000 to the University of Glasgow to endow a Chair of Modern Languages. The settlement contains the declaration that should either the testator or his wife endow any chair in Glasgow or other university before the death of the survivor, then that bequest should fall. This condition is independent altogether of the question whether the widow has taken her legal or conventional provisions. It cannot be seen until her death whether she has endowed any chair in Glasgow or any other university. Therefore it can-

¹ 17 R. (H. L.) 45.

² 8 R. 142.

not be seen during her lifetime whether the testator's bequest is to fall or Mar. 18, 1918. not. It is no doubt true that by the deed of ratification, surrender, and consent Mrs Jacks irrevocably and absolutely undertakes not to endow any ^{Jacks's Trusts v. Jacks.} chair in Glasgow or any other university now or at any time hereafter. If, however, the trustees pay the £20,000 to Glasgow University upon this ^{Lord Mac-} undertaking, it is impossible they could ever get the money back. They have paid to Mrs Jacks the full amount of her legal provisions. If therefore after payment to Glasgow University by the trustees Mrs Jacks chose to endow a chair in that or any other university, I am unable to see by what means the trustees could carry into effect the express declaration of the testator. I do not mean for a moment to suggest that Mrs Jacks would do anything in violation of the undertaking she has given. The Court is, however, bound to treat the matter on a strictly legal basis, and so regarding it, I am unable to hold that the Court would be warranted in sanctioning immediate payment of this bequest. ^{kenzie.}

LORD KINNEAR.—I should like to add two observations which I omitted to make, but of which I have been reminded by Lord Johnston. The first is this, that where legacies have been given upon contingencies which have been already purified, they are, in my opinion, exactly in the same position as legacies which have been given absolutely independent of any contingency at all. The case of the legacy to William Lee is an illustration. That was to be given to him if he attained the age of twenty-one; but if he did not attain the age of twenty-one it was to go to his mother, whom failing, it was to fall into residue. Now we are told that in point of fact he has attained that age, and therefore his right has become absolute. There is no difficulty, to my mind, in the application of that view arising from the interim gift of liferent to the mother, because the testator says distinctly that the income in the interim is to be applied for his benefit, and therefore it was really a legacy, the income of which was to go to the legatee while in minority and the capital when he came of age. There are, I think, other legacies in which the contingencies have been purified.

Then the other observation I wish to make is this, that although I think that the power of the liferenter to authorise the anticipation of payment is completely out of the case as an operative power, in respect of her having rejected the will, still I should quite agree with Lord Johnston that the power remains as part of the will which we must read in order to ascertain the intention of the testator. I do not think that the rejection of a bequest strikes anything out of the will itself but only the benefit of the refractory legatee. But then, in that view, what the testator really provides is that, if his wife shall exercise a certain power, then payment is to be accelerated, and the question of what is to happen if she does not exercise it must be decided according to the plain meaning and expression of the testator's will providing for that event. I agree that if there had been in fact an exercise of that power by the liferenter in terms of the will, the legacies which were paid in consequence must have vested, because they were paid.

THE COURT pronounced this interlocutor:—" . . . Find in answer to the first and second questions of law in the case

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that (1) the trustees are not entitled to pay any of the legacies before they have funds in their hands sufficient to make payment with interest and duty of the whole legacies; if and when they have funds sufficient, the fifth parties will be entitled to receive immediate payment of their legacies; (2) payment of the legacies and bequests to the third and fourth parties is postponed until the death of the second party, reserving any question that may arise if the liferent of the second party should at any future time be held to revive: Answer branch (a) of the third question in the affirmative, and find in answer to branch (b) of said third question that interest falls to be paid at the rate the money earns in the hands of the trustees. . . ."

WEBSTER, WILL, & Co., W.S.—HAMILTON, KINNAR, & BEATSON, W.S.—
MACKENZIE, INNES, & LOGAN, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 112.

KATHLEEN M'ENANEY (Ernest Leigh's Executrix), Pursuer
(Reclaimers).—*Moncrieff, K.C.—A. M. Mackay.*

Mar. 19, 1913.

THE CALEDONIAN RAILWAY COMPANY, Defenders (Respondents).—
Clyde, K.C.—Blackburn, K.C.—Hon. W. Watson.

Leigh's
Executrix v.
Caledonian
Railway Co.

Reparation—Damages for personal injury—Title to sue—Executor.

Held (rev. judgment of Lord Hunter) that the executor of a party who had, prior to his death, intimated a claim for damages for personal injury, had a title to sue for such damages.

Bern's Executor v. Montrose Asylum, (1893) 20 R. 859, and *Boyce's Executor v. M'Dougal*, (1903) 5 F. 452, distinguished.

Observations on the maxim *actio personalis moritur cum persona*, and on the use of the phrase *actio injuriarum* as a *nomen juris* in Scots law.

1ST DIVISION. ON 13th July 1912 Kathleen M'Enaney, executrix-nominate of the late Ernest Leigh, brought an action against the Caledonian Railway Company to recover damages from the defenders in respect of personal injuries sustained by the deceased owing to the fault of the defenders or their servants.

The pursuer averred that, on 25th December 1911, the said Ernest Leigh, while standing in a street in Glasgow, was knocked down and run over by a van belonging to the defenders through the fault of their servant; that he was removed to the Royal Infirmary where he lay in great suffering till 6th January 1912, when he died as a result of the accident.

She further averred:—(Cond. 7) "While in the infirmary, on or about 28th December 1911, the said Ernest Leigh instructed his solicitors in Glasgow to take proceedings to recover a sum in name of damages for his said injuries and sufferings from the defenders. Accordingly, on or about 28th December 1911, a letter in the following terms was sent on his behalf to the defenders, viz.:—
'Messrs The Caledonian Railway Co.,
302 Buchanan Street.

'Dear Sirs,—We have been consulted on behalf of Mr Ernest Leigh, 122 Charing Cross Road, London, who, on the morning of Christmas Day, was knocked down in West Nile Street by a van belonging to you, the horses of which had run away through, we understand, having been left unattended in the street. We have

made full inquiries into the whole circumstances connected with the matter, and are quite satisfied that you are liable. Our client was removed to the Royal Infirmary immediately, where he still is and will be for some considerable time. We understand that both his knees have been fractured, and that he has sustained serious internal injuries. We shall be glad to hear from you at your earliest convenience, and after you have made inquiries, whether or not liability is admitted.—Yours faithfully,
 ANGUS CAMPBELL & COCHRAN.
 The defenders refused or delayed either to admit or deny liability, and a reminder was sent on Leigh's behalf in the following terms:—
 'Messrs The Caledonian Railway Co.,

302 Buchanan Street, Glasgow.

'Ernest Leigh.

'Dear Sirs,—We refer you to our letter of 28th ult., and shall now be glad to hear from you.—Yours truly,

'ANGUS CAMPBELL & COCHRAN.'

The defenders declined to admit liability 'in the meantime,' and intimated that they were having inquiries made. For some time longer they unreasonably delayed or refused to admit liability, and in the meantime the said Ernest Leigh died of his injuries as aforesaid." (Cond. 8) "By will, dated 5th January 1912, and executed as accords of law, the said Ernest Leigh appointed the pursuer (who was otherwise known among her friends and acquaintances, and in particular to the said Ernest Leigh, under the name of Mrs Kathleen McEnaney Denton or Baird) his executrix and universal legatory, and left, bequeathed, and made over to her his whole means and estate as her absolute property. A copy of the said will, whereof the pursuer has taken out probate in England, is produced herewith and held as repeated herein. *Inter alia*, the testator made the following declaration, viz.:—'I also declare that she [the pursuer] is to be entitled to, and to get, any sum of money which may be paid in name of damages or otherwise by the Caledonian Railway Company in respect of the accident I have sustained.' Accordingly, the pursuer has a good and undoubted right and title to sue the present action." (Cond. 9) "The pursuer has called on the defenders to make payment to her of a sum of money adequate as damages and reparation for the injuries, loss, damage, and sufferings of the said Ernest Leigh, but they refuse to do so, or to admit any liability, and the present action is therefore necessary."

The pursuer pleaded, *inter alia*;—(2) The pursuer having good and undoubted right to sue the present action, as executor duly nominated to the said Ernest Leigh, decree should be pronounced in terms of the conclusions of the action. (3) The pursuer, as universal legatory and assignee of the said Ernest Leigh, having good and undoubted right to sue the present action, decree should be pronounced in terms of the conclusions of the action.

The defenders, who, for the purposes of the action, admitted responsibility for the accident, pleaded, *inter alia*;—(1) Any right to make the present claim having ceased on the death of the said Ernest Leigh, the pursuer has no title to sue, and the action is irrelevant.

On 13th November 1912 the Lord Ordinary (Hunter) sustained the first plea in law for the defenders and dismissed the action.*

* "OPINION.—[After narrating the circumstances]—For the purposes of this action the defenders admit that they are responsible for the accident,

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The pursuer reclaimed, and the case was heard before the First Division (without Lord Johnston) on 20th, 27th, and 28th February 1913.

Argued for the reclaimer;—In the case of *Darling v. Gray & Sons*¹ Lord Watson found it unnecessary to determine the question whether a claim in respect of personal injuries was transmissible on the death of the party injured to his representatives, and an affirmative answer to that question in certain circumstances was not excluded either by the decision or the grounds of judgment in the cases of *Bern's Executor v. Montrose Asylum*² and *Boyce's Executor v. M'Dougal*,³ upon which the Lord Ordinary had proceeded. There was a clear distinction between the circumstances of these cases and those of the present case, for here there had been intimation of a claim, and a clearly expressed intention of the deceased to treat it as an asset to pass with the rest of his estate to the pursuer.⁴ An action at the instance of a party suing upon an assignation of a good ground of action was not within the categories adversely commented upon by Lord Watson in the case of *Darling v. Gray & Sons*.⁵ The pursuer here had a good

but they maintain that, as no action was raised against them by the deceased in his lifetime, the pursuer has no title to sue the present action.

"In the case of *Bern's Executor v. Montrose Asylum*, 20 R. 859, it was held by a majority of a Court of seven Judges that an executor has no title to institute an action of damages for personal injuries to the deceased person whom he represents. It is true that the deceased in that case had not only not raised an action, but he had not by any public act indicated his intention of making a claim. Lord M'Laren's opinion does not, however, appear to me to proceed upon this distinction but upon general grounds. He treats the case of executors following out and insisting in an action raised by the injured party as a recognised exception to the rule against the transmissibility of an action for personal injuries where no patrimonial loss has been sustained. (*Neilson v. Rodger*, 16 D. 325, and *Darling v. Gray & Sons*, 19 R. (H. L.) 31.)

"Mr Mackay, in a learned argument submitted to me, asked me to treat *Bern's* case as only excluding the action where the injured party had given no public indication of his intention to prosecute the claim. He referred me to the opinion of Lord Shaw in the case of *Hendry v. United Collieries*, 1909 S. C. (H. L.) 19, at p. 24, and to the opinion of Lord Kinnear in *Traill & Son*, 6 F. 798. Neither of these learned Judges express disapproval of the decision in *Bern's Executor*; and in neither case was it necessary for the decision of the case to consider to what extent *Bern's* case excluded a claim like the present.

"In the case of *Boyce's Executor*, 5 F. 452, the executor who raised the action stated that, as curator bonis of the injured party, he had given instructions to raise an action for damages on account of the injuries, but that the ward had died before the action was raised. The action was dismissed. In giving judgment in that case Lord Moncreiff said, 'I have read the whole opinions in *Bern's* case over again, and I think, having regard to the grounds of judgment on the part of the majority of the Court, they involve this—that an action of this kind will not transmit to an executor unless the action has been actually raised during the lifetime of the party injured. On these grounds I think the Lord Ordinary had no alternative but to give effect to the case of *Bern* and dismiss the action.'

"The cases of *Bern* and *Boyce* are binding upon me, and I therefore sustain the first plea in law for the defenders and dismiss the action."

¹ (1892) 19 R. (H. L.) 31.

² (1893) 20 R. 859.

³ (1903) 5 F. 452.

⁴ *Milne v. Gauld's Trustees*, (1841) 3 D. 345.

⁵ 19 R. (H. L.), at p. 32.

title to sue for recovery of damages for injury to the deceased during his life and for personal loss, because the deceased had assigned the benefits recoverable.¹ The intimation of the deceased's claim and the assignation thereof had the same effect as if he had brought an action in his own name.² The right to sue in such an action once vested transmitted to personal representatives or assignees.³ If any relatives of the deceased had sued for damages the present pursuer could have shown a better title to sue than theirs. If the Lord Ordinary's judgment were sound, then, after intimation of a claim for damages, any defenders might escape liability by dilatory methods. The present defenders were not entitled to take any benefit from their delay in admitting liability. The maxim *actio personalis moritur cum persona* was not the law of Scotland, and in *Auld v. Shairp*,⁴ which was apparently the earliest case in the Scotch books in which reference was made to that maxim, a title to sue was held to have transmitted. Lord M'Laren's dictum in the case of *Bern's Executor v. Montrose Asylum*,⁵ which suggested that the law of Scotland was unique in not accepting a limitation of transmissibility of such actions, was hardly borne out by his Lordship's reference to the case of *Neilson v. Rodger*.⁶ The maxim *actio personalis* was never found in Roman law or in the Commentators thereon, and it was contradictory of the principles underlying that law. In Roman law a right to sue was transmissible actively, if not passively, in all actions for delict, except *actiones injuriarum*,⁷ and the *actio injuriarum* was always founded not upon personal loss but upon *contumelia*.⁸ The origin of the maxim *actio personalis* was to be found in the history of English law alone, where its source was obscure.⁹ Even in England its scope had been largely limited both by statute, as, for instance, where executors had been given a right by statute to sue for damage to the estate of a deceased party, and by decision.¹⁰ This was not an *actio injuriarum* in the sense of the Roman law, for the pursuer sought to recover damages for loss to the estate of the deceased by his death, and the present action was therefore distinguishable from such as involved purely penal consequences.¹¹

Argued for the respondents;—A right to recover damages for per-

¹ *Neilson v. Rodger*, (1853) 16 D. 325, Lord Cockburn, at p. 329, Lord Wood, at pp. 329-30.

² *Traill & Sons v. Actieselskabet Dalbeattie, Limited*, (1904) 6 F. 798, Lord Kinnear, at p. 807; *Riley v. Ellis*, 1910 S. C. 934, Lord President, at p. 942.

³ *Hendry v. United Collieries, Limited*, 1908 S. C. 1215, Lord Kinnear, at p. 1218, Lord M'Laren, at p. 1223, 1909 S. C. (H. L.) 19.

⁴ (1874) 2 R. 191, Lord Neaves, at pp. 198-200.

⁵ 20 R., at p. 862.

⁶ 16 D. 325.

⁷ *Justinian Institutes*, IV. xii. 1, Sandars, (9th ed.) p. 476; *Pothier des Obligations*, sec. 637, 638.

⁸ *Justinian Institutes*, IV. iv. 1, Sandars, (9th ed.) p. 418.

⁹ *Per Bowen, L.J.*, in *Finlay v. Chirney and Another*, (1888) 20 Q. B. D. 494, at p. 502.

¹⁰ 4 Edw. III. cap. 7; *Broom's Legal Maxims*, (8th ed.) 702; *Chamberlain v. Williams*, (1814) 2 M. & S. 408. The Lord President referred to *Hambly et al. v. Trott*, (1776) 1 Cowper, 371, and *Eisten v. North British Railway Co.*, (1870) 8 Macph. 980, Lord President Inglis, at p. 984.

¹¹ *Williamson v. North-Eastern Railway Co.*, (1884) 11 R. 596; *Black v. North British Railway Co.*, 1908 S. C. 444; *Palmer v. Wick and Pulteneytown Steamship Co., Limited*, (1894) 21 R. (H. L.) 39.

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sonal injury did not transmit to the executor of the injured party unless an action for recovery of damages had actually been brought by the deceased.¹ That the deceased had given instructions to raise an action did not suffice to give his executor a title to sue.² If death resulted from the injuries the dependants of the deceased would have a title to sue; and, if his executor also had a title to sue such an action as the present, the right to recover damages would be duplicated. But it was settled law that there could not be two actions arising out of the same wrong.³ Independently of the decision in the case of *Bern's Executor v. Montrose Asylum*,⁴ if the practice of the Roman law could be appealed to it would be necessary for the pursuer to show—which he had failed to do—that an action for personal injury was not an *actio injuriarum* of the class excepted as not transmissible to heirs.⁵ The decision in *Bern's Executor*⁴ was consistent with the law, not only of Rome, but of England⁶ and of America.⁷ The present case differed from that of a party suing upon an intimated assignation of a good ground of action, because the present pursuer's title to sue was founded upon a bequest which operated no intimation to the defenders of an intention to sue. Election to bring an action would be ineffectual to transmit to an executor a title to sue unless an action had been brought and the election had thus been intimated to the parties liable. The question here at issue was not affected by the decision in the case of *Hendry v. United Collieries*,⁸ which dealt with a totally different matter, viz., the transmissibility of a claim for compensation under the Workmen's Compensation Act. The case of *Trail & Sons v. Actieselskabet Dalbeattie, Limited*,⁹ (in which the soundness of *Bern's Executor*⁴ was not doubted) was distinguishable, because in that case the right of action was assigned for value, and the action was brought in the lifetime of the cedents. The practice of the Court did not support the dictum of Lord Kinnear in that case,¹⁰ which was relied upon by the pursuer, as to assignation of a right of action. The present action was not really a claim for patrimonial loss. The pursuer made no averments of such loss; and the damages which might have been recovered by the deceased for the personal suffering condescended on could not be broken up theoretically into a sum representing solatium to himself and a sum representing patrimonial loss to his estate.

At advising on 19th March 1913,—

LORD PRESIDENT.—This is an action brought by the executor-nominate of the late Mr Leigh to recover damages from the Caledonian Railway Com-

¹ *Bern's Executor v. Montrose Asylum*, 20 R. 859; *Darling v. Gray & Sons*, 19 R. (H. L.) 31.

² *Boyce's Executor v. M'Dougal*, 5 F. 452.

³ *Neilson v. Rodger*, 16 D. 325; *Darling v. Gray & Sons*, (1891) 18 R. 1164, 19 R. (H. L.) 31.

⁴ 20 R. 859.

⁵ Just. Inst. IV. xii. 1, *Sanders*, 476; *Broom's Legal Maxims*, (8th ed.) 704.

⁶ *Broom's Legal Maxims*, (8th ed.) 697-704.

⁷ *Finlay v. Chirney and Another*, 20 Q. B. D. 494, Lord Esher, M.R., at p. 497, *Bowen, L.J.*, at p. 505.

⁸ 1909 S. C. (H. L.) 19, Lord Macnaghten, at p. 21.

⁹ 6 F. 798.

¹⁰ 6 F., at p. 807.

pany in respect of personal injury sustained by Mr Leigh owing to the fault of the defenders or their servants. Mr Leigh was knocked down by a van which was the property of, and being driven by, the servants of the Caledonian Railway Company. Mar. 19, 1913.
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After the accident had happened, and while he was ill, Mr Leigh executed a will in which he made the present pursuer his executrix and universal legatory, and in the will he inserted the following declaration:—"I also declare that she"—the pursuer—"is to be entitled to, and to get, any sum of money which may be paid in name of damages or otherwise by the Caledonian Railway Company in respect of the accident I have sustained." While he was still alive, he instructed his solicitors to take proceedings to recover a sum of money as damages from the defenders, and a letter was written on his behalf, in general terms, asking what the defenders would do. The defenders declined to admit any liability in the meantime, and before anything further was done in that matter Mr Leigh died. This action having been raised, the defenders admit that the accident was caused by the fault of a servant for whom they were responsible; but they plead that "Any right to make the present claim having ceased on the death of the said Ernest Leigh, the pursuer has no title to sue, and the action is irrelevant." That plea was sustained by the Lord Ordinary, upon the ground that the case is covered by the case of *Bern's Executor v. Montrose Asylum*.¹

We had a very elaborate argument from the learned counsel for the pursuer, which was chiefly taken up with a discussion of the brocard *actio personalis moritur cum persona*, and especially with the question what the *actio injuriarum* really was in the Roman law, and a distinction was sought to be drawn between this case and the case of *Bern's Executor*¹ upon that matter. The latter case was a case where the husband of a deceased wife sued the proprietors of an asylum for injury, and, as the pursuer's counsel put it, indignity offered to his wife while she was an inmate of the asylum, and the action was dismissed as incompetent. Speaking for myself, I am not inclined to follow the learned counsel for the pursuer in his discussion upon this matter. I doubt whether we can get any great assistance from the Roman law in such a matter, and I very gravely doubt whether the term *actio injuriarum*, as used in Scots law, can be taken to be limited by a strict view of what *actio injuriarum* was in the Roman law.

Upon the merits of the case I have found the matter attended with great difficulty; because no recorded instance of such an action being allowed to go on has been found in the books. That is to say, there is no instance where an executor has raised, for the first time, an action in respect of personal injuries to a dead man. But so far as I am concerned, I am really concluded by what I said in *Riley v. Ellis*,² and, with great deference to my learned brethren who did not agree with me in that case, I may say that a repeated consideration of *Riley v. Ellis*² has only confirmed me in my opinion. What was actually decided in *Riley v. Ellis*² has not any application here, but the topics discussed have a great deal to do with this matter. In that case I was speaking of claims arising out of delicts and of

¹ 20 R. 859.² 1910 S. C. 934.

Mar. 19, 1913. the question of arrestment, and I said that actions in respect of slander might be added to actions that would not transmit, and though not so obviously, yet I thought equally safely, claims of damages for personal injuries. Then I continued,—“Now, why is this? It will not do to say because the claim arises out of delict; because admittedly if action was raised for seduction or slander, or damages for personal injury, an arrestment in the hands of the defenders to such an action would be good and the quality of the claim, i.e., as arising out of delict and not out of contract, is obviously not affected by the fact that action is raised.” I think, if I may say so, that I did two things in *Riley*.¹ I disposed of the idea that the matter was decided by the judgment in the case of *Auld v. Shairp*,² but I equally clearly said that the opinion of some of the Judges who took part in *Auld v. Shairp*² was adverse to the judgment in the case of *Bern's Executor*.³

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The extreme case is undoubtedly the opinion of Lord Neaves in *Auld v. Shairp*.² He holds that the moment that a delict has taken place a civil right is at once vested in the person who is the sufferer by the delict, and that that is part of his patrimony, and transmits just as any other part of his property transmits. I am of opinion that that is unsound law, and I think it is quite clear that that law, in its extreme form, cannot live with the law of *Bern's Executor*.³ But, then, while I do not go that length, I did in *Riley*¹ go the length of saying that in the case of a delict there is a transmissible right when a claim is made or an action is raised. That there is a transmissible right after the action is raised is admitted by everyone, because there is no question that, if an action has been raised by a man and he dies before the termination of that action, his executors can be assisted as parties. I personally think, for the reasons that I gave in *Riley*,¹ that the same thing happens when a claim is made. The injured man has then elected to say that he means to enforce a claim for damages. Now, that being my view, it follows that *Bern's Executor*³ does not cover this case. In *Bern's Executor*³ there had been no action by the lady which treated her injuries as giving rise to a claim of damages. She had died without saying anything upon the subject; and therefore the decision in that case is quite consistent with my opinion in *Riley*.¹ I said in *Riley*¹ that I thought the case of *Bern's Executor*³ was rightly decided, and all the considerations of good sense, I think, point very strongly the same way. Whenever you come to a liability which depends upon reparation which is to be made for personal suffering—whether the suffering is of the purely bodily class, as in the case of injury by accident, or of the mental class, which is represented by slander, or of that still more delicate and still more mixed class which may be represented by seduction—it is, I think, very evident that, if the persons themselves affected do not choose to make a claim, it is very right that nobody else should make it. But if the person has elected to make a claim, then I see no reason why that claim should not transmit like any other estate of the injured person. Accordingly I am of opinion that the Lord Ordinary was wrong in dismissing the action.

I think there is a very delicate inquiry in front of us here, especially

¹ 1910 S. C. 934.

² 2 R. 191.

³ 20 R. 859.

considering the possible application of what was laid down by the House Mar. 19, 1913. of Lords in the case of *Darling v. Gray & Sons*,¹ and accordingly I think Leigh's it would be inexpedient to go into that matter *ab ante*. I think the proper Executrix v. Caledonian course will be to recall the Lord Ordinary's interlocutor, and remit to his Railway Co Lordship with instructions to allow a proof.

LORD KINNEAR.—I agree with your Lordship. I had occasion to consider this question in the case of *Trasill & Sons v. Aktieselskabet Dalbeattie, Limited*,² and, as I adhere to what I said on that occasion, I do not think it is necessary, or at all proper, to repeat it. I only wish to add one or two observations for the purpose of considering a point which perhaps did not so directly arise in that case as in the present.

I am still disposed to attach the greatest weight to the very high authority of Lord Wood in *Neilson v. Rodger*,³ and also of Lord Neaves in *Auld v. Shairp*⁴ in their statement of the general law, but I think that probably Lord Wood's statement must be taken, since the case of *Bern's Executor*,⁵ with some qualification, which was not necessary for the purpose for which he was applying the law in the actual case, and which may or may not have been at the time present to his mind. The fundamental proposition which Lord Wood lays down, and which I hold to be not only sound in law but obvious, is that a claim for damages or solatium for injury to the person or feelings vests *ipso jure* in the injured person. So far as he is concerned, I apprehend there can be no doubt; if it did not so vest he could have no action at all, for an action is brought for the purpose of constituting and enforcing rights already vested in the pursuer. If he has no right he has no action. Well, then, his Lordship goes on to say that the right vests prior to any proceedings for decree for its constitution. And then he says that it is a moveable claim and assignable either by positive evidence or implied legal assignation, and passes to personal representatives. Now, if Lord Wood meant only that the action once instituted may pass to the representative of the pursuer on his death, that proposition is abundantly supported by the authority of decisions of this Court and by the authority of the House of Lords in *Darling v. Gray & Sons*,¹ because in that case the House of Lords expressed no doubt whatever that the deceased pursuer's mother was entitled to be sisted in his room as executrix and to carry on the action instituted by him. And he says the law has long been settled that, when the deceased has instituted an action to enforce his claim, his executor can take up and insist in the process to the effect of recovering damages to which the deceased was entitled. So far, I think, Lord Wood's proposition is beyond doubt. He then goes on to say that it is also assignable, and I must say that I remain of opinion that, if a right is transmissible to executors by law, it is, according to our well-settled legal principles, of necessity assignable by the person from whom it may be legally transmitted. Our law on this subject divides claims into two categories—transmissible, and personal and intransmissible—but there is not to be found in our books the trace of a suggestion that there is a third category—transmissible but not

¹ 19 R. (H. L.) 31.² 6 F. 798.³ 16 D., at p. 329.⁴ 2 R., at pp. 199-200.⁵ 20 R. 859.

Mar. 19, 1913. assignable. According to our system, rights of action are assignable; and if a man's right of action will pass to his executors if he does not deal with it himself, it seems to me to follow that he may deal with it himself during his life, or the law would be that the legal executors of a man have the absolute right to take through him against his will, and excluding his assignees or legatees. So far, therefore, I think there is really no question.

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But then there does arise the difficulty to which the Lord President has referred. If the injured person has said nothing about his injury, and intimated no intention of raising an action of damages for it, it is very reasonable to say that his executors and personal representatives have not had an action transmitted to them, because they cannot assume that he treated, or intended to treat, the act of which they complain as a cause of action at all. I think the assumption which may reasonably arise from the possibility of a man having a claim for personal injury *ex delicto* or *quasi ex delicto* is totally different from that which arises from his having a claim for an ordinary civil debt. On the death of a creditor it must be assumed that he intended to enforce payment of his debts, unless he has done something to waive his right, and the person who affirms waiver has to prove it. But then I think there may be a very reasonable assumption the other way when an executor proposes to sue for an injury to the personal feelings of the deceased, which the latter has indicated no intention of complaining about at all, because it may very well be the case that a man may have suffered a legal injury, in respect of which he would never think of bringing an action. If he did not choose to complain, why should his executor be entitled to do so? Therefore, if Lord Wood meant that a right of action transmits absolutely without reference to anything that may have been done by the injured person to establish his own intention to constitute his claim, I think the case of *Bern*¹ would be an authority the other way. On the other hand, his doctrine that the right vests, although it may not be actually constituted, is borne out by *Darling v. Gray*,² because a claim is not constituted by raising an action, but by obtaining a decree. The question therefore comes to be whether the only way in which the injured person can intimate his intention to enforce his right to recover damages is by raising an action. For the reasons which I ventured to give in the case of *Trasill*³ I think the true principle is as put by his Lordship in the chair in the case of *Riley*,⁴ when he asks, Why is it that the institution of an action is necessary? and answers that question by saying, Because that determines the intention of the injured person to claim the damages due to him.

I think with his Lordship that the argument is not much affected one way or the other by Mr Mackay's very interesting excursus on the Roman law. I cannot say that I entertain any doubt that when the words *actio injuriarum* are found in the judgments of this Court—and it is a phrase that has been used by a great many of our predecessors, including Lord President Inglis, who was a great civilian—they are used with reference to the law of Scotland, and not with reference to the law of Rome, from which, no doubt, the law of Scotland has borrowed a great deal in matters of prin-

¹ 20 R. 859.

² 19 R. (H. L.) 31.

³ 6 F. 798.

⁴ 1910 S. C. 934.

ciple, but little in the matter of remedy. I think the words are used simply as a convenient Latin term for expressing a class of actions known to our own law. The Judges who began to class them together borrowed a phrase from the Roman jurisprudence, and used it with reference to their own classification of actions, without considering whether in classical usage it was restricted to claims arising out of insult or outrage, to the exclusion of claims founded on negligence, and in so doing I think they followed a common practice both of law language and ordinary language by which Latin terms are employed to express ideas which never were Latin, and so acquire by usage an English or Scottish signification which may be far from identical with their meaning in the original language. Therefore I cannot doubt that the phrase *actio injuriarum*, used in the cases cited, referred to the actions which Lord Wood describes as actions for bodily suffering and injury to the feelings from wrong by another person.

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 Lord Kinnear.

On the remaining matter to be considered I agree entirely with your Lordship that this is a kind of case which, when it proceeds, will involve very delicate questions as to the amount or measure of damages. I think that was foreseen, and is thoroughly discussed by Lord Wood in the case of *Neilson*.¹ I think they are all questions which can be more satisfactorily decided by a Judge than by a jury. They can be brought under the consideration of a Court of appeal in the former case when they could not be in the latter case, because the jury would have to decide them without giving the reasons, whereas we shall have the reasons of the Judge who tries the case for whatever course he takes.

LORD MACKENZIE.—The Lord Ordinary has dismissed this action on the authority of the cases of *Bern's Executor*² and *Boyce*.³ There is a specialty in this case which was not present in either of those. The deceased, Ernest Leigh, met with the accident in question on the 25th December 1911. He was knocked down by a van belonging to the defenders, the Caledonian Railway Company. He was removed to the Royal Infirmary, Glasgow, where he died, in consequence of the accident, on 6th January 1912. While in the infirmary, on 28th December 1911, it is averred that he instructed his solicitors to take proceedings to recover from the defenders a sum in name of damages for his injuries and sufferings. His agents accordingly wrote to the Caledonian Railway Company on the same day the letter quoted in cond. 7. In it they said they had been consulted, that they had made inquiries, and were satisfied that the Railway Company were liable, and that they would be glad to hear from the Company at their earliest convenience, and after they had made inquiries, whether or not liability was admitted. It is averred that, on 5th January 1912, the deceased executed a will appointing the pursuer his executrix and universal legatory. It contained this declaration: "I also declare that she is to be entitled to, and to get, any sum of money which may be paid in name of damages or otherwise by the Caledonian Railway Company in respect of the accident I have sustained." No action was raised by the deceased. The present action was raised after his death by the pursuer as his executrix-nominate.

¹ 16 D., at p. 329.

² 20 R. 859.

³ 5 F. 452.

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kenzie.

Now the principle upon which the rule laid down in the case of *Bern's Executor*¹ rests is that an injured person may have excellent reasons for refraining from bringing an action for reparation for bodily injuries. As Lord M'Laren points out,² "the injured party often refrains from pressing his claim, or accepts an inadequate sum of compensation because of his unwillingness to set his face to an inquiry involving the disclosure of facts connected with infirmity of health, losses in business, and the like, disclosures which may be very painful even when not discreditable." The reason therefore why it was held that the executor in *Bern's Executor*¹ had no right, title, or interest to sue for the personal injuries alleged to have been suffered by his wife, is absent here. If an injured person has himself begun the action, the ground of objection to the executor's title as explained in the passage quoted above to a large extent disappears. That is because the injured person has indicated in the clearest way possible, viz., by raising an action, that he intends to make the claim. He may, however, indicate in a perfectly clear manner his intention to insist in the claim, short of the actual signing or service of a summons. I refer to what Lord Kinnear says in the case of *Traill*³: "All that was decided in *Bern's case*¹ is that if a person who has sustained bodily injury through the fault of another dies without taking any step to vindicate a right to reparation, his executor cannot make a claim which during his life he abstained from making. This makes the title of a representative to sue depend upon the intention of the injured person himself to vindicate his right. But the institution of an action is not the only means of manifesting that intention." The question raised in *Traill's case*³ was as to the right of an assignee of a claim by a widow and children for damages for the death of the husband and father arising *ex delicto* to bring an action in his own name. His title to do so was sustained. The ground of judgment was that the assignation by the injured persons was just as plain an assertion of their right to demand reparation as if they had brought an action in their own name. So in the present case I think that the letter written by the agent, and received by the Railway Company, was a plain assertion by the deceased of his right to demand reparation.

The case of *Boyes*⁴ is distinguishable from the present. There the averment was that the executor-dative, who brought the action, had, as curator bonis of the deceased, given instructions before the death that an action of damages on account of the injuries should be raised. So far as the averment goes, this might have been a mere verbal statement by the curator bonis. No claim was ever made upon the defender in that case before the death. Here it was. In the present case it is not the fact of the injury which creates the civil debt, but the election by the deceased to treat the injury caused him as an actionable wrong, as evidenced by the claim which he made through his agents. I do not think the judgment in the case of *Riley v. Ellis*⁵ adverse to the view I take, and what is there said by the Lord President confirms it. Nor is the decision in *Darling v. Gray & Sons*⁶ in point for the purposes of the present discussion. No doubt that judgment creates a difficulty in the case where dependants desire to make

¹ 20 R. 859.

² 20 R., at p. 863.

³ 6 F. 798, at p. 806.

⁴ 5 F. 452.

⁵ 1910 S. C. 934.

⁶ 19 R. (H. L.) 31.

their claim, when a claim has already been made by the executor. That Mar. 19, 1913. difficulty however would necessarily arise if a summons had been served at Leigh's the instance of the deceased before his death. All that we are here deciding *Executrix v. Caledonian Railway Co.* is that what the injured person did was equivalent to the serving of a summons.

I therefore think the executrix has a title to sue, and that the first plea Lord Mac-kenzie. in law for the defender should be repelled. In coming to this conclusion, I express no opinion as to the items of damage the pursuer is entitled to recover. Points for argument may arise when the evidence is being taken.

The case does not appear to me to be one suitable for trial by jury.

THE COURT recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to allow the parties a proof of their averments.

HILL MURRAY & BRYDON, S.S.C.—HOPE, TODD, & KIRK, W.S.—Agents.

EDWARD CHARLES ELLICE AND OTHERS, Complainers (Respondents).— No. 113.
Macmillan, K.C.—D. Anderson.

THE INVERGARRY AND FORT AUGUSTUS RAILWAY COMPANY,
Respondents (Reclaimers).—*Morison, K.C.—Gentles.*

Railway—Powers of Railway Company—Sale of whole permanent way material—Ultra vires.

Mar. 19, 1913.

Ellice v. Invergarry and Fort Augustus Railway Co.

Held that a railway company which had constructed its line under statutory powers, was not entitled to sell the rails, bridges, and other materials forming its whole permanent way, although it was financially impossible for it to continue to work the undertaking; and interdict *granted* at the instance of a holder of shares and debenture stock of the company against such a sale.

Observed that different considerations would arise in the case of a company which proposed only to sell the materials of an unremunerative branch line which was no longer in use.

On 8th January 1913 an action of suspension and interdict was brought by the Lochaber District Committee and the Aird District Committee of the County Council of Inverness; Edward Charles Ellice and others, the trustees of the deceased Edward Ellice of Glengarry; Major George James Bailey of Invergloyle; and Edward Charles Ellice, as an individual, against the Invergarry and Fort Augustus Railway Company. 1st Division. Lord Hunter.

The complainers sought to have the respondents interdicted "from selling or otherwise disposing of the steel rails, cast-iron chairs, fish plates, fish bolts and nuts, spikes, points and crossings, sleepers and keys, comprising the material of the permanent way of the railway belonging to the respondents, and constructed and maintained by them under and in virtue of the Invergarry and Fort Augustus Railway Act, 1896, 59 and 60 Vict. cap. ccxi., and the Invergarry and Fort Augustus Railway Act, 1897, 61 and 62 Vict. cap. ccxvii., situated between Spean Bridge and Fort Augustus in the county of Inverness, together with steel bridge work, turntables, water tanks, water columns, signal cabins, signals and signalling apparatus, and station platform buildings, including stores sheds, goods sheds, and engine sheds, or from otherwise taking any steps to dismantle the said railway, or from

Mar. 19, 1913. doing anything which will prevent the respondents from carrying out the provisions of the said Acts or fulfilling their obligations thereunder."

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The circumstances in which the note was presented were thus narrated by the Lord President in his opinion:—

"The history of the matter is this. The respondents, the Railway Company, are incorporated under the Invergarry and Fort Augustus Railway Act, 1896, which provided for the making of a railway and pier in the county of Inverness to be called the Invergarry and Fort Augustus Railway, and for other purposes. The works authorised by the Act consisted of, besides the pier, a railway 24 miles roughly in length, which began by a junction with the West Highland Railway near Spean Bridge and terminated near the centre bridge carrying the public road from Invermoriston to Fort Augustus over the River Oich. The railway was constructed, and was for some time worked by the Highland Railway Company under an agreement. At the expiry of the agreement the Highland Railway Company refused to renew it, and the railway was then worked by the North British Railway Company under another agreement up till 31st October 1911. Since that agreement terminated the respondents have been entirely unable to work the railway. They cannot get any of the Scottish railway companies to work it. They have no money to work it themselves, and having come to the conclusion that it was hopeless to suppose that the railway could be worked, they resolved to sell off the whole of the railway plant, and accordingly they inserted an advertisement in the papers on 16th December 1912 to the following effect:—'Invergarry and Fort Augustus Railway. Permanent way material, steel girders, and station equipment for sale.' And they then say that they are prepared to sell the rails, chairs, &c., &c., comprising the material of the permanent way of the railway situated between Spean Bridge and Fort Augustus, together with the steel bridge work, turntables, &c., &c., the length of the single line, exclusive of loops and sidings, being about 24 miles."

In their averments the complainers quoted sections of the Invergarry and Fort Augustus Railway Act, which empowered the Company to divert certain roads, and imposed on the Company an obligation to construct and to maintain permanently certain bridges, cattle creeps, level-crossings, &c. They also quoted a section which imposed on the Company an obligation, in favour of the trustees of the late Edward Ellice of Glengarry, to erect and maintain a station at Loch Oich, and to stop all ordinary trains there. They averred that the proposed sale would disable the Company from fulfilling these various obligations, and also their public duties, and would thus be greatly to the prejudice of the interests of the complainers. They also averred that such a dismantling and abandonment of the railway was only competent with the sanction of Parliament, which the Company had not obtained.

When the case was in the Inner House certain amendments to the note were allowed, by which Edward Charles Ellice was added as a complainer "as an individual," and averments were added in which he stated that he was a holder of ordinary shares and debenture stock of the Company; that the permanent way was part of the security of the debenture stockholders; that neither the shareholders nor the debenture stockholders had been consulted about the proposed sale; and that the Company had no power to carry through the sale, which

would be greatly to the prejudice of the shareholders and debenture stockholders. Mar. 19, 1913.

The complainers pleaded, *inter alia*;—(1) The actings of the respondents as condescended on being illegal and *ultra vires*, the complainers are entitled to interdict, as craved. (2) The proceedings complained of being illegal and contrary to the provisions of the statutes under which the respondents are incorporated, interdict should be granted as craved. (3) The respondents not having any right to discontinue the said railway or to dissolve the said Railway Company, *et separatim* the same being contrary to their said statutes, the complainers are entitled to interdict as craved. (4) The respondents having no right to dismantle the said railway or to abandon their said undertaking without making provision for the maintenance of the works constructed under the said Acts, interdict should be granted, as craved. (5) The actings of the respondents being in breach of their statutory obligations to the complainers, interdict should be granted as craved. The following plea was added by amendment:—(5A) The undertaking of the respondents being subject to a statutory charge in favour of the debenture stockholders, the respondents are not entitled at their own hand to carry out the proposed sale.

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The respondents pleaded;—(1) No title to sue. (2) The complainers' material averments are irrelevant and insufficient to support the prayer of the note. (3) The actings of the respondents being legal and *intra vires*, the prayer of the note should be refused. (4) The proceedings complained of being legal and within the respondents' statutory rights as a Railway Company, the prayer of the note should be refused.

On 5th February 1913 the Lord Ordinary (Hunter) passed the note and granted interim interdict.

The respondents reclaimed, and the case was heard before the First Division (without Lord Johnston) on 28th February and 1st March 1913.

Argued for the reclaimers;—It was not maintained that the Company could be abandoned or wound up without parliamentary powers. But the proposed sale was not an abandonment; it was merely a prudent administrative step taken with a view to the price obtained being added to the other assets of the Company, and applied to lawful purposes—if necessary with the authority of Parliament. It might eventually be applied—if more favourable circumstances should arise—towards the expense of relaying the line. Moreover, it was a step not uncommon with railway companies to discontinue a branch line, such as the line here in question. No one could compel the Company to run trains, and, when circumstances made such running impossible, the only alternative to taking advantage of a favourable market and realising the value of the permanent way material was to allow the material to deteriorate. It was suggested that the whole undertaking might be taken over and worked by another company, but the only offer of that kind received was one at a price less than the break-up value of the permanent way materials. There was no proposal to interfere with any of the roads or bridges, but without the money to be obtained from the proposed sale the Company could not continue to implement their obligations as to these. With reference to these obligations, and the liabilities of the Company generally, the conversion of deteriorating subjects into cash was to the advantage of the

Mar. 19, 1913. *Ellice v. Invergarry and Fort Augustus Railway Co.* complainers and the general body of creditors; and the complainers were not entitled to interdict such conversion unless they could show that the dismantling of the line was to the prejudice not of one complainer only, but of the general body of those interested. Interdict was not the appropriate remedy for debenture-holders or shareholders, their remedy being to have the policy of the directors reviewed at a meeting of the shareholders. The reclaimers' Act was not obligatory, but permissive, with reference to the construction of their line,¹ and it imposed no obligation to maintain the line, or to restore it if in disrepair.²

Argued for the respondents;—The sale would make it impossible for the Company to carry out the purposes for which it had obtained statutory powers, and the abandonment of these purposes was *ultra vires* of the Company. The case of *York and North Midland Railway Company v. The Queen*³ was distinguishable, because in that case the line in question had not been made. That the line of the Company was only a branch line did not affect the present question, because it was their whole system, and the case was exactly the same as if any great railway company proposed to dismantle its whole permanent way. Demolition was not an act of administration of a trust-estate; and the directors of a railway company were really trustees for the public, because Parliament only granted powers for the construction of a railway where it was for the public interest. Railways were originally formed as public highways, on which members of the public might use their own engines and wagons. Even as they now existed the parties interested in them were represented by the shareholders, heritable proprietors, and the public. That Parliament did not intend to confer upon railway companies any power to abandon their undertakings and sell their materials was clear from the express exclusion of the closing of railways from the purposes for which a company was authorised to make regulations.⁴ The provisions of the Companies Acts for the winding-up of companies did not apply to the determination of railway undertakings, and these could not be abandoned without parliamentary sanction.⁵ It was because Parliament intended public interests to be paramount, and the existence of the line to be maintained, that railway companies were protected from diligence. Further, the special obligation undertaken by the Company in favour of the trustees of Edward Ellice of Glengarry to

¹ *York and North Midland Railway Co. v. The Queen*, (1853) 1 E. & B. 858, Jervis, C.J., at pp. 860 and 863-4, 22 L. J., Q. B. 225.

² *The Queen v. Great Western Railway Co.*, (1893) 62 L. J., Q. B. 572, 69 L. T. 443, 572; *Darlaston Local Board v. London and North-Western Railway Co.*, [1894] 2 Q. B. 694.

³ 1 E. & B. 858.

⁴ *Railways Clauses Consolidation (Scotland) Act*, 1845 (8 and 9 Vict. cap. 33), sec. 101.

⁵ *Railways Clauses Consolidation (Scotland) Act*, 1845, sec. 105; *Renfield v. Corporation of Wickham*, (1888) 13 App. Cas. 467, Lord Watson, at p. 474; *Dundee Union Bank v. Dundee and Newtyle Railway Co.*, (1844) 6 D. 521, Lord Justice-Clerk Hope, at pp. 525 and 527, Lord Cockburn, at p. 529; *Potts v. Warwick and Birmingham Canal Navigation Co.*, (1853) Kay, 142; *In re Barton-upon-Humber and District Water Co.*, (1889) 42 Ch. D. 585, North, J., at pp. 587-8; *Furness v. The Caterham Railway Co.*, (1859) 27 Beav. 358; *Sale of Railways Act*, 1845 (8 and 9 Vict. cap. 96); *Lindley on Companies*, (6th ed.) p. 216.

maintain a station could not be fulfilled without an effective line¹; Mar. 19, 1913. and the Company's undertaking, upon which the debenture-holders had a charge,² could not be converted to the purposes of an investment company, nor could it be dismantled and wound up, without parliamentary powers.³ Therefore the complainers were entitled to interdict in order to prevent the Company taking steps which would involve the abandonment of their undertaking at their own hand. If the Company applied to Parliament for powers to abandon their undertaking their present averments would then be relevant, and the complainers would have an opportunity of defending their own rights.

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At advising on 19th March 1913,—

LORD PRESIDENT.—[After narrating the circumstances, and the nature of the proposed sale]—Now it is admitted that this proposal means dismantling the whole railway, and that, if the sale is carried through, the railway as a railway in the ordinary sense of the word will cease to exist, though no doubt there will still be the strip of ground on which the railway once was. That the Lord Ordinary was right in passing the note and in granting interim interdict cannot be doubted, and, if this had been an ordinary case, we should simply have adhered to his interlocutor; but when parties came to be heard it became quite obvious that it would be very expedient that they should be allowed to get a final judgment upon the matter at once. It also became equally obvious that we really had the whole facts before us and that nothing would be truly gained by making up a record in the ordinary way in the Court of Session. While that was so, your Lordships thought that there was considerable doubt as to the title of some of the parties to the case, and as we were informed that Captain Ellice was not only, as he appeared in the original note, a trustee of the late Edward Ellice, but also that he as an individual was a shareholder, we invited him to put in a minute of amendment. A minute of sist and amendment was accordingly put in by which Captain Ellice was sisted to the action as an individual, and the statement is also added that he is the holder of 222 shares of £10 each and £606, 5s. debenture stock of the Company. The Company admitted those facts and made no objection to the minute of sist and amendment.

Your Lordships are therefore now in a position to deal with the case as effectively as if it were here upon a record made up in the Court of Session, and it is eminently expedient that we should so deal with it. The Company in this matter are perfectly frank. The justification for what they are doing is, according to them, this—and the truth of what I am now going to state is really not controverted by the other side—they say: "Experience has shown us that we have not got the slightest chance at present of

¹ *In re Ruthin and Cerrig-y-Druidion Railway Act*, (1886) 32 Ch. D. 438, Cotton, L.J., at p. 443; *In re Southport and Lytham Tramroad Act*, 1900, [1911] 1 Ch. 120, Buckley, L.J., at p. 134.

² Companies Clauses Act, 1863 (26 and 27 Vict. cap. 118), secs. 22 and 23.

³ *Haldane v. Rushton, &c.*, (1881) 9 R. 253, Lord President Inglis, at p. 256; *Muir v. Forman's Trustees*, (1903) 5 F. 546, Lord Kinnear, at p. 571; *Gardner v. London, Chatham, and Dover Railway Co.*, (1867) L. R., 2 Ch. 201, Cairns, L.J., at pp. 214-5 and 216-7.

Mar. 19, 1913. working the railway. We have attempted to get a working agreement out of the North British. We cannot. We cannot get one out of the Highland. It is not to be supposed that any other Scottish railway will want to work this railway branch, the line from Fort Augustus to Spean Bridge, and we have no money and no possibility of raising any money to do it ourselves. The result is that the whole of our railway plant is being subjected to rapid deterioration. The rails are very much more attacked by oxidation when they are not used than when they are used, and the only result of leaving things as they are is that the plant, in a very little time, will perish entirely. It is better policy for us therefore—the market at present being a good one for steel rails—to turn our plant into money, and having got the money, to await the course of events. If times change and for some reason or other we can raise money, we can always put the plant back again, and we will be in a better position to do so if we have the money in our pocket than we should be if we were now to allow the whole line to go to wreck and ruin.”

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Now, as I have said, the truth of that statement and the *bona fides* of it are really not controverted by the complainers, but what they maintain is that the proposal to dismantle the railway is a proceeding which is entirely *ultra vires* and which must be restrained. As I have already indicated, your Lordships had considerable doubts as to the title of the two County Council Committees to raise any such question. The only way in which they could say that they had a title was this: they pointed out that in connection with their undertaking the Company were empowered to alter roads, to construct bridges, and to divert certain highways, and that, in the interests of the public, they, the County Council Committees, were bound to see that these bridges, level-crossings, and road diversions were properly maintained. Well, that, I think, is a slender matter on which to support a title for raising this question, because it was explained that there was no intention of selling any bridge where the bridge is an overline bridge. Those bridges were to be left. Where, on the other hand, it is an underline bridge the only effect of its removal would be to leave the road open to the heavens instead of being under a bridge. Then, so far as the maintenance of the road diversions is concerned, probably the Committees would have very much better security for the performance of that obligation if the Company were allowed to have a sum of money in the bank than they would have if the Company were left there with a set of rusty rails. I do not think, however, that we need particularly trouble ourselves about the question of title, because it is perfectly clear that Captain Ellice as a shareholder and debenture-holder has a good title to interfere with anything that is *ultra vires*. So far as it is an act of management he has no title to interfere, because the directors are the proper persons to manage the railway, but if the directors propose to do something that is *ultra vires* then his title to interfere is undoubted.

The Company's argument on the merits was chiefly rested on this: they said that it had been decided again and again, and that it was now trite law that the clause in the special Act, “may make and maintain,” was not obligatory, but permissive, and that although you get the power to make a railway and maintain it, you are not bound to make it or, having made

it, to maintain it. I think that is perfectly true. I need not go into the authorities which were quoted to us, because it has been so held in the Courts of both countries. A railway undertaking is in a very curious position. It is, as your Lordships know, exempt from ordinary diligence. The ground of a railway may not be adjudged. The rolling stock is protected by special Act, and the undertaking as a whole cannot in any way be broken up by the action of creditors using the ordinary forms of diligence. All that was settled in the well-known case of *Gardner v. The London, Chatham, and Dover Railway Company*,¹ and was subsequently given effect to in our own Courts in the case of *Haldane v. The Girvan and Portpatrick Junction Railway Company*.² That being so, and the idea of the railway being that it should be kept as an undertaking for the public—originally, no doubt, with the intention that the public themselves might use it as a highway with their own carriages, though that form of use, which is to be found in all the older railway statutes, has practically long ago gone into desuetude—I am of opinion that it is *ultra vires* for the directors by their own act to put an end to the railway as a railway, and that that is a different thing from saying that they are bound to run it. That they cannot be compelled to run the railway has been settled, as I have said, quite clearly, and one can easily see the reason. If they were bound to continue the railway, I suppose there would be a decree against them ordering them to do so, and if they did not obtemper it they would be put in prison. It would be a hard case indeed for the directors of a railway company if they were to be put in prison, where there was no possibility of their working the railway, for want of money to run it. But that is a totally different thing from saying that they are entitled at their own hand to put an end to the railway as a railway. If this sale is carried through there will no longer be such a thing as the Fort Augustus Railway. No doubt there will still be the Fort Augustus Railway Company, and there will still be a strip of ground on which the Fort Augustus Railway used to run, but the Fort Augustus Railway there will not be. Now, I cannot bring myself to think that that is within their power. It may be that this railway has no future at all, but then I think the only answer to that is that the Company must go to Parliament to get fresh powers. That the Legislature looks upon it in that light is also, I think, to be inferred from the preamble of the Abandonment of Railways Act, 1850.³ You do not require an Act of Parliament to allow you to abandon other undertakings. You do require it in order to abandon a railway. And that again just makes clear the point that once a railway has been established it is to a certain extent an asset of the public as well as an asset of the particular company.

I need scarcely say that if there was any question that what was being done here was a question of ordinary management, my view would be perfectly different, and accordingly my opinion now must not be held to cover such a case, for instance, as a large railway choosing to give up the working of an unremunerative branch, and then proceeding, perhaps, to sell the rails

¹ L. R., 2 Ch. 201.

² (1881) 8 R. 669.

³ 13 and 14 Vict. cap. 83.

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Mar. 19, 1913. and bolts. That would not be putting their undertaking out of existence; it would be merely an act of management. But here we are not hampered with any such question, because it is frankly admitted that this is a sale of the whole railway, and that if it is carried out no railway will be left at all.

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Upon the whole matter, therefore, I am of opinion that we should affirm the judgment of the Lord Ordinary. Technically speaking, as we are in the Bill Chamber, we cannot make the interdict perpetual. The next stage, therefore, would be that the case should go back to the Lord Ordinary in order that a record may be made up, and then on that record perpetual interdict might be granted; but our interlocutor affirming the judgment of the Lord Ordinary and remitting the case to him in order that the record may be made up, will give an opportunity to the Railway Company of taking our judgment to the House of Lords, if they wish to, and of getting judgment upon what is really the merits of the case at once.

LORD KINNEAR concurred.

LORD MACKENZIE.—The Invergarry and Fort Augustus Railway Company propose to sell the rails and other material forming the permanent way of their line between Spean Bridge and Fort Augustus, together with the steel bridge work, &c., as advertised. Regarded solely as a business proposition there is much to be said for what the board desire to do. We were informed that no train has run on the line since October 1911, and that there is no prospect of trains being run; the rails are rusting and deteriorating in value; the time is said to be opportune for realisation; and the Company's counsel stated that a better price could be got at the present time for the materials than was offered by the North British Railway for the undertaking as a whole. If, therefore, the question were one of the prudent administration by an individual of his property, it would probably be said that the best thing to do in the circumstances would be to turn assets which are at present unproductive and depreciating in value into cash, and hold the land to await developments in the future.

The Company is, however, not in the same position as an individual. The railway is a public undertaking and the sole question before us is whether the proposed sale is *ultra vires*. The Company is quite frank about the matter. The total length of their line is 24 miles, and it is the rails on these 24 miles that they propose to sell, with their adjuncts. They are not selling them because they are worn out and need to be renewed. It is a case of realisation pure and simple. What they mean to do is to dismantle the whole line. The 24 miles in question do not form part of a larger system worked by the same company. It is not a case of a going concern ceasing to use a dead branch. The 24 miles of rails constitute the whole undertaking; the permanent way is the substratum of this Company. If they were lifted and carried away the Railway Company would be relegated to the position of landowners merely; the sale by the directors of the rails would not be an act of administration by them as railway managers, but would be a transaction into which any metal broker might enter. The position of the board is thus quite different from what it would be if the question

raised was as to their duty to make, or work and maintain, the line authorised by their special Act. There is abundant authority to the effect that they could resist any attempt to force them to do either the one or the other. The powers conferred by the statute are permissive only.

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Railway Co.

The question raised here is whether the Company can by its own act, and at its own hand, put it out of its power to fulfil those duties for the discharge of which it was incorporated by Act of Parliament. It may be that the directors are doing no more than their duty by the shareholders, and even the debenture-holders, for the price might, under orders of the Court, be treated as a surrogatum for the materials. It may be that matters are in such a position that no prejudice would be suffered by any members of the public, for, if no train is to be run, it would not matter whether the Company had metal or money. These considerations, however, are not relevant when the Company has made a contract with the public under public sanction. The undertaking owes its existence to statute, and by statute only can its existence be terminated. There is careful provision made by statute for the steps which must be taken before a railway undertaking can be abandoned. What the Company seeks to do here is really equivalent to abandoning the undertaking as a railway. Once that conclusion is reached it follows that it must comply with the statutory enactments before it can effect its purpose. If it does not the powers of the directors remain merely powers of administration, which may be defined as the transaction of the Company's legitimate business in the way in which business is usually carried on by other people. They have not power to alienate. The reason why the undertaking of the Company is protected against the diligence of the creditors is because Parliament has given effect by enactment to its intention that a railway shall be permanent. The Company cannot itself sell, and this is the reason why it cannot create such a security in favour of a creditor as would enable him to destroy the undertaking. The remedy provided in the interest of debenture-holders of the appointment of a receiver indicates the policy of the Legislature. I am of opinion that there is sufficient to warrant the Court in sustaining the title of the complainers, and in holding that the note should be passed, and the interim interdict continued.

Lord Mac-
kenzie.

It is therefore not necessary to go into other points which were argued, but I may add that the Company failed, in my opinion, to answer the pertinent question put by the other side in regard to their power to dispose of the proceeds of the sale without going to Parliament.

THE COURT of new granted interim interdict and remitted to the Lord Ordinary on the Bills, and, on the motion of counsel for the reclaimers, granted leave to appeal to the House of Lords.

No. 114. COOPER CORBRIDGE (Samuel Wallace May Somerville's Trustee),
 Pursuer (Respondent).—*M'Lennan, K.C.—J. B. Young.*
 Mar. 19, 1913. MRS CAROLINE STUART MAY SOMERVILLE, Defender (Reclaimer).—
Fleming, K.C.—Macmillan, K.C.—Howden.
 Corbridge v. Somerville.

Husband and Wife—Divorce—Reduction of decree—Competency—Reduction on ground of no jurisdiction at instance of creditors of divorced spouse.

The trustee on the bankrupt estate of a husband divorced in the Court of Session, desiring to recover certain marriage-contract funds which, as a result of the divorce, had become payable to the wife, brought an action for reduction of the decree of divorce on the ground that, the husband being a domiciled Englishman, the Court which pronounced the decree had no jurisdiction. The action of divorce had been undefended, and, although brought after the date of the husband's bankruptcy, had not been intimated to the trustee.

Held (dub. Lord Johnston) that the action of reduction was competent, in respect that the pursuer was not attacking the decree on its merits, but was merely maintaining that, having been pronounced by a Court having no jurisdiction, it was of no effect; but *observed* that his better course would have been to bring a petitory action against the marriage-contract trustees and challenge the decree of divorce *ope exceptionis* in that action.

Husband and Wife—Consistorial causes—Rules of Commissary Court.

Observed that the rules laid down with regard to consistorial causes by the Commissaries are not binding on the Court of Session.

1st DIVISION. ON 27th November 1911 Cooper Corbridge, chartered accountant in
 Lord Cullen. London, as trustee in the bankruptcy of Samuel Wallace May Somerville, residing in Cornwall, brought an action against the bankrupt's former wife, Mrs Caroline Stuart May Somerville, and the bankrupt, for reduction of a decree of divorce pronounced against the bankrupt by Lord Dewar on 18th June 1910.

The pursuer's averments were thus summarised by the Lord Ordinary (Cullen) in his opinion:—

"The pursuer of this action is the trustee on the bankrupt estate of Samuel Wallace May Somerville under an adjudication of bankruptcy in England. He was appointed in January 1910. Mr Somerville was then married to the present compearing defender, Mrs Caroline Stuart Smith or May Somerville, the marriage having taken place in 1899. By a postnuptial settlement executed by Mr Somerville in 1900 certain funds belonging to him were put in trust for the purpose, *inter alia*, that in the event of his dying survived by Mrs Somerville the income thereof should be paid to her during her survivorship, restrictible to one-half in the event of her entering into a second marriage. The trust funds in question are held by trustees in Scotland.

"In May 1910 Mrs Somerville raised, in this Court, an action of divorce on the ground of adultery against her husband. He did not defend. The action depended before Lord Dewar, who, after hearing the proof tendered by the pursuer, granted, on 18th June 1910, decree of divorce. The proof led in the action was directed, *inter alia*, to establishing that the domicile of the spouses was in Scotland. It is common ground in the present case that the patrimonial consequence of the decree of divorce is to divert the income of the foresaid trust funds from Mr Somerville, the bankrupt, to the defender.

"The action of divorce was not intimated to the present pursuer, who states that he was ignorant of it until after the decree in absence had been pronounced. In this action he seeks to reduce that decree. The ground of reduction is that this Court had no jurisdiction to pronounce it in respect that the domicile of the spouses at the time was in England. The pursuer makes detailed averments on this head, which are relevant to be remitted to probation." *

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The pursuer pleaded, *inter alia*;—1. The pursuer, as trustee in the bankruptcy of the said Samuel Wallace May Somerville, is entitled to decree of reduction as concluded for in respect that (1) the said Samuel Wallace May Somerville not having been a domiciled Scotsman at the date of the divorce proceedings, the Court of Session had no jurisdiction to grant the pretended decree of divorce, and said decree of divorce is null and void. (2) Said decree was obtained in absence, without the pursuer being informed of the divorce proceedings or having any opportunity of opposing the same, and without the whole facts and circumstances being fully disclosed to the Court. 3. The said decree of divorce being to the gross prejudice of the pursuer, as trustee for the creditors in said bankruptcy, he has a title and interest to reduce the same.

The defender, Mrs Caroline Stuart May Somerville, alone appeared to defend the action, and pleaded;—1. No title to sue. 2. The action is incompetent in respect that (1) the said decree of divorce having become final on the expiry of a year and a day from the date thereof, is not liable to be reduced. (2) *Esto* that the Court of Session had no jurisdiction to pronounce said decree of divorce, there having been no subsequent change of domicile by the said S. W. May Somerville, the Court has no jurisdiction to reduce said decree. 3. The averments of the pursuer are irrelevant and insufficient to support the conclusions of the summons. 4. The said S. W. May Somerville having been a domiciled Scotsman at the date of the said decree of divorce, the Court of Session had jurisdiction to pronounce said decree, and said decree is valid and ought not to be reduced.

On 19th June 1912 the Lord Ordinary pronounced an interlocutor repelling the first three pleas in law for the compearing defender, and allowing a proof.†

* The pursuer also averred that, had the action of divorce been intimated to him, he would have appeared to oppose it on the ground of no jurisdiction; that in the action of divorce it was not disclosed that the husband was a bankrupt; and that the husband's object in not defending the action was to deprive his creditors of the income from the trust funds, in the expectation that his wife would, after divorce, make him an allowance out of these funds, which in fact she was doing.

† "OPINION.—[After the narrative quoted *supra*].—The question, however, is raised whether the pursuer has a title to insist in the action. While the action of divorce related to the status of the spouses, the present pursuer, had he known of its dependence, might, in respect of the patrimonial interests involved in it, have appeared and obtained himself sisted as a defender. There is, on the authorities, no room for doubt that, while the jurisdiction in consistorial causes lay with the Commissaries, the right of creditors of a defender in an action of divorce to appear and defend was fully admitted. The latest of the reported cases is that of *Greenhill v. Ford*, 1 Shaw, 296 (275), 2 Shaw's App. 435. So far as I am aware, there is no example of such procedure to be found in any reported case since the

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The compearing defender reclaimed, and the case was heard before the First Division on 16th and 17th October 1912.

Argued for the claimer;—(1) *On title to sue*.—The creditors of a married man were to be regarded as having accepted all risks incidental to the married state, including that of a loss of patrimonial rights in the event of decree of divorce being pronounced against their creditor.¹ The case of *Greenhill v. Ford*² did not warrant the Lord Ordinary's conclusion, because in the present case the decree which the pursuer sought to reduce was not qualified by any reservation as to patrimonial rights.³ The pursuer would not have had a title to sue before the Commissaries, because it was only on grounds of collusion or condonation, neither of which were pleaded here, that creditors of a divorced spouse could sue for reduction of the decree⁴ during a period of a year and a day—the period during which status remained unaltered as in the case of a decree *nisi* in the English

transfer of the jurisdiction to this Court. But neither in the Act of 1830 nor in any subsequent statutes do I find anything to abrogate this right on the part of creditors. There is, it is true, no requirement of intimation to them, but there seems equally to have been no such requirement in the time of the Commissary Court. The right of creditors to defend is stated both by Lord Fraser (*Husband and Wife*, (2nd ed.) vol. ii. 1225) and by Mr Mackay (*Manual of Practice*, 478).

"If I am right in thinking that the pursuer could competently have asked to be sisted as a defender in the action of divorce, the next question which arises is whether it is not competent to him to bring this action of reduction of the decree in absence with the object of urging the plea of no jurisdiction as one which he might have proposed by way of defence to the action.

"The ground of discussion has been so far limited by the position taken up in argument by the defender's counsel, who expressly conceded that the pursuer had a title to challenge the decree of divorce, provided he did so on certain grounds. These grounds were stated to be collusion between the spouses or fraud of any kind attending the proceedings for divorce. Now, this being a reduction of a decree in absence, the grounds of reduction competent to the pursuer must, I take it, be commensurate with the grounds of defence which he might have urged had he compeared to defend the divorce action. And thus the question is whether the pursuer, had he compeared in the divorce action, could not competently have proposed the defence of no jurisdiction. I have been unable to find any authority for the distinction advanced by the defender. Such authority as there is on the subject goes to negative it. The rule which obtained in the Commissary Court is stated in Lothian's Consistorial Law (p. 168), in these terms:—'It is competent not merely to the party accused of adultery, but to creditors interested to prevent a decree of divorce going out against their debtor, to sist themselves as defenders, and to propound *all* defences competent to their debtor.' The italics of the word *all* are the author's. Shand (*Practice*, i. 435), in dealing with the defence of *remissio injuriæ*, remarks that it is available to creditors. Lord Fraser (*Husband and Wife*, (2nd ed.) vol. ii. 1225) says: 'Should the husband be bankrupt, his creditors cannot prevent

¹ Fraser, *Husband and Wife*, (2nd ed.) vol. ii. pp. 1146, 1196, 1225-6; *Johnstone-Beattie v. Dalzell and Others*, (1868) 6 Macph. 333; Lothian's Consistorial Law, p. 169; Mackay's *Manual of Practice*, p. 478.

² (1822) 1 S. 296, N. E. 275.

³ *Greenhill v. Aitken*, (1824) 2 Sh. App. 435, at p. 444.

⁴ *Creditors of Watson v. Cruikshank*, (1681) M. 330; Bell's Prin. sec. 1534; Bell's Com. (7th ed.) i. p. 680; Ersk. i. 6, 45.

Courts. If the pursuer sought to set up a title to sue upon principles which prevailed before the Commissaries, then these principles would have to be applied in all respects, and, being so applied, the present action fell to be dismissed as it had not been brought within a year and a day of the decree of divorce.¹ That such a decree affected the pecuniary interests of the guilty spouse was not a ground upon which a trustee for creditors could intervene, because creditors had no right to appear such as children had, or next of kin called to represent a spouse who could not be found.² Even in the case of such parties a mere patrimonial interest did not give a title to sue in an action such as the present,³ there being no plea of fraud upon the Court. Since the transfer of consistorial causes from the Commissaries to the Court of Session⁴ there was no instance in an action of divorce of intimation to the trustee in bankruptcy of a spouse. Interests which might have called for such intimation as being

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decree of divorce going out in the usual terms, except by stating some of the defences competent to the husband himself.' Mr Mackay (Manual, p. 478) says: 'Creditors of the principal defender may also state defences,' without adverting to any distinction as to the grounds of defence competent to them. In the latest of the reported cases, *Greenhill v. Ford* (*supra cit.*), I find that the grounds of defence put forward by the trustee in bankruptcy of the husband and defender were (1) no evidence of the alleged adultery; (2) collusion; (3) *remissio injuriæ*. It would therefore appear that the distinction advanced by the defender—that is to say, between collusion or fraud, and other grounds of defence, does not hold good as regards a defence by creditors to a divorce suit. And if this be so, I do not see why it should obtain in reductive proceedings for opening up a decree of divorce in absence.

"In the ordinary case where someone who has not been called as a defender to an action, but who has a sufficient interest to be sisted so that he may defend it, does not become aware of the dependence of the action, and does not therefore come forward, he may plead against the decree that it is *res inter alios acta* and not a judgment binding on him. But it would appear that if creditors of a defender in an action of divorce wish to avert the patrimonial consequences of a decree against him they must oppose the divorce itself—(*Greenhill v. Ford, supra cit.*; *Fraser, Husband and Wife*, (2nd ed.) vol. ii. 1225). Standing the decree of divorce, the patrimonial consequences follow *ex lege* in a question both with the defender and with his or her creditors. Accordingly, if I am right in thinking that the present pursuer could competently have asked to be sisted in the divorce action, and have proponed therein his plea of no jurisdiction, it seems to follow that he is *in titulo* to open up the decree in absence by this reduction, so that he may have an opportunity of making his plea good. If he cannot do so, it would appear that he has no remedy at all. On the whole matter, I am of opinion that the defender's plea of no title to sue fails.

"In her second plea in law the defender pleads, *inter alia*, that the action is incompetent in respect that the decree of divorce became final on the lapse of year and day from its date. This plea refers to the 'Instructions' to the Commissaries, and renews the controversy as to whether the finality after year and day thereby attached to decrees of the Commissary Court attaches to decrees of this Court. I had occasion to consider a similar plea in the recent case of *Walker v. Walker*, 1911 S. C. 163, when I was of

¹ *Donald v. Thom*, (1823) 2 S. 312, N. E. 275; *Lockyer v. Ferryman*, &c., (1876) 3 R. 882.

² *Conjugal Rights* (Scotland) Act, 1861 (24 and 25 Vict. cap. 86), sec. 10.

³ *Menzies v. Menzies*, (1835) 14 S. 47, Lord Medwyn, at p. 51.

⁴ *Jury Trial Act*, 1830 (11 Geo. IV. and 1 Will. IV. cap. 69), sec. 33.

Mar. 19, 1913. exposed to the risk of fraud were safeguarded, because the Lord Advocate could enter appearance in actions of divorce, and the Court could direct the papers in such actions to be laid before him.¹ Though a party, against whom there had been obtained a decree in absence upon which a charge could not follow, might sue for reduction within twenty years from its date,² a third party had no title to sue for reduction of such a decree. (2) *On the competency of the action*.—The present pursuer lost his opportunity when the action of divorce was made public by intimation on the Walls and in the Minute-book. For the purpose of his ground of action the decree was not to be regarded as a decree in absence, because it was pronounced *causa cognita* after the Lord Ordinary had investigated the question of jurisdiction, and was truly a decree *in foro* though not *in foro contentioso*. In the absence of averments of fraud upon the Court it was not competent to reinvestigate the question of jurisdiction on the merits³; but that was what the pursuer sought to do here, having failed in a previous action⁴ to attain his object otherwise. The decree was to be regarded as *res judicata* by a competent Court, and it could not be set aside unless on the ground of fraud. If the defender were not found entitled to succeed on her first plea, the first branch of her second plea should be sustained.

Argued for the respondent;—(1) *On title to sue*.—It could not be said on the authority of the case of *Johnstone-Beattie v. Dalzell and Others*⁵ that the creditors of a married man took the risk of decree of divorce being pronounced against him, because it was the duty of the pursuer in an action of divorce against a bankrupt husband to intimate the action to the trustee in bankruptcy. The present pursuer was not made aware of the action in which the decree was pronounced which he now sought to reduce. Had he received intimation he could have appeared, and, if he had done so, then it was admitted that fraud upon the Court would have been the only ground upon which he could now have obtained reduction of the decree. But as the decree was obtained without intimation to the pursuer, it was ineffectual in a question with him.⁶ All the pleas which he could have stated if he had appeared were still open to him. Accordingly he had a title to sue in the present action, in which he accepted the onus of showing that the decree should be set aside.⁷ (2) *On the com-*

opinion that it was not well founded. The case went to the Inner House, but the plea in question was not resumed there, so that the case does not contain any authoritative judgment on the point. As, however, I do not see any reason to change the view which I there expressed, I shall repel the plea.

“The second branch of the second plea for the defender is intended to be founded on the case of *Longworth v. Yelverton*, 7 Macph. 70. As, however, the defender is maintaining the existence of a Scottish domicile, and therefore has no plea of no jurisdiction, and as the decree now sought to be opened up is a decree in absence, I do not see the application of that decision. Following the views which I have expressed, I shall repel the first three pleas for the defender and allow a proof.”

¹ Conjugal Rights (Scotland) Act, 1861, sec. 8.

² Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 24.

³ Walker v. Walker, 1911 S. C. 163, Lord President, at p. 170.

⁴ Corbridge v. Somerville's Trustees, 1911 S. C. 1326.

⁵ 6 Macph. 333.

⁶ Blake v. Blake, (1826) 4 S. 495, N. E. 803.

⁷ Stewart v. Stewart, (1863) 1 Macph. 449.

petency of the action.—If the pursuer had had an opportunity of appearing in the action of divorce he could have defended, not only upon all grounds competent to the bankrupt,¹ or on the ground of fraud upon the Court, but also on the ground of condonation or collusion,² in order to avoid a decree which would carry off the whole of the bankrupt's estate. For that purpose a trustee for creditors might have pleaded condonation or collusion with reference to a decree of the Commissaries, and a plea of no jurisdiction could not be in a less favourable position with reference to the decree of the Court of Session which the pursuer now sought to reduce than pleas of condonation or collusion with reference to decrees of the Commissaries.³ The Instruction to Commissaries of 1563 as to finality of decrees after the expiry of a year and day did not obtain with respect to decrees of the Court of Session in causes where the jurisdiction had been transferred from the Commissaries to that Court.⁴ Next of kin could sist themselves for the purpose of upholding a judgment obtained without intimation to them, or even for the purpose of getting such a judgment reversed,⁵ and creditors had the same right. The decree in question was a nullity, and the pursuer relevantly averred facts which were not before the Lord Ordinary in the action in which it was pronounced, and having been pronounced in absence it was open to reduction within twenty years. That decree would under no circumstances be accepted by the English Courts as deciding the question of divorce,⁶ because permanent domicile of the spouses within the territory was necessary to give to its Courts jurisdiction to pronounce a decree that would be so accepted.⁷ If the pursuer were sued in England by creditors of the bankrupt claiming payment from the income to which the bankrupt was entitled under his marriage-settlement, the Scotch decree of divorce, if pleaded in defence, might be successfully met by a plea that the Court which pronounced it had no jurisdiction.⁸ It was accordingly out of the question that such a decree should be allowed still to formally stand, and as it was only in Scotland that formal reduction could be granted, the present action was the appropriate procedure.

At advising on 19th March 1913,—

LORD PRESIDENT.—The pursuer in this case is the trustee on the bankrupt estate of a Mr Somerville, under an adjudication of bankruptcy in England. Mr Somerville was married to the present compearing defender, Mrs Somerville; and, by a postnuptial settlement executed by him, certain funds belonging to him were put in trust for the purpose, *inter alia*, that in the event of his dying survived by his wife the income thereof should be

¹ Lothian's Consistorial Law, 168.

² Greenhill v. Ford, (1822) 1 S. 296, N. E. 275; Greenhill v. Aitken, 2 Sh. App. 435.

³ Creditors of Watson v. Cruikshank, M. 330; Fraser, Husband and Wife, (2nd ed.) 1184, 1225. The Lord President referred to Pemberton v. Hughes, [1899] 1 Ch. 781.

⁴ Lockyer v. Ferryman, &c., (1876) 3 R. 882; Walker v. Walker, 1911 S. C. 163.

⁵ Fraser, Husband and Wife, (2nd ed.) vol. ii. 1146.

⁶ Bonaparte v. Bonaparte, [1892] P. 402, Gorell Barnes, J., at pp. 409-10.

⁷ Le Mesurier v. Le Mesurier, [1895] A. C. 517.

⁸ Pemberton v. Hughes, [1899] 1 Ch. 781, Lindley, M.R., at p. 791.

Mar. 19, 1913. paid to her during her survivance. These trust funds are held by trustees in Scotland, and naturally, during the subsistence of the marriage, the interest of them was payable to him, and consequently became payable on his bankruptcy to the present pursuer. In 1910 Mrs Somerville raised an action in the Court of Session for divorce on the ground of adultery against her husband. The action was undefended, and decree was granted. In the proof which was led in the action certain facts were inquired into with a view of showing the Lord Ordinary that he was entitled to pronounce the decree in respect that the domicile of the husband was Scotch. That decree having been pronounced, the trustees under the marriage-contract intimated to the pursuer that they could no longer pay to him the interest of these funds, because, the effect of divorce being the same as that of death, the income was now payable to the wife and not to the gentleman who had been her husband.

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The present action is raised by the pursuer as trustee in bankruptcy, and takes the form of an action of reduction of the decree of divorce, the ground being that there was truly no jurisdiction, the domicile of Mr Somerville being not Scotch but English. The pursuer sets forth that the action of divorce was undefended, and that, if he is allowed to go into the matter, he will bring before the Court certain circumstances, which were not before the Court on the former occasion, tending to show that the decision was wrong in so far as it was found that the domicile of the husband was Scotch. The Lord Ordinary has allowed a proof, and he has repelled the first three pleas in law for the comparing defender, who is the wife. Those pleas are—No title to sue, irrelevancy and incompetency in respect that a year and a day have passed from the date of the divorce, and another plea which is put in the form of a dilemma: "*Eeto* that the Court of Session had no jurisdiction to pronounce said decree of divorce, there having been no subsequent change of domicile by the said S. W. May Somerville, the Court has no jurisdiction to reduce said decree."

The Lord Ordinary has gone upon a consideration of what used to be the law in the time of the Commissaries, and he has found that the title of creditors to intervene in actions of divorce was sustained by that Court. He has also gone upon this, that it has already been decided that the year and day rule, which the Commissaries laid down for themselves, was not binding upon the Court of Session, and has not been in existence since the jurisdiction of the Commissaries was transferred to the Court of Session. He has not gone at length into what I have called the dilemma plea, but has merely said that it does not fall to be sustained.

I confess that I do not think that this matter can be dealt with upon any view of the rules of the Commissaries. The rules of the Commissaries were not in any way binding upon the Court of Session; and since the jurisdiction was transferred to the Court of Session I think no instance is to be found of the application of those rules in this Court. Of course, that naturally justifies the conclusion to which the Lord Ordinary has come as to the inappropriateness of the plea of a year and a day; but it has an equal bearing upon the ground of his Lordship's judgment as a whole; and if the action rested upon that ancient practice alone—I mean if it were an application by a creditor to reduce a decree of divorce—I think the plea that is

founded upon the dilemma would give rise to some difficulty. But in this case I do not think the plea does give rise to difficulty. I think the pursuer has really taken an unfortunate course of action. I do not think this action ought to have been brought in this form at all. The pursuer was a person to whom money was being paid by the Scottish trustees in virtue of the assignation of bankruptcy. Now, when the trustees came to say that they proposed no longer to pay that money, I think the proper retort would have been an ordinary petitory action. To that the only answer which the trustees could have made would have been to put forward the decree of divorce; and to that, I think, the pursuer could have made this triumphant reply: "That decree, so far as I am concerned, is worth nothing, because it is a decree pronounced by a Court which had no jurisdiction, in an undefended case." I come to that conclusion because of the law which is laid down by Lord Watson in the case of *Le Mesurier*.¹ I think it is now perfectly certain that the domicile of the spouses is that of the husband, and that unless the husband is domiciled within the jurisdiction, the Court has no right to pronounce a decree of divorce. Obviously, a decree pronounced by a Court which had no jurisdiction is a decree which no other Court can acknowledge. It is quite clear also on the averments that this was an undefended case—it is so said—and an undefended consistorial case, even although there is a certain duty on the Court which is not put upon it in an ordinary petitory action, still remains an undefended case.

If the action had taken the form I have suggested, and if the pursuer had met the defence in the manner I have indicated, it is quite evident that this so-called dilemma would never have arisen. The pursuer would necessarily have had to resort to the Scotch Courts, because the trustees, who upon his view ought to pay the money, are resident in Scotland and can only be reached through the Scotch Courts; and when the decree was tabled in defence which, according to the defender, had the effect of transferring the money, notwithstanding the assignation in bankruptcy, from the husband to the wife, the pursuer would have been quite entitled to answer: "That decree is not worth the paper it is written on, because it was pronounced by a Court which had no jurisdiction over the man against whom it was pronounced." That, I think, would have been the proper procedure, and if that procedure had been followed this dilemma would have been avoided.

If that is so, the matter resolves itself into this: Would it be a proper proceeding for us to dismiss this action in order that practically the same action should be brought at once in another form? The Court nowadays is always anxious to avoid unnecessary procedure, and accordingly I am of opinion that the action must be allowed to go on.

LORD KINNEAR.—I agree. I cannot accept the reasoning on which the Lord Ordinary has based his interlocutor. I think that it would be extremely dangerous and contrary to all principle if we were to sustain the right of a creditor, who was not required to be cited as a defender in an action of divorce, to come in after decree of divorce had been pronounced and challenge a decree, which has determined the status of the two spouses,

¹ [1895] A. C. 517.

Mar. 19, 1913. upon any question affecting its merits; and that, I think, is the necessary result of the Lord Ordinary's view. I am not very much moved by the consideration which his Lordship thinks of so great effect, that by the practice of the Commissaries creditors were entitled to appear in actions of divorce. I think all the information we have as to that practice is extremely meagre and unsatisfactory; and although there is some evidence tending to show that creditors might state a defence to divorce upon any ground, I think it is meagre evidence, and that it would be rash to express anything like a fixed and definite opinion as to what place they were allowed to take in the Commissary Court. But that is not material, because I agree with your Lordship that, whatever the rule of the Commissaries was, no such rule has been introduced into the practice of the Court of Session.

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The Lord Ordinary says, quite rightly, that the rule of the Commissaries was recognised in actions of appeal in the Court of Session, and he refers to the case of *Greenhill v. Ford*,¹ which he says is the latest case, for the purpose of showing that the practice is recognised. I cannot say that I think any really valuable inference upon the point can be drawn from that decision. A creditor who had appeared before the Commissaries appealed against the judgment. His appeal was heard, but dismissed; and the significant point of the case, I think, for the present purpose is that his appeal upon its merits was rested upon an allegation of collusion, and that he expressly stated that he did not desire to interfere with the sentence of divorce, but only to obtain a judgment as to the pecuniary effects of that sentence. The appeal was rejected, as I have said, but the Court of Session held that the allegation of collusion came too late after the wife, who was the pursuer in the action, had taken the oath of calumny and been examined by the creditor himself, and that his right to object to the decree without disturbing the merits was not tenable. The decision was affirmed in the House of Lords without any reported expression of opinion; and on the whole I am unable to draw from it any certain conclusion as to the extent of a creditor's right to interpose in actions of divorce. It was decided in this Court that a creditor who had no interest in the question of status must submit to the legal consequences of a divorce, so far as it affects the property of the spouses. But the case is certainly no authority for saying that a creditor can be allowed to reduce a decree of divorce upon its merits, for he expressly disclaimed any intention to do so.

Before leaving the reasoning of the Lord Ordinary I ought to make one further observation. His Lordship says that if the pursuer could competently have asked to be sisted as a defender, the next question is what pleas he could competently urge in an action of reduction. And his Lordship says: "It would . . . appear that the distinction advanced by the defender, that is to say, between collusion or fraud, and other grounds of defence, does not hold good as regards a defence by creditors to a divorce suit." I am not prepared to agree that that has been found; but suppose that it has, his Lordship goes on to say: "And if this be so, I do not see why it should obtain in reductive proceedings for opening up a decree of divorce in absence." Now, I agree with your Lordship that a proof should be allowed

¹ 1 Shaw, 296.

just because there is all the difference in the world between an action of reduction of what purports to be a decree of a Court of Justice founded upon an allegation of fraud upon the Court, or upon an allegation of no jurisdiction, and an attempt to reduce the decree of a competent Court upon grounds which might have been pleaded before the Judge who pronounced it and which affect the merits of the question that he decided. I think this action is maintainable just because the pursuer has made a relevant averment that the Court had no jurisdiction. I agree that he has made an unnecessary difficulty for himself by his form of action, because it may seem to encourage the notion that a creditor can come in to reduce a decree determining status. I do not think he can. But he can come in for the purpose of maintaining that there is no decree at all, which is all that would be a necessary consequence of the pursuer's action. I think his natural course would have been to sue the trustees for payment of this money, and upon the decree of divorce being tabled as being equivalent to a transfer of the money from his debtor—the husband—to somebody else, to maintain that there is no such decree, because what purports to be a decree was pronounced by a Court having no jurisdiction. His ground of action is, not that the judgment is wrong, but that what purports to be a judgment was not pronounced by a Judge who had jurisdiction to deal with the matter, but by a Court which was going beyond its jurisdiction and pronouncing a judgment which could be of no effect.

Mar. 19, 1913.
Corbridge v.
Somerville.
Lord Kinnear.

It is quite clear, I think, in law that if the judgment in question were really a judgment pronounced for the divorce of an English husband not domiciled in Scotland, it could have no effect either here or elsewhere; it certainly would not be recognised as a good divorce by the Courts of any other country. I think the creditor is entitled to have that matter inquired into, because anybody who disputes that an alleged judgment can affect his pecuniary interests must have a right to challenge it upon the ground that it is not a real judgment pronounced by a Court having jurisdiction.

LORD JOHNSTON.—I entirely agree with your Lordships in the view that the old rule of the Commissaries does not apply to consistorial actions before this Court, and I have nothing further to say on that subject.

I also agree with your Lordships that the pursuer here has taken a wrong course in matter of procedure; but I regret to say that I feel much greater doubt as to whether we are justified, in a case of this sort, in allowing it to proceed instead of dismissing it and leaving the pursuer to take the proper course. This is an action for reduction of a decree of divorce. It is quite true that the pursuer says that, though he was not a party to the action of divorce, he has a patrimonial interest in getting rid of the decree of divorce, because that will open to him a claim to funds which otherwise he cannot touch. But, supposing him to be successful, there is nothing to oblige him to proceed after he has got his decree of reduction—there is nothing to compel him to go on and make good his pecuniary claim. Yet the reduction will stand as a reduction of the decree of divorce as regards all concerned and in all time unless the reduction again be set aside.

Now, I have difficulty there; and I have difficulty also in this, that I cannot dispossess my mind of the feeling that this Court is being asked to

Mar. 19, 1913. commit the same offence against international law that it is alleged to have already committed in the original divorce. It seems to me that, taking the action as it is laid, we have no more jurisdiction in an action at the instance of a third party pursuer to deal with the status of this lady or of this gentleman than we had before. It might be that we could entertain an action to deal with the validity of the decree of divorce if raised at the instance of the husband, because I think that, by an extension of the principle of prorogation of jurisdiction, we should be entitled to deal with a lady as defender in a reduction who came here as pursuer to take advantage of the jurisdiction of this Court. But I cannot see that any such power goes beyond the actual parties to the previous action.

Corbidge v.
Somerville.
Ld. Johnston.

I think, therefore, that the pursuer has undoubtedly done wrong in raising the action in the way he has done, and that he ought to be sent back, if he wants to get these funds, to raise his ordinary petitory action against the trustees. When the trustees produce, in their defence, the decree of divorce, I think it will then be open to him in reply to object that it is a decree which is of no avail against him, because it was pronounced without jurisdiction—and I do not think that any decree of reduction will be found to be necessary. If that procedure were to be followed, I think that the decree of divorce obtained in absence of the husband would be examinable *ope exceptionis*, just in the same way as a decree of a foreign Court would be if produced in this Court, and that then the matter would be disposed of as one touching the pecuniary interests of the third party pursuer only, who has right to have the pecuniary question determined between him and the trustees who hold the money, leaving the validity of the decree as touching the status of the spouses to be determined between themselves. I say that the more readily because I feel that this Court by allowing this action to proceed may involve its successors in difficulty. For a decree of divorce, even in absence, may be followed by consequences, and by the creation of new interests, which would make it very difficult to follow the precedent now being created. Nor do I see how this precedent is to be limited in its application to a decree in absence. But as your Lordships are satisfied, I content myself with expressing my doubts, and do not push them to the point of dissent.

LORD MACKENZIE.—This is an action of reduction of a decree of divorce pronounced in Scotland, in an action brought in May 1910 at the instance of a wife against her husband. The husband had been made bankrupt in England in January 1910, and his estates had vested in his trustee in bankruptcy, the pursuer, before the decree of divorce. Prior to the divorce the husband was entitled to the income of certain settled money. In consequence of the divorce payment of this income was refused to the trustee in bankruptcy. Hence the present action, which was brought on 27th November 1911. The ground upon which reduction is sought is that the Scotch Court had no jurisdiction to grant the decree. There is this further averment in cond. 7: "The bankrupt concealed the fact of said divorce proceedings from pursuer, and abstained from opposing same with the object of depriving his creditors of the income of said trust funds, and in the hope and expectation that the defender, Mrs Somerville, would, after

divorce, make him an allowance for his maintenance from said income." Mar. 19, 1913. The action of divorce was undefended. The pursuer says that neither he nor the trustees of the settlement got intimation of the divorce proceedings; that the wife failed to disclose in the summons or at the proof that her husband was bankrupt; and he avers that the husband was, at the date of the bankruptcy and of the divorce proceedings, a domiciled Englishman. He further details certain statements made by the bankrupt in his public examination in bankruptcy which, he says, were not disclosed to the Court when a preliminary proof on the question of jurisdiction was taken in the divorce action.

In these circumstances I am of opinion that there must be inquiry into the facts. The pursuer desires to vindicate a fund which vested in him for behoof of the creditors of the husband before divorce was granted. In answer to his claim the decree of divorce is tabled. If his reply is sound the decree is null, because the first essential for the validity of the decree is that it should have been pronounced by a Court of competent jurisdiction between parties who are *bona fide* subject to it. None of the authorities referred to by the Lord Ordinary really apply to a case of this kind. The decree was in absence. The pursuer, in my opinion, has a title to reduce a decree which he says is null, and which is pleaded as a bar to recovery by him of property which had vested in him prior to its date. Although reluctant to sanction a course which may have the result of affecting the status of the husband and wife in order to secure merely patrimonial interests of others, it is necessary to point out that, if the pursuer succeeds in establishing that the decree of divorce was not pronounced in accordance with the rules of public international law, the decree would have no extra-territorial effect whatever. This is stated by Lord Westbury in *Shaw v. Gould*,¹ *Bonaparte v. Bonaparte*,² *Le Mesurier*,³ *Pemberton v. Hughes*.⁴ Although, therefore, in one view the present proceedings may involve hardship, it is in the interests of both Mr and Mrs Somerville that the question now raised should be finally determined.

The reclaimers did not argue plea 2 (2) before us.

THE COURT adhered.

FORBES DALLAS & Co., W.S.—FRASER, STODART, & BALLINGALL, W.S.—Agents.

¹ 3 E. & L. App. 55, at p. 81.

³ [1895] A. C. 517.

² [1892] P. 402.

⁴ [1899] 1 Ch. 781.

No. 115.

MRS ELIZABETH M'CLYMONT, Pursuer (Appellant).—*Lippe*.
 THE CORPORATION OF THE CITY OF GLASGOW, Defenders.
 (Respondents).—*Russell*.

Mar. 19, 1913.

M'Clymont v. Corporation of Glasgow. *Expenses—Tender—Appeal for jury trial—Tender accepted immediately after order for issues—Expenses of preparing for proof while case in Sheriff Court—General Regulation No. 3 appended to Act of Sederunt 15th July 1876.*

A Sheriff Court action, in which proof had been allowed, was remitted to the Court of Session for trial by jury. An order having been pronounced to lodge issues within eight days, the pursuer, within that time, accepted a tender by the defenders, and was found entitled to expenses.

Held (after consultation with the Judges of the Second Division) that the defenders were liable for the expenses, charged on the Sheriff Court scale, of precognitions and medical reports obtained by the pursuer in preparation for the proof while the case was pending in the Sheriff Court.

Church v. Caledonian Railway Co., (1883) 11 R. 398, *overruled*.

1st Division. Sheriff of Lanarkshire. MRS ELIZABETH M'CLYMONT brought an action of damages for personal injury against the Corporation of Glasgow in the Glasgow Sheriff Court.

On 31st October 1912 the Sheriff-substitute (Fyfe) allowed a proof, and the pursuer then required the cause to be remitted to the First Division of the Court of Session.

On 13th November 1912 issues were ordered to be lodged within eight days.

On 20th November 1912, in respect of a minute of tender for the defenders and a minute of acceptance by the pursuer, decree was pronounced against the defenders for payment to the pursuer of the sum of £50 sterling, and the pursuer was found entitled to expenses, and the account thereof was remitted to the Auditor to tax and to report.

In his report on the pursuer's account of expenses the Auditor allowed charges, on the Sheriff Court scale, for precognitions taken and medical reports obtained while the case was still in the Sheriff Court.

A note of objections was lodged by the defenders objecting to these charges.

The case was heard in Single Bills of the First Division on 6th February 1913.

Argued for the defenders;—The pursuer's application to have the cause remitted to the Court of Session overruled the order for proof pronounced in the Sheriff Court, and, no such order having been pronounced in the Court of Session, the expenses of precognitions and of preliminary investigations had been improperly allowed by the Auditor.¹

Argued for the pursuer;—Though the case of *Church v. Caledonian Railway Company*² could not be distinguished from the present case, the decision in that case was irreconcilable with a recent decision of the Court which warranted the charges allowed by the Auditor.³

¹ *Church v. Caledonian Railway Co.*, (1883) 11 R. 398; General Regulations appended to the Act of Sederunt 15th July 1876, No. 3, Parliament House Book, 1912-13, G. 34.

² 11 R. 398.

³ *Boyle v. Olsen*, *supra*, p. 112.

The Lord President intimated that the Court would consult with Mar. 19, 1913.
the Second Division.

At advising on 19th March 1913 the opinion of the Court was
delivered by the M'Clymont v.
Corporation
of Glasgow.

LORD PRESIDENT.—In this case an action of damages was raised in the Sheriff Court, and a proof was allowed. The pursuer then required the cause to be remitted to the Court of Session for jury trial, and, there being no question of relevancy, issues were ordered. On the day that issues were to be adjusted a tender was put in, and, the pursuer having accepted it, the sum tendered was decerned for with expenses.

When the pursuer's account of expenses was presented it included charges for precognitions which were necessary for the case if it was to go on, and they were charged on the Sheriff Court scale. The Auditor having allowed the charges for these precognitions, they were objected to, the objection being based on the decision in the case of *Church v. Caledonian Railway Company*,¹ where such expenses were disallowed. There is a familiar rule that expenses of taking precognitions are only allowed where an action has reached the stage of an interlocutor allowing proof. The argument in that case, which was successful, was that when the case was appealed to this Court for jury trial it became a Court of Session case, and not a Sheriff Court case, and that as a compromise took place when a tender was accepted before adjustment of an issue, prior to which no proof was allowed in the Court of Session, therefore the expenses of precognitions could not be allowed. There is no doubt that was what was decided in the case of *Church*.¹

After hearing counsel in the present case we were of opinion that we could not deal with the matter without consulting the Second Division. Having done so, we are of opinion that, notwithstanding the case of *Church*,¹ the expenses here charged on the Sheriff Court scale were rightly allowed by the Auditor. The precognitions were taken while the case was still in the Sheriff Court, and if it had remained there, and the tender had been put in and accepted after proof had been allowed in that Court, undoubtedly the expenses would have been allowed. The case having come to this Court and followed the procedure necessary to attain the same stage as it had already attained in the Sheriff Court—because the order for issues was tantamount to an allowance of proof—we are of opinion that that ought not to prevent the expenses being recovered. We shall therefore disallow the objection and approve of the Auditor's report.

THE COURT repelled the objections and approved of the Auditor's report.

SCOTT & GLOVER, W.S.—ST CLAIR SWANSON & MANSON, W.S.—Agents.

¹ 11 R. 398.

No. 116.

ALEXANDER KNOX & ROBB, Pursuers (Respondents).—

Macmillan, K.C.—Aitchison.

Mar. 20, 1918.

THE SCOTTISH GARDEN SUBURB COMPANY, LIMITED, Defenders
(Appellants).—*Clyde, K.C.—Hamilton.*Knox & Robb
v. Scottish
Garden
Suburb Co.,
Limited.*Agent and Principal—Usage of trade—Implied authority of architect to employ measurer.*

Held that there is no usage of trade by which the official architect of a building company, which has not commenced operations, or approved of plans, or instructed the architect to proceed with the building, has implied authority to employ the services of a measurer to the effect of rendering the building company liable for the measurer's charges.

Black v. Cornelius, (1879) 6 R. 581, *distinguished*.

1st DIVISION.
Sheriff of
Lanarkshire.

IN May 1911 Alexander Knox & Robb, measurers in Glasgow, brought an action in the Glasgow Sheriff Court against the Scottish Garden Suburb Company, Limited, for payment of an account of £121, 8s. 2d. alleged to be due to the pursuers by the defenders.

The defenders' company was incorporated on 6th June 1910, and was promoted with a view to acquiring a property in Greenock and of erecting thereon workmen's houses to be used in connection with a Government torpedo factory which it was proposed to establish there.

The pursuers averred that they were instructed by Mr Salmon, the official architect of the defenders' company, to carry out certain work in connection with which the account sued for was incurred. The account contained seven items, the first three of which were for small outlays in connection with the work subsequently charged for in the fourth and fifth items of the account, which latter items were dated 7th and 9th June 1910 respectively. The sixth and seventh items were incurred in August 1910. The work consisted in measuring plans, altering schedules, and preparing estimates for houses which it was proposed that the company should erect.

The grounds on which the pursuers sought to make the defenders liable were stated thus by Lord Mackenzie:—“(1) That Mr Salmon had the instructions and authority of the defenders to employ the pursuers to do the work; (2) that according to the custom in the building trade Mr Salmon, as the official architect of the defenders, had implied authority to employ the pursuers, and that the defenders became liable for the pursuers' fees although there was between them no direct relation of employer and employed; and (3) that the defenders made use of the information which was the result of the pursuers' work, and are therefore liable in payment.”

On 27th February 1912 the Sheriff-substitute (Fyfe), after a proof, pronounced the following interlocutor:—“Finds (1) that by the custom and usage of the building trade an architect has implied authority to engage the services of a measurer; (2) that pursuers were employed by defenders' architect to do the work, the cost of which is sued for: Finds in law that pursuers having been employed by defenders' architect, defenders are liable in payment of the account sued on: Therefore decerns against the defenders for the sum of £121, 8s. 2d., with interest, as craved. . . .”*

* The Sheriff-substitute's note contained the following passage:—“In my opinion the pursuers have established their averment of custom of trade

The appeal was heard before the First Division (without Lord Mar. 20, 1913. Kinnear) on 21st and 25th February 1913.¹

At advising on 20th March 1913,—

Knox & Robb
v. Scottish
Garden
Suburb Co.,
Limited.

LORD MACKENZIE.—[After dealing with matters with which this report is not concerned]—It is also clear that the pursuers did the work they now ask payment for on the instructions of Mr Salmon. It is impossible, however, to find ground for holding as regards the June items that there was any contractual relation between the Company and the measurers.—[His Lordship discussed this matter and continued]—Nor is it possible to agree with the view taken by the Sheriff-substitute that the defenders are liable in consequence of a custom of trade. I find it impossible to formulate what the custom of trade is under which the defenders are supposed to be liable. It is intelligible that where a private individual or a company has employed an architect and definitely settled plans with him, and he is instructed to proceed with the work, the architect may then proceed to employ a measurer in accordance with the custom of trade. This is the view taken by Mr Barclay, the pursuers' expert witness. The present case, however, is different. At the time Mr Salmon instructed the measurer the position of matters was still inchoate, although certain plans had been apparently adjusted with the Admiralty.—[His Lordship then dealt with questions with which this report is not concerned, and expressed his opinion that as regarded the first five items of the account the defenders made use of the work charged for, and were bound accordingly to pay these items.]

LORD PRESIDENT.—I agree with the opinion that has just been delivered, and I would not find it necessary to say anything were it not for the fact that the learned Sheriff-substitute has gone upon a different ground. I wish to say most distinctly that the proposition which is laid down by the Sheriff-substitute in his note, that, by the custom of trade, the official architect of a company proposing to build has implied authority to engage the assistance of a measurer is not, in my opinion, good law, and is certainly not borne out by the case which he quotes—the case of *Black v. Cornelius*.¹ I have no doubt whatever that when an architect is employed, plans have been approved of, and he is instructed to go on with the building, that he has the right, with no further order, to employ a measurer, without whom the whole matter cannot be gone on with or proper schedules for contrac-

to the effect that the official architect of a person or company proposing to build has implied authority to engage the assistance of a measurer, and that the architect's constituent then becomes liable for the measurer's fees, although the constituent and the measurer have had no direct communication. This doctrine of the law of agency has been recognised in a Scottish judgment—(*Black v. Cornelius*, 6 R. 581, and in several English cases collected in Hudson on Building Contracts, 3rd ed., p. 128 *et seq.*)”

¹ The following authorities were referred to at the hearing.—*Brown v. McConnell*, (1876) 3 R. 788; *Black v. Cornelius*, (1879) 6 R. 581; *Ireland v. Livingston*, (1872) L. R., 5 E. & I. App. 395, *per* Lord Chelmsford, at p. 417; *In re Rotherham Alum and Chemical Co.*, (1883) 25 Ch. D. 103; *Moon v. Witney Union*, (1837) 3 Bing. (N. S.) 814.

² 6 R. 581.

Mar. 20, 1913. tors given out. That was all that was decided in *Black v. Cornelius*.¹

Knox & Robb v. Scottish Garden Suburb Co., Limited. But the idea that, because a man has the position of official architect, he has a free hand to employ measurers when he likes is perfectly out of the question.

Ld. President. In the actual circumstances of this case I think it is quite clear that the parties did get the good of these measurements, and never could have gone on to consider what the houses would really cost, and what propositions they could put before the public, without seeing the measurements. Therefore, without going into the details which Lord Mackenzie has already discussed, I entirely concur in the interlocutor proposed by him.

LORD JOHNSTON.—I have had the advantage of perusing the opinion prepared by Lord Mackenzie, and I entirely concur in the results at which he has arrived and the method of arriving at them. I respectfully concur also in what your Lordship has added.

THE COURT pronounced this interlocutor:—" . . . Find that the pursuers did the work charged for in the first five items of the account sued for on the instructions of Mr Salmon, architect: Find that Mr Salmon had no authority, express or implied, so to employ the pursuers on behalf of the defenders, but find that the directors of the Company, subsequent to incorporation, made use of the information which was the result of the pursuers' work as detailed in said five items: Therefore find in law that the defenders are liable to make payment to the pursuers of the sums charged under the first five heads: Further find as regards the sixth and seventh items of the account, that the defenders, through Mr Salmon or his firm, instructed the pursuers to do the work charged for, and are therefore liable to make payment of the sums sued for under these heads: Therefore decern against the defenders for payment to the pursuers of the sum of £121, 8s. 2d., with interest, as craved. . . ."

W. R. RAMSAY & NIGHTINGALE, Solicitors—CADELL & MORTON, W.S.—Agents.

No. 117. LIEUTENANT-COLONEL RODERICK WILLIAM COLQUHOUN AND OTHERS (Sir Alan John Colquhoun's Trustees), First Parties.—*Johnston, K.C.—C. H. Brown.*

Mar. 20, 1913.

Colquhoun's Trustees v. Abercromby.

DAVID JAMES ABERCROMBY, Second Party.—*Blackburn, K.C.—J. H. Millar.*

MRS IVIE MURIEL ELLEN HARRINGTON, Third Party.—*Blackburn, K.C.—J. H. Millar.*

Revenue—Estate-duty—Deductions allowable as incumbrances—"Incumbrances created by a disposition made by the deceased"—"Disposition taking effect out of the interest of the deceased"—Provisions for widow and children—Relief—Finance Act, 1894 (57 and 58 Vict. cap. 30), secs. 7 (1) (a), and 22 (2) (b).

The Finance Act, 1894, in providing for the ascertainment of the value of an estate for estate-duty, allows a deduction for incumbrances; but by sec. 7 (1) (a) excepts therefrom in certain circumstances "incum-

branches created by a disposition made by the deceased"; and by sec. Mar. 20, 1913. 22 (2) (b) enacts that "a disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required." Colquhoun's Trustees v. Abercromby.

A executed a trust-disposition and settlement by which he directed his trustees to pay an annuity out of his estate to B, and also, should B request them to do so, to burden the estate with provisions for B's wife and family. On the death of B the fee of the estate was directed to be conveyed to C.

After A's death his trustees paid the annuity to B during his life, and also, at B's request, burdened the estate with bonds of provision for his widow and children. On B's death the estate was conveyed to C, who, in adjusting estate-duty with the Inland Revenue, sought to make deductions in respect of the provisions to B's widow and children. The Inland Revenue refused to allow the deductions, and C paid duty on the whole estate.

A question having arisen as to C's right to recover from the widow and children the estate-duty paid in respect of their provisions—

Held that, as these incumbrances were not "created by a disposition made by" B in the sense of sec. 7 (1) (a), and did not take effect "out of the interest of" B in the sense of sec. 22 (2) (b), they were deductible; and, accordingly, that C could not recover from the beneficiaries this estate-duty which he ought not to have paid.

On 25th May 1912 a special case was presented for the opinion of 1st Division. the Court with reference to a question whether the trustees under the trust-disposition and settlement of Sir Alan Colquhoun of Colquhoun and Luss, who died on 14th March 1910, were entitled to be relieved by the widow and children of Sir James Colquhoun (*secundus*) of estate-duties paid by Sir Alan on his succeeding to the Colquhoun estates in 1907 on the death of Sir James, so far as these duties were charged upon sums representing provisions for Sir James's widow and children. This question depended upon whether these provisions were incumbrances "created by a disposition made by the deceased" in the sense of sections 7 (1) (a), and 22 (2) (b) of the Finance Act, 1894.*

Sir Alan Colquhoun's trustees were the *first parties* to the case;

* The Finance Act, 1894 (57 and 58 Vict. cap. 30), enacts:—

Sec. 7 (1). "In determining the value of an estate for the purpose of estate-duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made—(a) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest."

Sec. 14 (1). "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate-duty may be recovered by the person, who being authorised or required to pay the estate-duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary."

(3) "Any person from whom a rateable part of estate-duty can be recovered under this section shall be bound by the accounts and valuations as settled between the person entitled to recover the same and the Commissioners."

Sec. 22 (2) (b). "A disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required."

Mar. 20, 1913. **David James Abercromby**, sole surviving trustee under a bond of provision in favour of the younger children of Sir James Colquhoun (*secundus*), was the *second party*; and Mrs Ivie Muriel Ellen Urquhart or Colquhoun or Harington, the widow of Sir James Colquhoun (*secundus*), was the *third party*.

Colquhoun's
Trustees v.
Abercromby.

The case stated as follows:—

"1. Sir James Colquhoun of Colquhoun and Luss, in the county of Dumbarton, afterwards referred to as Sir James Colquhoun (*primus*), died on 18th December 1873. He was predeceased by his wife and survived by one son, James, who succeeded his father in the title, and is afterwards referred to as Sir James Colquhoun (*secundus*).

"2. Sir James Colquhoun (*primus*) left a trust-disposition and settlement, dated 1st May 1871, and registered in the Books of Council and Session on 18th February 1874. The general purposes of his said trust-disposition and settlement were to provide for the payment of the debts on the estates of Luss, occasioned by the large purchases of land made by his father and himself, to pay to his son Sir James (*secundus*) an annuity, increasing in amount with the corresponding diminution of the heritable debts, from £4000 to £10,000 per annum, and to hold the fee of the unentailed portion of the estates for the behoof of the heir who should succeed to the said Sir James Colquhoun (*secundus*) in the entailed portion thereof—the testator declaring it to be his wish and intention that the whole lands and estates, whether entailed or not, should descend and be held and possessed by the same person as heir.

"3. By the sixth purpose of the said trust-disposition and settlement Sir James Colquhoun (*primus*) provided as follows:—'In the event of the said James Colquhoun, my son, being married and being desirous in contemplation of or after his marriage to make provision for his wife or intended wife and children born or to born of the marriage, I hereby direct and appoint my trustees, if asked by the said James Colquhoun to do so, to grant and deliver such deed or deeds as may be necessary for securing over my lands and estates hereby conveyed, or any part thereof, to and in favour of the wife or intended wife of the said James Colquhoun, in the event of her surviving him, a free annuity or jointure of such sum as he may desire, but not exceeding the sum of One thousand five hundred pounds sterling per annum . . . and also to grant such deed or deeds as may be necessary for securing over the lands and estates hereby conveyed to and in favour of any lawful child or children of him the said James Colquhoun, other than the heir who shall succeed to the said lands and estates, or to any person or persons for their behoof that may be named by the said James Colquhoun, suitable provisions after his death, the said provisions to be so secured over my said lands and estates not exceeding the sums after mentioned, *videlicet*: . . . Declaring that the said provisions to the children of the said James Colquhoun shall be payable on the death of the said James Colquhoun, and in such manner and in such proportions as he may appoint by any writing under his hand, and farther declaring that the sum or sums so to be settled on the wife and children of the said James Colquhoun shall be inclusive of and not over and above any sum or sums he may provide to them or any of them over the entailed estates of Luss and others under the powers possessed by him as heir of entail of the said lands and estates.'

"4. In the year 1875, on the marriage of Sir James Colquhoun

(*secundus*) to his first wife, Charlotte Mary Douglas Monro, the trustees of his father (at the request of Sir James (*secundus*), and in exercise of the powers hereinbefore narrated), granted in favour of his wife a bond of annuity for £1500 per annum, payable after the death of her husband. The lady, however, predeceased Sir James on 9th January 1902, and accordingly the annuity secured by the said bond never became exigible. Mar. 20, 1913.
Colquhoun's
Trustees v.
Abercromby.

"5. On the same occasion the trustees of Sir James Colquhoun (*primus*) (at the request of Sir James Colquhoun (*secundus*), and in exercise of the powers hereinbefore narrated), granted a bond of provision in favour of the trustees therein named for behoof of the younger children of the marriage of the said James Colquhoun (*secundus*) with the said Charlotte Mary Douglas Monro . . . for payment to the trustees for behoof of the younger children of said marriage other than the heir succeeding to the lands and estates of Luss, of a sum of . . . £20,000 in the event of there being two children other than the heir . . . These provisions were heritably secured on certain parts of the unentailed lands of Luss particularly described in the bond. There was no male issue of the marriage, and on the death of Sir James (*secundus*) on 13th March 1907, the estates of Luss (both entailed and unentailed) passed to his cousin the now deceased Sir Alan John Colquhoun, Bart., who died on 14th March 1910. Two daughters, the whole issue of the first marriage of Sir James (*secundus*), survived however, and accordingly a sum of £20,000 became payable under the bond of provision to the trustee acting under the said bond of provision for their behoof; and this sum, with interest from 13th March 1907 was paid to him at Whitsunday 1908. The sole remaining trustee acting under the said bond of provision, to whom the £20,000 was paid, is the second party to this case.

"6. In November 1904 Sir James (*secundus*) entered into a second marriage with Ivie Muriel Ellen Urquhart (now Mrs Harington), and on that occasion the trustees of Sir James (*primus*) (at the request of Sir James (*secundus*) and in exercise of the powers conferred on them as aforesaid) granted a bond of annuity in favour of Lady Ivie Muriel Ellen Urquhart or Colquhoun, for payment to her of a free annuity or jointure of £1500 a year after the death of her husband, and in security thereof disposed certain parts of the unentailed lands of Luss particularly therein described. . . . Since the death of Sir James (*secundus*) his widow has regularly received payment of her annuity in terms of the bond. There were no children of this second marriage.

"7. On the death of Sir James Colquhoun (*secundus*) on 13th March 1907 the whole entailed and unentailed lands and barony of Luss passed, as already mentioned, to the now deceased Sir Alan John Colquhoun, and so far as unentailed were conveyed to him by the trustees of Sir James Colquhoun (*primus*), conform to disposition in his favour, dated 18th March 1908, under burden of settlement by him of the Government duties, exigible in respect of his succession. The aggregate value of the estates (including certain moveable funds in the hands of the trustees of Sir James Colquhoun (*primus*)) amounted to £524,223, 4s. 2d., and estate-duty was payable on that amount at the rate of $7\frac{1}{2}$ per cent. This duty, so far as chargeable on the unentailed heritable estate is being settled by eight annual instalments, the first of which fell due upon 13th March 1908, and five of these instalments have now been paid. Altogether there has

Mar. 20, 1913. *Colquhoun's Trustees v. Abercromby.* been paid in respect of estate-duty on the unentailed portion of the lands of Luss, £16,402, 7s. 10d., exclusive of interest, and a sum of £9841, 8s. 11d. representing the remaining three instalments has still to be paid. The first three instalments of said estate-duty were paid by the late Sir Alan John Colquhoun during his lifetime, and the remaining five instalments have been and are being paid by the first parties as Sir Alan's testamentary trustees.

"8. When the accounts for estate-duty were passed in 1908 on the succession of Sir Alan John Colquhoun, the Inland Revenue authorities, although requested by Sir Alan so to do, declined to allow as deductions from the capital value of the estate passing on the death of Sir James (*secundus*) the amount of the provisions of £20,000 to to his younger children, and the capital value of Mrs Harington's annuity of £1500 a year."

The contentions of parties were stated as follows :—

"The first parties maintain (1) that the said provisions and annuity were property which passed on the death of Sir James Colquhoun (*secundus*) in the sense of section 2 of the Finance Act, 1894 and that the late Sir Alan John Colquhoun was, and they as his testamentary trustees are now, primarily liable for estate-duty thereon ; and (2) that there being no express provision to the contrary in either the bond of provision or the bond of annuity, the first parties, as the testamentary trustees of the late Sir Alan John Colquhoun, have, under section 14 of the said statute, the right to recover from the second party the proper rateable part of the estate-duty which then became applicable to the provisions of £20,000 before referred to, and that they also have a similar right of recovery against the third party of the proper rateable part of the estate-duty applicable to the capital value of her annuity of £1500 a year.

"10. The second party contends (1) that in determining the value of the estate on which duty was payable on the death of the said deceased Sir James Colquhoun (*secundus*) for the purpose of estate-duty, an allowance fell to be made, in terms of subsection (1) of section 7 of the Finance Act, 1894, for the said provision of £20,000, in respect that the said provision was not an incumbrance created by the deceased ; (2) that the first parties are accordingly not entitled, under subsection (1) of section 14 of the said Act, to recover from the second party an amount equal to the proper rateable part of the estate-duty paid by the first parties as aforesaid ; and (3) that, in respect that the second party is not a person from whom a rateable part of estate-duty can be so recovered, he is not bound under subsection (3) of section 14 of the said Act by the accounts and valuations as settled between the first parties or their author and the Commissioners of Inland Revenue.

"11. The third party adopts the contentions of the second party *mutatis mutandis* as applicable to the said annuity of £1500. She further contends *et separatim*, that, in any event, upon a sound construction of the terms of the trust-disposition and settlement of Sir James Colquhoun (*primus*) and of the bond of annuity, the first parties are not entitled to recover from her in respect of the same an amount equal to the rateable part of the estate-duty paid by them as aforesaid."

The questions of law were :—" (1) Did an allowance fall to be made, in terms of section 7, subsection (1), of the Finance Act, 1894, for (a) the said provision of £20,000, and (b) the said annuity of

£1500, or either of them, in determining the value for the purpose of Mar. 20, 1913. estate-duty of the estate passing on the death of Sir James Colquhoun Colquhoun's (secundus)? (2) Are the first parties now entitled to recover from the Trustees v. second party the proper rateable part of estate-duty applicable to the Abercromby. value of the said provision paid to him? and (3) Are the first parties now entitled to recover from the third party the proper rateable part of the estate-duty applicable to the capital value of her said annuity of £1500?"

The case was heard before the First Division (without Lord Kin-ear) on 6th February 1913.

Argued for the second and third parties;—The provisions in question—assuming them to be incumbrances—were not incumbrances created by Sir James Colquhoun (secundus), for he was not the fiar of the estate in question, but only an annuitant, with no power to create incumbrances upon it. The incumbrances in question were in fact created by Sir James (primus), who conferred powers on his trustees for their creation, and defined the time at which, and conditions upon which, the powers conferred might be exercised.¹ In any event these provisions fall to be regarded as separate estates, and so were not liable for estate-duty at the rate chargeable on the aggregate estate passing on the death of Sir James (secundus). With regard to the annuity provided for the third party, no repayment could, in any circumstances, be claimed from her, for, by the terms of the deed creating it, it was declared to be a "free annuity," i.e., liable to no deductions, and was therefore excluded from the apportionment provided for by section 14 (1) of the Finance Act, 1894, in respect that the disposition creating it contained an "express provision to the contrary."²

Argued for the first parties;—Power had been conferred upon Sir James Colquhoun (secundus) to burden the fee-simple estate with provisions for his wife and children through the hands of his father's trustees; therefore the incumbrances created on his demand by these trustees were truly created by him, and, in virtue of the exception in subhead (a) of section 7 (1) of the Finance Act, 1894, could not be the subject of allowance in determining the value of the estate taken on his death by Sir Alan Colquhoun. If, however, the provisions for which the incumbrances were created were to be regarded as having been made not by Sir James (secundus) himself, but by him acting jointly with his father's trustees, they were still chargeable, in virtue of section 2 (1) (d) of that Act, with estate-duty as property passing on his death.³ The provision of a "free annuity" in favour of the third party could not be construed, on the authority of the case of *In re Parker-Jervis*,⁴ as meaning an annuity without any deduction whatever.⁵

¹ The following authorities were referred to:—*Alexander's Trustees v. Alexander's Trustees*, 1910 S. C. 637; *Lord Advocate v. Warrender's Trustees*, (1906) 8 F. 371; *Inland Revenue v. Alexander's Trustees*, (1905) 7 F. 367.

² *In re Parker-Jervis*, [1898] 2 Ch. 643; *Bulloch v. Beaton*, (1853) 15 D. 373; *In re Maryon Wilson*, [1900] 1 Ch. 565; *Dundas' Trustees v. Dundas' Trustees*, 1912 S. C. 375; *Hanson, Death Duties*, (6th ed.) p. 514.

³ *Attorney-General v. Montefiore*, (1888) 21 Q. B. D. 461.

⁴ [1898] 2 Ch. 643.

⁵ The Lord President referred to *In re Maryon Wilson*, [1900] 1 Ch. 565; *In re Gray*, [1896] 1 Ch. 620; *In re Turnbull*, [1905] 1 Ch. 726; *Lord Advocate v. MacLachlan*, (1899) 1 F. 917.

Mar. 20, 1913. At advising on 20th March 1913,—

Colquhoun's
Trustees v.
Abercromby.

LORD PRESIDENT.—This is a special case between the trustees of Sir Alan Colquhoun, first parties, the trustee under a trust for behoof of the children of Sir James Colquhoun (*secundus*), second party, and the widow of Sir James Colquhoun (*secundus*), third party, and the question that we are asked to decide is whether the first parties, the trustees of Sir Alan, who settled the Government duties payable on the death of Sir James (*secundus*), are entitled to be relieved of those Government duties so far as they represent the sums to which the second and third parties are entitled.

The circumstances out of which the case arises are these :—Sir James Colquhoun (*primus*) left a trust-disposition and settlement by which he made over his whole estate, except his entailed estate, in trust to pay an annuity to his son, Sir James (*secundus*), and with the rest of the money to wipe off the debt upon the entailed estates. The annuity was upon what may be called a sliding scale, that is to say, as the debts were paid off the annuity was to be increased. But Sir James (*secundus*) was never to get the fee of the estate. Upon the death of Sir James (*secundus*) the fee of the estate was then to descend to the person who was entitled to the entailed estate, in other words, to the person who was entitled to the baronetcy. In order, however, to provide for the case that might arise, namely, that Sir James (*secundus*) might marry and wish to make provision for his wife and children, the trustees were empowered to grant a provision for his wife, to become effectual in the case of her becoming a widow, and also to grant a provision of a certain sum to his children, varying according to the number of children that there might be. That event did happen. Sir James (*primus*) died, and his trustees administered the estate and paid off part of the debt and paid the annuity to Sir James (*secundus*). Sir James (*secundus*) did marry, and he called upon the trustees to make provision for his wife and children. They did so, and the children are practically the second parties to the case, not directly but through the trustee who holds the provision for them. The first wife died, and consequently her provision did not become exigible ; but Sir James (*secundus*) married a second time, and again asked the trustees to make the same provision, which they did, for his second wife. That lady survived, and is the third party to the case.

Upon Sir James (*secundus*) dying at a date after the passing of the Finance Act, 1894, estate-duty became exigible upon the whole of the estate that passed at his death. In other words, in terms of the Finance Act, it was property which passed on the death of the deceased, not property in which the deceased himself had an interest. Sir James (*secundus*) never had any interest in the fee of the estates ; he was a mere annuitant paid by the trustees. The estate was therefore not property in which he had an interest, but property which passed on his death ; and accordingly Sir Alan had to settle with the Revenue authorities for the estate-duties. In determining the value of the estate he claimed to make a deduction for the sums that were charged upon the estate in respect of the children and widow of Sir James (*secundus*). That deduction was not allowed. But the other parties to this case are not in any way bound by the arrangements that were made between the Crown and Sir Alan.

The matter is settled by the seventh section of the Finance Act of 1894, Mar. 20, 1913. which enacts:—(1) "In determining the value of an estate for the purpose of estate-duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances." Now these sums were incumbrances, and if the section had stopped there, there could be no doubt. But then it goes on, "but an allowance shall not be made (a) for debts incurred by the deceased"—now this was not a debt incurred by the deceased, because Sir James Colquhoun (*secundus*) never incurred a debt—"or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest." It is quite clear that this was not for his own use and benefit. It has already been decided, if decision was necessary, in the case of *Lord Advocate v. Warrender's Trustees*,¹ that if a father charges an estate with a view to making a provision in his son's marriage-contract for his son's wife or his son's children, that is not for his own use and benefit. So the whole point comes to turn upon whether this incumbrance was created by a disposition made by the deceased. I am of opinion that it was not created by a disposition made by the deceased. He never had anything to do with a disposition. The person who created the power was Sir James Colquhoun (*primus*), and all that Sir James Colquhoun (*secundus*) had to do was to ask the trustees to do something which Sir James (*primus*) had said they might do. I am helped in that opinion by the terms of subsection (2) (b) of section 22, which says: "A disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required." This never took effect out of the interest which Sir James (*secundus*) had, because Sir James (*secundus*) never had an interest in the estate. He was an annuitant from the trustees, but he never had an interest in the estate, and it made no difference to him, one way or the other, whether this provision was charged in favour of his wife and children or not.

The result is that Sir Alan was wrong in allowing the Crown to insist that no deduction was to be made; and if that is so, it is quite clear that his trustees cannot now claim a proportional abatement from the other parties, because he never ought to have paid upon their interests. That does not decide the question whether these parties may not, in a question directly with the Crown, have to pay duty at the same rate; and although I have an opinion upon that, it is probably inexpedient that I should express it, because I should be doing so behind the back of the Crown, which is not here. But so far as this case is concerned, it seems to me clear that we must answer the first question in the affirmative; and, that being so, it follows as a corollary that the second question and the third are answered in the negative.

LORD JOHNSTON.—[After narrating the facts stated in the case]—The Inland Revenue were not parties to the case, but we were given to understand at the bar that they were prepared to give effect to our decision on the case between the parties.

¹ 8 F. 371.

Mar. 20, 1913. The Finance Act, 1894, provides (section 1) that on the death of every person dying after the date of the Act there should be levied and paid on the value of all property, which passes on the death of such person, a duty called "estate-duty," at the graduated rates thereafter mentioned. Sir Colquhoun's Trustees v. Abercromby. Ld. Johnston. James Colquhoun's (*secundus*) children's provisions and his widow's annuity were certainly property passing at his death, and liable, either separately or as part of other property, to estate-duty, and the real interest that these beneficiaries have is in the rate—to avoid their provisions being massed with other property so as to render them liable in a higher rate.

The Act, section 2 (1), provides that property passing on the death of the deceased shall be deemed to include the property following, that is to say—(a) Property of which the deceased was at the time of his death competent to dispose. (b) Property in which he or any other person had an interest ceasing on his death, to the extent to which a benefit accrues or arises by the cesser of such interest. First, then, Sir James Colquhoun (*secundus*) had presumably property of his own or under his control which passed at his decease. But his daughters' and his widow's provisions were not included in such estate by reason merely of his right to require the trustees of his father to give effect to the power which they had to create such provisions, notwithstanding that Sir James (*secundus*) had conferred upon him, within limits, the right to define the amount, to appoint the manner of payment, and apportion the amount. It is by section 22 (2) (a) only where a general power is vested in the deceased, that he is treated as competent to dispose of the subject of the power. Second, to the extent of the value of his annuity Sir James (*secundus*) had an interest ceasing with his death in the settlement property. *Quoad ultra* the trustees of Sir James (*primus*) had an interest in trust in the settlement property ceasing with the death of Sir James (*secundus*). Discrimination between these two interests is, however, of no practical importance in relation to this case, inasmuch as although the deceased had a limited interest in the estate which passed at his death, that interest passed under a disposition not made by the deceased, and under one in favour of someone other than the wife and children of the deceased (section 4).

The provisions of section 4 for the aggregation of property fall next to be considered. The section provides that, for determining the rate of duty on property passing on the death, all property so passing shall be aggregated so as to form one estate, but provided that any property so passing in which the deceased never had an interest, or which under a disposition not made by him passes on his death to some person who is neither his wife or husband, nor his lineal ancestor or lineal descendant, shall form an estate by itself, but that any benefit under a disposition not made by the deceased reserved or given to the wife or husband or to a lineal ascendant or descendant of the deceased shall be aggregated with other estate, except as above excepted, passing on his death. Accordingly, as in the main settlement property generally Sir James (*secundus*) was succeeded by his cousin, that estate does not fall to be massed with other estate passing on his death, but forms an estate by itself. It is, however, a question upon which, though it is not directly raised in the case, I find myself obliged to form some, though I should not be justified in saying a concluded, opinion, viz., whether the

provision to the children and widow of Sir James Colquhoun (*secundus*) Mar. 20, 1913.
 though not derived from Sir James (*secundus*) but from Sir James (*primus*) Colquhoun's
 and carved out of the settlement estate, is nevertheless to be massed with Trustees v.
 the property of Sir James (*secundus*) for determining the rate of duty. That Abercromby.
 question, as at present advised, I should answer in the affirmative. Ld. Johnston.

The mode of collection and recovery of estate-duty is this: The executor of the deceased (section 6 (2) and (4)) shall pay the duty on all personalty passing, of which the deceased was competent to dispose; may pay the duty on any other property passing, which by virtue of any testamentary disposition of the deceased is under the executor's control, and may, at the request of the person accountable, pay the duty on any property passing, which is not under his, the executor's, control. So far as not paid by the executor, the duty is to be collected upon an account delivered by the person accountable for the duty. And it is also expressly provided (section 8 (4)) that where property passes on the death and the executor is not accountable for the duty, "every person to whom any property so passes for any beneficial interest in possession" shall be accountable for the estate-duty on the property, and shall deliver and verify an account. A rateable part of the duty, in proportion to the value of property not passing to the executor as such, may be recovered by the executor under section 9. And similarly a rateable part of the duty paid by any person authorised or required to pay duty, in respect of any property, may be recovered from the person entitled to any sum charged on such property under a disposition not containing any express provision to the contrary under section 14.

Sir Alan Colquhoun was required to pay the duty on the settlement estate derived from Sir James (*primus*) as if it was not encumbered by the provisions for the children and widow of his predecessor, Sir James, leaving him to recover a rateable proportion from them. The Inland Revenue by so insisting, do two things which affect the rate of duty—they increase the main settlement estate by the inclusion of the capital value of these provisions, whereby they may affect the rate payable by Sir Alan, and they certainly fix those taking these provisions with a higher rate than they would probably otherwise pay, for they debar them from the opportunity of delivering an account for themselves, and maintaining their right to be charged either (a) at the rate applicable to their provisions taken as separate estates, or (b) at the rate at which they would be charged if these provisions were massed with the estate of Sir James Colquhoun (*secundus*), their father and husband, under section 4.

Now, it is provided (section 7 (1)) that in determining the value of an estate for the purposes of estate-duty, allowance shall be made for debts and incumbrances, and that any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other property liable to the duty. I think that the combined effect of section 4 and section 7 (1) is that Sir James's (*secundus*) children's provision of £20,000 and his wife's provision of £1500 a year are incumbrances to be deducted from the value of the main settlement estate, and are estates by themselves, though it may be aggregated with other estate passing on the death of Sir James (*secundus*), their father, in order to ascertain the rate of duty. I admit there is some difficulty in reconciling the provisions of sections 4 and 7 with that of sec-

Mar. 20, 1913. *Colquhoun's Trustees v. Abercromby. Ld. Johnston.* tion 14 (1). I think this is done by regarding the fact that the provisions in question were already an incumbrance secured by infestment on the settlement property, when that property passed on the death of Sir James (*secundus*), and therefore that each is a separate heritable subject standing on its own title, though they only came into beneficial possession at his death. But even if that is not sufficient explanation of the apparent conflict, I do not think that the incidental provision in section 14 (1) can be held to override the direct provisions of sections 4 and 7 (1).

I think, therefore, that the first query falls to be answered in the affirmative, and the second and third in the negative.

LORD MACKENZIE.—I am of opinion that the first question should be answered in the affirmative. Section 23 (10) of the Finance Act, 1894, defines incumbrance to be any heritable security or other debt or payment secured upon heritage. Section 7 (1) provides that in determining the value of an estate allowance shall be made for incumbrances. It further provides (a) that an allowance shall not be made for incumbrances created by a disposition made by the deceased. (Then follows a sub-exception with which we have no concern in the present case.) The only question we have to consider is whether the provisions of £20,000 and £1500 a year were incumbrances created by a disposition made by the deceased. It is clear that the word "disposition" is not used in the technical sense of Scots conveyancing. In section 22 (2) (b) the same expression is used, the enactment being: "A disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required."

What was the interest which Sir James Colquhoun (*secundus*) had in the estates upon which the provision of £20,000 and the annuity of £1500 was charged? He had no right of fee, his sole right being derived from the settlement of his father, Sir James (*primus*). Under it he was entitled to payment from the trustees of an annuity, increasing in amount with the corresponding diminution of heritable debts, from £4000 to £10,000 per annum. These were debts occasioned by the large purchases of land by the truster and the truster's father. The condition attached to Sir James (*secundus*) being entitled to this annuity was that he should allow the trustees to collect the rents of the entailed estates of Luss, to which he succeeded on his father's death. The annuity of £4000, it was declared by the settlement, was not to be in addition to, or over and above, the rents of the entailed estates, but in lieu and place thereof. The direction to the trustees was to hold the fee of the unentailed portion of the estates for behoof of the heir who should succeed to Sir James (*secundus*) in the entailed portion thereof.

The question with which we are concerned in the present case arises upon the terms of the sixth purpose of the trust-disposition and settlement of Sir James (*primus*). It directs the trustees, if asked by the testator's son, "to grant and deliver such deed or deeds as may be necessary for securing over my lands and estates hereby conveyed or any part thereof," i.e., the unentailed lands, an annuity not exceeding £1500 in favour of his son's widow, and a provision not exceeding, in the event of there being two

children other than the heir succeeding to the said lands and estate, of a sum of £20,000. Sir James (*primus*) died in 1873. His son, Sir James Colquhoun's (*secundus*), succeeded him. He requested his father's trustees to grant the deeds necessary to secure the provisions to his children and an annuity to his wife. They did so.

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Lord Mac-
kenzie.

Upon this narrative I think the conclusion follows that these encumbrances were not created by a disposition made by the deceased, nor were they created out of the interest of the deceased in the estate. His interest in the estate was that of an annuitant. The fact that he asked his father's trustees to grant the deeds in question is not, in my opinion, sufficient to bring them within the exception in section 7 (1) (a).

Queries 2 and 3 should, in my opinion, be answered in the negative for the reasons stated in the contentions of the second party to the case. The first parties are not entitled under section 14 (1) to recover from the second party an amount equal to the proper rateable part of the estate-duty paid by the first parties; the second party is not a person from whom a rateable part of the estate-duty can be so recovered, and is therefore not bound under section 14 (3) by the accounts and valuations as settled between Sir Alan or his trustees and the Inland Revenue. The result of my opinion is that Sir Alan, when he fixed with the Inland Revenue, under section 1, the principal value of the property which passed on the death of his predecessor, Sir James (*secundus*), should have insisted on his right to deduct from the value of the property the amount of the provisions and annuity in terms of section 7 (1). He would, in my opinion, have successfully contested that they did not fall within the exception in section 7 (1) (a). Taking this view, it is unnecessary to consider the separate point that was made in argument as to the effect of its being a "free" annuity that is provided to the widow. This is all we have to decide in the present case, and in order to arrive at a conclusion it is not necessary to anticipate any questions that may arise between the Inland Revenue and the second and third parties.

THE COURT answered the first question in the affirmative and the second and third questions in the negative.

MACRAE, FLETT, & RENNIE, W.S.—J. S. & J. W. FRASER-TYTTLER, W.S.—Agents.

THE CALEDONIAN RAILWAY COMPANY, Complainers (Reclaimers).— No. 118.
Clyde, K.C.—Hon. W. Watson.

HUGH SYMINGTON, Respondent.—*Murray, K.C.—Macmillan, K.C.—* May 13, 1913.
D. Jamieson.

Process—Proof—Diligence for recovery of writs—Confidentiality—Letters by party's law-agents to arbiters and employees of party—Similar business-book entries.

Caledonian
Railway Co.
v. Symington.

In an action of suspension and interdict by a railway company against a quarrymaster, the question at issue being whether the freestone on a certain estate was a mineral, the respondent averred that more than sixty years before the present dispute had arisen the freestone was regarded and treated as a mineral by the complainers in claims and arbitration proceedings between them and the proprietors from whom they acquired the lands. A proof having been allowed, the respon-

May 13, 1913.

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Railway Co.
v. Symington.

dent applied for a diligence to recover (1) letters from the complainers' law-agents to arbiters, engineers, contractors, and officials employed by, or acting on behalf of, the complainers in such claims and arbitrations, and tending to show whether the complainers regarded the freestone as a mineral or otherwise, and (2) entries in the business-books of the complainers' law-agents referring to the same transactions.

Circumstances in which the Court (altering judgment of Lord Cullen) granted the diligence, expressly reserving all questions of confidentiality.

2D DIVISION.
Lord Cullen.

THE CALEDONIAN RAILWAY COMPANY, owners of part of the estate of Woodhouse, which they had acquired in 1852, under the Caledonian Railway Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845, under a conveyance which excluded minerals, brought an action of suspension and interdict against Hugh Symington, lessee of the right of "quarrying for and removing freestone rock" upon the estate of Woodhouse, to restrain him from working the freestone upon that estate.

In defence it was averred that the freestone on the estate was a mineral, in respect that it was of exceptional quality, that at the time when the land was purchased by the complainers freestone was universally regarded as a mineral, and that "in selling and purchasing respectively the land in question both the sellers and the complainers treated with each other, in respect of the said freestone rock, on the footing that it was admittedly a mineral within the meaning and for the purposes of the said Railways Clauses Act."

The respondent further averred that where railway companies, including the complainers, desired to take rock, they treated expressly with the proprietors therefor, and paid a special price for the rock in addition to the price paid for the land. Specific instances were given where, in claims and arbitration proceedings, this practice had been followed by the complainers from 1845 onwards in connection with freestone taken by them on the estate of Woodhouse and on the adjacent estates of Cove and Mount Annan.

After sundry procedure a proof was allowed.¹ Thereafter the respondent made several applications to the Lord Ordinary (Cullen) for diligences for the recovery of documents. The fourth specification of documents (with which alone this report is concerned) called for the letter-books and business ledgers kept by Messrs Hope, Todd, & Kirk, the complainers' law-agents, and their predecessors, that excerpts might be taken (I.) of all letters passing between the law-agents, and (a) arbiters, oversmen, or clerks acting in arbitrations between the complainers and the proprietors after mentioned, (b) engineers employed by the complainers, (c) contractors employed by the complainers, (d) officials in the complainers' employment, and containing references to freestone as a mineral or otherwise, and tending to show whether the complainers regarded freestone as a mineral or otherwise in dealing with such proprietors and their claims, or containing instructions and reports regarding claims made by such proprietors in respect of freestone or sandstone used by the complainers or their contractors in connection with the construction of their railways, or in any way relating to such claims, or the arbitration proceedings following thereon, viz. :—(a) the proprietors of Woodhouse estate between the years 1845 and 1868; (b) the proprietors of (1) Burnfoot, (2) Kirkpatrick, (3)

¹ 1911 S. C. 552, *revd.* 1912 S. C. (H. L.) 9. See also 1912 S. C. 1033.

Cove, (4) Barncleugh, (5) Longbedholm, and (6) Mossknowe, between May 18, 1913. said years; and (c) the proprietors of Mount Annan estate between the years 1845 and 1875; (II.) of all entries in the business ledgers kept by the complainers' law-agents relating to instructions, communications, and reports passing between the complainers' law-agents and the persons above mentioned relative to such claims and arbitration proceedings, or to meetings with reference to such claims. Caledonian Railway Co. v. Symington.

On 19th December 1912 the Lord Ordinary granted a diligence for recovery of the letters passing between the complainers' law-agents and the arbiters, oversmen, and clerks relating to the matters specified, and *quoad ultra* refused the specification.

The complainers, having obtained leave, reclaimed, and the case was heard before the Second Division (without Lord Salvesen) on 18th January 1913.

Argued for the complainers;—The specification should have been disallowed *in toto*. It was now settled law both in England and in Scotland that all communications passing between a client and his solicitor in his professional capacity were protected from disclosure, even though made before any dispute had arisen with regard to the matters therein referred to.¹ This rule applied to all the documents called for. Arbiters nominated by the complainers were in reality their representatives and confidential advisers, and their letters were privileged. Engineers, contractors, and officials of the railway company were in the same position, and the complainers could not be called on to disclose private reports which they had made in the course of their business. Finally, the ledgers of the complainers' law-agents fell in terms within the rule as being a record of professional work done on behalf of their clients.

Argued for the respondent;—The whole-specification should be allowed. The rule of law formulated by the complainers was indisputable, but it did not apply to the present case. It was a rule "confined entirely to communications which take place for the purpose of obtaining legal advice from professional persons,"² and therefore did not protect letters and reports from arbiters, engineers, or reporters. Such letters and reports would be privileged only if made for the purpose of a litigation, and if called for in the course of that litigation. But the purpose for which they were now being sought was quite distinct from the purpose for which they were made. Then, the question was, how much should be paid for the freestone as a mineral? Now, the question was whether freestone was a mineral at all, which partly depended on how it was regarded at the time when the lands were acquired.³ This was a historical fact of which the best evidence, at this interval of time, was to be found in the letters called for. In any event, the letters from the arbiters should be allowed, since it could not be maintained that an arbiter,

¹ Bower v. Russell, May 26, 1810 F. C.; Lady Bath's Executors v. Johnston, Nov. 10, 1811 F. C.; Lumsdaine v. Balfour, (1828) 7 S. 7; McCowan v. Wright, (1852) 15 D. 229, *per* Lord Wood, at p. 237; Munro v. Fraser, (1858) 21 D. 103; Greenough v. Gaskell, (1833) 1 Mylne & Keen, 98, *per* Lord Chancellor Brougham, at p. 103; Begg on Law-Agents, 2nd ed.) p. 317.

² Wheeler v. Le Marchant, (1881) 17 Ch. D. 675, *per* Brett, L.J., at p. 683; Taylor on Evidence, (10th ed.) sec. 911.

³ North British Railway Co. v. Budhill Coal and Sandstone Co., 1910 S. C. (H. L.) 1, *per* Lord Chancellor Loreburn, at p. 4.

May 18, 1913. even though nominated by a party, was in the position of that party's agent.

Caledonian
Railway Co.
v. Symington. At advising on 29th January 1913 the opinion of the Court was delivered by the

LORD JUSTICE-CLERK.—The Lord Ordinary in dealing with the fourth specification of documents called for by the respondent has allowed the specification in so far as it calls for letters between the law-agents and arbiters, but *quoad ultra* has disallowed it. On leave granted, the complainers have reclaimed and the respondent has also taken advantage of the reclaiming note.

In the argument before us, both the complainers and the respondent founded on the opinion of Lord President M'Neill in the case of *Munro v. Fraser*.¹ His Lordship said: "The general rule is, that communications passing between client and agent are confidential. A party is entitled to have advice and to communicate with his law adviser confidentially, and such communication is not to be laid open except in particular circumstances and questions," and he added, "each case of course rests on its particular circumstances."

It is plain that the litigant who is desirous to have a specification sanctioned, cannot have it sanctioned in such form as will lay open to him confidential advice given to his opponent or his opponent's predecessors. But on the other hand, I think it equally plain that in endeavouring to recover what may be called historical facts, a litigant cannot be debarred from obtaining those parts of any document which are not of a confidential character. A letter which conveys information as to facts only might be admissible. Also a letter which in part states facts, and which in part is confidential, can, if the statements of fact are separable in the language from that which is confidential, be excerpted and made available to the party seeking to ascertain facts. For example, suppose that in a case relating to minerals there should be a letter—or its press copy in a letter-book—containing a quotation from a report of an expert regarding the character in fact of a particular bore made to ascertain the nature of the ground below the surface, it would appear to me that the recovery of such a statement of fact, occurring in a letter written in the far past, could be fairly granted, means being taken by sealing up, or by copying, of giving that information, while excluding all, which was not fact, but comment or suggestion. Accordingly, it appears to the Court that the Lord Ordinary, in dealing with the specification which is now before the Court, has gone too far in disallowing altogether the portions which he has refused.

There are here special circumstances which make it necessary that the letter-books and business ledgers called for in the specification, should be exhibited, reserving the question of confidentiality of any excerpt made by the Commissioner for the consideration of the Lord Ordinary.

In the first place, the purpose of the proof which has been allowed must be kept in view. The respondent, Hugh Symington, avers in answer 11, "In selling and purchasing respectively the land in question, both the

¹ 21 D. 103, at p. 107.

sellers and the complainers treated with each other, in respect of the said May 13, 1913. freestone rock, on the footing that it was admittedly a mineral within the meaning and for the purposes of the said Railways Clauses Act." Thus the inquiry, in connection with which the diligence is asked, relates to transactions alleged to have taken place at a time when, it is said, no dispute existed, or, owing to the views then held by all parties, could have existed; and when, therefore, no occasion arose for confidential communications or consultations between agent and client, or between employer and employed, in regard to that matter.

Caledonian
Railway Co.
v. Symington.
Lord Justice-
Clerk.

The next special circumstance is the period, in some cases extending over more than sixty years, to which the investigation relates. Obviously no oral evidence is now obtainable from any of the parties to the earlier of these transactions. This fact might, however, have been negligible had the documents forming the primary evidence of the transactions been in existence. But it is admitted that these, so far as consisting, for example, of the proceedings in arbitrations, have been destroyed in ordinary course. If the respondent is to prove the averments remitted to probation, it must be, to some extent at least, by secondary evidence.

But it does not follow that the respondent is entitled to unrestricted access to the whole documents called for by him. There may be documents falling under the diligence to which, in whole or in part, the objection of confidentiality will apply. We think the proper course is to grant the diligence as craved, expressly reserving all questions of confidentiality to be determined by the Lord Ordinary. The letter-books and business ledgers will be examined by the Commissioner, who will make excerpts of such letters and entries as fall under the call, and these excerpted letters and entries (so far as objection is taken to their being produced) will be admitted or excluded in whole or in part by the Lord Ordinary according to his view of whether they are or are not confidential.

This is the opinion of the Court.

THE COURT recalled the interlocutor reclaimed against and granted a diligence for recovery of the documents called for in the specification as originally lodged, "expressly reserving all questions of confidentiality," and remitted the cause to the Lord Ordinary to proceed.

The diligence was thereafter executed, and the following documents, relating to transactions and arbitrations in regard to the various estates mentioned in the specification, were, *inter alia*, produced to the Commissioner (Crabb Watt, K.C.) :—

I. Copies taken from the letter-books of the complainers' law-agents of letters addressed by them to (a) arbiters and oversmen, (b) engineers, (c) contractors, (d) the directors, manager, treasurer, secretary, assistant secretary, local law-agents, parliamentary agents, valuers, counsel, and witnesses, of or employed by the complainers.

II. Excerpts from the business ledgers of the complainers' law-agents containing the accounts incurred to them in connection with the transactions and arbitrations in regard to the estates in question.*

* In his report to the Lord Ordinary the Commissioner stated :—"The Commissioner desires to explain that the letters to the parliamentary agents

May 13, 1913. The complainers objected to all the foregoing documents on the ground that they were wholly confidential, and they also objected that no discrimination was made between letters which specifically referred to sandstone and those which did not, or between letters parts of which might, in the opinion of the Court, be confidential, and those which did not fall into such a category.

Caledonian
Railway Co.
v. Symington.

On 13th May 1913 the Lord Ordinary repelled the complainers' objections *in toto*, and allowed all the documents to be recovered. His decision was acquiesced in by the parties.

HOPE, TODD, & KIRK, W.S.—DOVE, LOCKHART, & SMART, S.S.C.—Agents.

No. 119. ROBERT M'ALLEY AND ANOTHER, Pursuers (Reclaimers).—*Dunbar*.
JAMES ROBERTSON AND OTHERS (John Charles Robson Marshall's
Trustees), Defenders (Respondents).—*J. H. Millar*.

May 13, 1913.

M'Alley v.
Marshall's
Trustees.

Process—Reclaiming note—Competency—Timeous lodging of reclaiming note—Final interlocutor—Court of Session (Scotland) Act, 1850 (13 and 14 Vict. cap. 36), sec. 11—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 53.

An action reclaimed to the Inner House was settled by a joint minute in terms of which the Division pronounced an interlocutor decerning against the defenders for payment of a certain sum, finding the pursuers entitled to expenses up to and including the date of the Lord Ordinary's interlocutor, remitting the account thereof to the Auditor to tax and to report to the Lord Ordinary, and remitting the cause to his Lordship with power to decern for the taxed amount of the account.

The Lord Ordinary thereafter pronounced an interlocutor in which he repelled objections by the pursuers to the Auditor's report, decerned against the defenders for the taxed amount of the account, and found the pursuers liable in the expenses of discussing the note of objections.

A reclaiming note against this interlocutor *held* not to have been timeously lodged in respect that it had not been lodged within ten days, and *refused*.

Cowper v. Callender, (1872) 10 Macph. 353, *followed*.

and the local law-agents have been admitted because it is possible the Court may regard them as officials *pro hac vice* of the complainers. He further explains that the letters to the local law-agents, counsel, witnesses, engineers, and directors, have been admitted—(1) because they 'in any way relate to instructions and reports of officials of the complainers, or to communications or meetings (including trials or arbitrations) with reference to the claims made and the arbitration proceedings following thereon'; (2) because they tend to show the footing on which the parties were transacting and arbitrating with regard to freestone; and (3) because, fulfilling the conditions in (1) and (2), they reconstruct to some extent the arbitrations of which the primary evidence has been destroyed or lost. The witnesses particularised in the lists seem to have been called with reference, *inter alia*, to freestone. In some of the letters what is historical is mixed up with what may be called 'instruction.' Others refer to documents such as reports of bores that were intended to figure in the proceedings. . . . David Rankine, the treasurer of the complainers, and John Collister, C.E., may be taken as the types of another class of officials whose letters seem to detail the working out of the awards given in the arbitrations. Further, the great mass of letters are merely historical, as, for example, the instructions to counsel."

ON 31st January 1913, in an action brought by Robert M'Alley and May 18, 1913.
 another against James Robertson and others, the trustees and execu-
 tors of John Charles Robson Marshall, the First Division, proceeding ^{M'Alley v.}
 on a joint minute of the parties, refused a reclaiming note for the ^{Marshall's}
 defenders against an interlocutor of the Lord Ordinary (Cullen) of ^{Trustees.}
 24th July 1912, and in terms of the joint minute pronounced the ^{1st Division.}
 following interlocutor:—" . . . Decern against the defenders for ^{Lord Cullen.}
 payment to the pursuers of the sum of £688, 9s. 10d., with interest
 thereon at 5 per cent from 3rd August 1910 till paid: Find the pur-
 suers entitled to their expenses up to and including 24th July 1912,
 and remit the account thereof to the Auditor to tax and to report to
 the Lord Ordinary, to whom remit the cause to proceed as accords,
 with power to his Lordship to decern for the taxed amount of said
 account."

The pursuers thereafter lodged a note of objections to the Auditor's
 report on their account of expenses, and on 19th March 1913 the
 Lord Ordinary pronounced an interlocutor in the following terms:—
 "The Lord Ordinary having heard counsel for the parties on the note
 of objections . . . Repels said objections: Approves of the said
 report and decerns against the defenders for payment to the pursuers
 of the sum of £539, 3s. 10d., the taxed amount thereof."

On 24th April 1913, being the second box-day in the spring vaca-
 tion, the pursuers lodged a reclaiming note against this interlocutor.

On the calling of the case in Single Bills of the First Division on
 13th May 1913, objection was taken by the defenders to the com-
 petency of the reclaiming note.*

Argued for the defenders;—It was doubtful whether any reclaim-
 ing note was competent against the Lord Ordinary's interlocutor, as
 it was purely executorial,¹ but, even if competent, the present reclaim-
 ing note was not timeously lodged, as it should have been lodged
 within ten days, or, as vacation began within that period, on the first
 box-day of the vacation.²

Argued for the pursuers;—The interlocutor reclaimed against was

* The Court of Session Act, 1850 (13 and 14 Vict. cap. 36), enacts:—
 Sec. 11. "It shall not be competent to reclaim against any interlocutor of
 the Lord Ordinary, at any time after the expiration of ten days from the
 date of signing such interlocutor, with the exception only of reclaiming
 notes against interlocutors disposing in whole or in part of the merits of the
 cause, and against decrees in absence, which reclaiming notes shall continue
 to be competent in like manner as at the passing of this Act."

The Court of Session Act, 1868 (31 and 32 Vict. cap. 100), enacts:—
 Sec. 53. "It shall be held that the whole cause has been decided in the
 Outer House when an interlocutor has been pronounced by the Lord Ord-
 inary, which, either by itself, or taken along with a previous interlocutor or
 interlocutors, disposes of the whole subject-matter of the cause, or of the
 competition between the parties in a process of competition, although judg-
 ment shall not have been pronounced upon all the questions of law or fact
 raised in the cause; but it shall not prevent a cause from being held as so
 decided that expenses, if found due, have not been taxed, modified, or
 decerned for. . . ."

¹ Inglis v. National Bank of Scotland, 1911 S. C. 6, Lord President, at
 p. 8; Stirling-Maxwell's Trustees v. Kirkintilloch Police Commissioners,
 (1883) 11 R. 1.

² Court of Session Act, 1850, sec. 11; Court of Session Act, 1868, sec.
 53; Cowper v. Callender, (1872) 10 Macph. 353.

May 13, 1913. a final interlocutor against which a reclaiming note might be presented within twenty-one days.¹ That being so, it was timeously lodged on the second box-day. It was not a purely executorial interlocutor, because it dealt with objections to the Auditor's report, and for this purpose the Lord Ordinary had to apply his mind to a question not previously considered.² The case of *Cowper v. Callender*³ had been overruled.¹

M'Alley v.
Marshall's
Trustees.

LORD PRESIDENT.—In this case I do not find it necessary to say anything upon the question whether the interlocutor reclaimed against is of the nature of a final interlocutor. That question is discussed in the opinion which I delivered in *Inglis v. National Bank of Scotland*.⁴ The question whether this reclaiming note should have been presented within ten days or within twenty-one is decided by the case of *Cowper v. Callender*,⁵ which we must follow.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

THE COURT pronounced an interlocutor in the following terms:—

"Having heard counsel for the parties on defenders' objection to the competency of pursuers' reclaiming note, sustain the objection: Hold that the said reclaiming note has not been timeously lodged: Refuse the same," &c.

HENDERSON & MUNRO, W.S.—MACKENZIE & KERMACK, W.S.—Agents.

No. 120.

JOHN KING, Pursuer (Respondent).—*J. Macdonald*.

May 16, 1913.

ARNISTON COAL COMPANY, LIMITED, Defenders (Appellants).—

Horne, K.C.—Hon. W. Watson.

King v.
Arniston Coal
Co., Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (3), Second Schedule (9)—Act of Sederunt, 26th June 1907, secs. 11 (1) and 12—Arbitration to obtain award of compensation—Simultaneous application for warrant to record memorandum of agreement—Conjunction—Competency—Process.

A workman presented an application in the Sheriff Court for warrant to record a memorandum of agreement for payment of compensation under the Workmen's Compensation Act, 1906, in respect of an accident. The genuineness of the memorandum was disputed by his employers. While the application was pending he initiated arbitration proceedings to obtain an award of compensation under the Act in respect of the same accident.

Held that the two proceedings could not competently be conjoined, and that the arbitration should be sisted until the application for the warrant had been determined.

2D DIVISION.
Sheriff of the
Lothians and
Peebles.

IN an application for warrant to record a memorandum of agreement for payment of compensation under the Workmen's Compensation Act, 1906, presented in the Sheriff Court at Edinburgh by John King, brusher, Gorebridge (the genuineness of the agreement being

¹ *Crellin's Trustee v. Muirhead's Judicial Factor*, (1893) 21 R. 21.

² *Stirling-Maxwell's Trustees v. Kirkintilloch Police Commissioners*, 11 R. 1, *per* Lord President Inglis, at p. 2; *Taylor's Trustees v. M'Gairgan*, (1896) 23 R. 738.

³ 10 Macph. 353.

⁴ 1911 S. C. 6.

disputed by his employers, the Arniston Coal Company, Limited), May 16, 1913. the Sheriff-substitute (Guy) pronounced an interlocutor conjoining the application with a pending arbitration between the same parties at the instance of the workman, in which the workman sought to obtain an award of compensation under the Act in respect of the same accident. At the request of the employers the Sheriff-substitute stated a case for appeal.

King v.
Arniston Coal
Co., Limited.

The case set forth that on 16th October 1912 the respondent lodged a memorandum of agreement with the Sheriff-clerk at Edinburgh to be recorded in terms of the Workmen's Compensation Act, 1906. The memorandum bore that the appellants had agreed to pay, and the respondent had agreed to accept, 14s. weekly as the compensation to which he was entitled under the Act, commencing on 9th May 1912, in respect of an accidental injury sustained by the respondent while in the employment of the appellants. The appellants lodged a minute of objections in which they stated that the memorandum was "not genuine, in respect that no agreement was entered into between the parties such as stated in the memorandum. It is explained and averred that on 28th May 1912 the respondents admitted liability to pay compensation under the Workmen's Compensation Act, 1906, and agreed to pay, and the claimant agreed to accept, compensation at the rate of 14s. per week in respect of such accident, it being a material term of said agreement that at the first or any subsequent payment of weekly compensation to the claimant by the respondents liability was admitted only for the compensation to date of payment, and that further liability, if any, would be determined week by week when application for payment was made, and that this was the only agreement entered into between the parties."

On 13th December 1912 the Sheriff-substitute allowed a proof.

On 12th December 1912 the respondent instituted arbitration proceedings in the Sheriff Court at Edinburgh by an initial writ, in which he craved the Court to award compensation in respect of the same accident in terms of the Act. He lodged a condescendence, *inter alia*, setting forth the circumstances of the accident, averring that he continued totally incapacitated for work, and admitting payment by the appellants of all compensation to which he was entitled up to 16th December. The 3rd, 6th, and 9th articles of his condescendence were in the following terms:—

"3. The said accident was duly reported to the defenders, and on or about 28th May 1912 the parties agreed that the pursuer's average weekly earnings were 28s., and the defenders agreed to pay him 14s. a week as compensation under the Workmen's Compensation Act, 1906, being 50 per cent thereof.

"6. The pursuer's wife received the first payment of compensation on 28th May 1912. When the pursuer began to call himself at the defenders' office he was not informed that there was any special condition attached to the payment of compensation. When, however, he caused his agent to have the agreement, as he understood it, presented for recording, the defenders objected to the recording thereof, on the ground that it was a material term of said agreement, that, at the first or any subsequent payment of weekly compensation to the claimant by the respondents, liability was admitted only for the compensation to date of payment, and that further liability, if any, would be determined week by week when application for payment was made. The pursuer was unaware of any such condition being printed on any

May 16, 1913. sheet he signed on getting his weekly payments, and he never assented thereto. Reference is made to the pleadings in the application to record a memorandum.

King v.
Arniston Coal
Co., Limited.

"9. As the defenders refuse to continue payment of the agreed-on compensation, and as the parties have never concluded an agreement, this action is necessary."

To this condescendence the appellants, on 31st December, lodged answers, in which they admitted the accident to the respondent, denied that the respondent continued totally unfit for work, and admitted the payment of all compensation to which he was entitled up to 16th December. The appellants' answers to the 3rd, 6th, and 9th articles of the respondent's condescendence were in the following terms:—

"3. Admitted that the accident was reported to defenders. *Quoad ultra* denied.

"6. The proceedings in the application to record are referred to, beyond which no admission is made.

"9. Admitted that defenders refused to continue payment of compensation at 14s. per week beyond 16th December 1912. *Quoad ultra* denied."

The appellants did not plead or maintain that it was incompetent to proceed with the arbitration until the application to record the memorandum of agreement had been disposed of.

On 10th January 1913 a motion was made for the respondent to conjoin the arbitration and the application to record the memorandum, and this motion was opposed by the appellants as incompetent. A motion was made for the appellants to have proof fixed in the arbitration on the same day as that fixed in the application to record the memorandum.

The case proceeded:—"Having made avizandum, I thereafter conjoined the said arbitrations, and pronounced the following interlocutor in the application to record:—" *Edinburgh, 16th January 1913.*—The Sheriff-substitute conjoins with this application to record a memorandum of agreement the application presently depending in this Court at the instance of the claimant to fix compensation, and the following interlocutor in the application for an award of compensation:—" *Edinburgh, 16th January 1913.*—The Sheriff-substitute, having heard parties' procurators, and seen the condescendence and answers lodged, allows a proof and appoints the cause to be heard, tried, and determined on Thursday, 6th February 1913, at 10.30 A.M. within the Sheriff Court House, Edinburgh; conjoins this application with the application presently depending in this Court at the instance of the claimant for warrant to record a memorandum of agreement."

"In so acting I held that I was competently exercising a discretionary power. I was of opinion that if the appellants succeeded in establishing their defence to the recording of the pursuer's memorandum then the way would be clear for the respondent to have his claim for compensation determined. I was also of opinion that conjunction of the arbitrations would save expense to both parties, one proof between the same parties as to the same accident serving to determine the rights of parties, instead of two proofs with many of the same facts requiring to be deponed to twice."

The question of law for the opinion of the Court was:—"In the circumstances was it competent for me to conjoin the foresaid applications?"

The case was heard before the Second Division on 16th May 1913. May 16, 1913.

LORD JUSTICE-CLERK.—I think there is no doubt that the course taken by the Sheriff in conjoining these two sets of proceedings—I do not call them actions—is incompetent. There are two modes under the Workmen's Compensation Act by which a man may obtain compensation. If there is an agreement between him and his employers he may get that agreement recorded. By the other mode, where there is no agreement, there is a process by which the facts are ascertained, and the Sheriff then gives his judgment upon them and awards compensation if he thinks it is due. These two modes seem to me to be absolutely inconsistent with one another, and if either party is to maintain that there is an agreement, his opponent is entitled to be free from any other process until that is decided; because the question of an agreement is a question which must be decided before you can proceed logically to discuss the question whether there is liability or not.

King v.
Arncliffe Coal
Co., Limited.

Now in this case the position is that the claimant began by tabling a memorandum of agreement, to which his employers objected in respect that it did not correctly represent the terms of the agreement between the parties; nevertheless he tabled that memorandum in Court, and proposed to have an inquiry upon it. Then he proceeded by an ordinary initial writ to originate an arbitration for the purpose of establishing that he was entitled to compensation, and of determining what that compensation should be. Now that was the only arbitration in question; the other was not an arbitration, but merely a process to ascertain the fact whether there was an agreement and, if so, what it was.

In the arbitration proceedings the claimant makes the clear averment that he brings the case because there is no agreement. He says that "as the parties have never concluded an agreement this action is necessary." Then we find ourselves in this position, that according to the view of the Sheriff-substitute both these cases, one of which is departed from upon the face of the claimant's own pleading in the arbitration, are still to stand, and that the two are to be conjoined on the sole ground of saving expense. I do not see how that would save expense. It is quite certain that it will add to the expense if it be the case that there is an agreement; because, if the whole proof is taken in both matters, and if the evidence in regard to liability, and the nature of the accident and how it was caused, and whether the pursuer is entitled to recover having regard to his own conduct, is gone into, it will involve a considerable amount of expense which will be absolutely wasted if there is an agreement.

Accordingly I understand it has been the practice in all these cases where it is averred that there is an agreement, that if the injured party chooses to raise an arbitration, the question whether there is a binding agreement must be settled first, and the proceedings in the arbitration must be sisted until that question has been determined. It seems to me that is the simple mode of dealing with the matter, and it has always been followed in proceedings in such circumstances. Therefore I am of opinion that the question put to us should be answered in the negative.

LORD DUNDAS.—I entirely agree.

May 16, 1913. **LORD SALVESSEN.**—I also am of the same opinion. The Sheriff-substitute has conjoined a proceeding which is not an arbitration with an arbitration and appointed proof in both proceedings as if they were capable of being embodied in one. Now I think that is a fundamental mistake. The second proceeding is not competent at all if the first proceeding is well founded. It may be competent for the workman (I express no opinion on that point) to present an application for arbitration in the event of his failing in his initial proceeding; but, if so, the proper way to deal with it, after he has presented it, is to sist it until it has been determined whether the memorandum of agreement, which he has already presented for registration, is or is not a genuine memorandum within the meaning of the Act.

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LORD GUTHRIE.—I am of the same opinion. The Sheriff seems to have had in view, in coming to the result he did, the desirability of saving expense to both parties; but it would appear that any order, which results in the whole of the questions raised in the two proceedings being taken together, would, at least in the event of the memorandum being held good, involve very great additional expense, because in that case the whole expense incurred in the second action would be thrown away. However, the question immediately before us is whether conjunction is competent, and I agree that it is not competent to conjoin the two proceedings, because by statute the one can only be brought on the footing that the statement in the other is not correct.

THE COURT answered the question of law in the negative.

T. J. CONNOLLY, Solicitor—W. & J. BURNES, W.S.—Agents.

No. 121.

ROBERT MICKEL, Pursuer (Respondent).—*Horne, K.C.*—*D. P. Fleming.*

May 16, 1913.

MRS SARAH M'COARD, Defender (Appellant).—*M'Lennan, K.C.*—*MacRobert.*

Mickel v.
M'Coard.

Lease—Occupation—Tenant's duty to preserve subject let from injury—Duty to turn off water when leaving house empty.

Held that the tenant of a villa, who left it unoccupied for a month in winter without having either turned off the water and emptied the cisterns or informed the landlord of her intended absence, was liable to the landlord for damage caused by the bursting of the water-pipes owing to frost.

2D DIVISION.
Sheriff of
Lanarkshire.

IN June 1911 Robert Mickel, timber merchant and property owner, Glasgow, brought an action in the Sheriff Court at Glasgow against Mrs Sarah M'Coard, concluding for payment of £350.

The facts of the case (so far as bearing on the question of liability, with which alone this report is concerned), as ultimately held to be proved, were as follows:—The defender became tenant of a self-contained villa at 22 Larch Road, Dumbreck, Glasgow, belonging to the pursuer, as at Whitsunday 1909, and continued to be tenant thereof until Whitsunday 1911. On 25th December 1909 the defender vacated the villa, leaving no one in it, and went to Dunblane, taking with her the keys. Before leaving, the defender's son, James M'Coard,

looked for an inside stop-cock in the house in order to turn off the water. There was no inside stop-cock, the only means of turning off the water being a "toby" or stop-cock in the street, outside the garden gate. When James M'Coard failed to find a stop-cock, no steps were taken to have the water turned off from the main, nor was the pursuer informed that the house was being left empty. The house was left empty, and without firing or airing, until 26th January 1910. On that date the constable on the beat discovered that water was flowing from the house, and on the house being entered, it was found that the water came from three separate bursts that had taken place in the pipes, owing to the water in them having been frozen during the defender's absence. Considerable damage was caused to the house by the flow of water, for the recovery of which the action was brought.

May 16, 1913.
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M'Coard.

The pursuer pleaded, *inter alia*;—(1) The defender being the tenant of the said dwelling-house under the pursuer was bound to occupy and to keep the same fired and aired, and to take all reasonable precautions against damage to the premises. (2) The defender having failed continuously to occupy the said premises and to keep the same fired and aired, and having deserted the occupancy of the said house during winter weather without making adequate preparation for the prevention of burst pipes therein, whereby damage was caused to the pursuer's property let to the defender, he is entitled to reparation from the defender therefor.

The defender pleaded, *inter alia*;—(2) No damage having been done to the pursuer's property through the fault or negligence of the defender, or anyone for whom she is responsible, decree of absolvitor should be granted with expenses.

On 15th February 1912 the Sheriff-substitute (Craigie), after a proof, found that the damage was caused through the negligence of the defender, and assessed the amount at £100, for which sum he granted decree.*

The defender appealed to the Court of Session, and the case was heard before the Second Division on 13th and 14th March and 13th, 14th, and 16th May 1913.

Argued for the appellant;—There was no general rule to the effect that a tenant, on leaving a house for a short period, was bound to leave anyone in it to keep it fired and aired.¹ He was only bound to act reasonably for the purpose of preserving it from harm. In this case the defender had acted reasonably. Her son had looked for a stop-cock for the purpose of turning off the water, and when he found there was no means of turning off the water in the house the defender was entitled to infer that the landlord did not intend her to have anything to do in the matter. The defender was not bound to search for a stop-cock outside the house, and if the pursuer omitted to supply the usual device of an inside stop-cock, he could not hold the defender to blame for not turning off the water. The risk of pipes bursting through frost, like the risk of fire, was a risk incidental to ownership, and lay upon the landlord.

Argued for the respondent;—As a general rule a tenant was bound "to use a reasonable degree of diligence" in preserving a house from

* The Sheriff-substitute indicated in his findings in fact and in his note that one of the main points in which the defender had been negligent was her failure to fire and air the house during her absence.

¹ Whitelaw v. Fulton, (1871) 10 Macph. 27.

May 16, 1913. harm,¹ which included the duty of keeping it fired and aired.² A tenant was not acting reasonably who left a house empty at a time of year when frost might be expected, without turning off the water and emptying the cisterns, or without at least informing the landlord of his absence, so that the landlord might take the necessary precautions.

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LORD DUNDAS.—This case arises out of an unfortunate dispute between a landlord and a tenant at Dumbreck. I say unfortunate, because the possible amount of money involved seems altogether disproportionate to the expenses which must have been incurred in carrying on the case. One cannot help regretting that the parties did not see their way to settle their dispute out of Court upon some reasonable footing, by the exercise of some good sense and mutual concession. But the case is here, and we must dispose of it. We have had a very full and excellent argument from all the four counsel who addressed us; and as we are all of one mind as to the result at which we ought to arrive, I think it is better to give judgment now and save the parties further delay, anxiety, and expense, even if the remarks which are made now may not be so full as might have been the case if we had taken the matter to *avizandum* and written detailed judgments. The first question is whether there is liability in damages on the part of the defender here at all. On that matter one must look at the facts, which on that point are quite clear. It appears that the defender and the household left this house on or about 25th December 1909 for a holiday. I think they only intended to be away some ten days, but in point of fact the holiday extended into at least a month. The house was left absolutely empty at a frosty period of the year. The keys were taken away to Dunblane. Before leaving, no effectual steps were taken by the defender to turn off the water, and the risk was therefore incurred of bursting pipes at that season of the year; nor did the defender or any of the household think it worth while to inform the landlord that they were going away. I do not think it is necessary to lay down any absolute general rule of liability in such cases. Mr Erskine puts it broadly that the tenant of a house is bound to use a reasonable degree of diligence in preserving it from harm; and, as an illustration of that undoubted law, it may well be that a tenant while in the legal occupation of a house runs a risk of liability if he fails to do what is reasonably necessary to fire and air it and keep it as it should be kept. Here, Mr M'Coard did proceed to look for the toby to turn the water off, which shows that he recognised that this would be a sensible thing to do. But he did not find it, and not finding it I think the risk was taken of what might happen by leaving the water on. The defender might at least have sent a postcard to the landlord to say that she was going away; but she did not do so, and several bursts were discovered in full operation on 26th January 1910, with the result that damage was done. I think on that state of the facts it would be idle to dispute that primarily liability was on the defender, as was argued for the pursuer, and as the Sheriff-substitute has held.

¹ Ersk. Inst., ii. 6, 43.

² Smith v. Henderson, (1897) 24 R. 1102; Whitelaw v. Fulton, 10 Macph. 27; Rankine on Leases, (2nd ed.) p. 223.

But I think the difficulties in the case arise when one comes to try to May 16, 1913. estimate the amount of the damage, and to deal with the considerations on Mickal v. the one side and on the other which ought to weigh with us in arriving at M'Coard. the true measure and amount of the damage.—[His Lordship then dealt with the assessment of damages, with which this report is not concerned.]

LORD SALVESEN.—I entirely agree in the result at which your Lordship has arrived. I think the Sheriff-substitute has not appreciated the true ground of liability, although he has properly found that the defender was to blame for part of the damage which arose through the bursting of these pipes. The only finding that he has on the subject is as follows :—“That on 25th December 1909 the defender vacated said house and left no person therein to fire or air the house, and that she continued thus to vacate it until 26th January 1910”; and that he holds to constitute negligence in law. I do not think the premises warrant the conclusion.

The duty of a tenant with regard to firing and airing is to do such firing and airing as is necessary to preserve the house from damp. It is not *per se* a breach of his duty to leave the house empty for a month or two months without firing or airing. If the house does not suffer from the want of firing or airing there is no liability on the part of the tenant towards the landlord; nor can he be compelled to put on fires or air the house. Something may depend on the nature of the subject let, which may require more firing and airing than other subjects; but I do not think it can be affirmed as a general proposition in law that it is negligence on the part of a tenant to leave a house for a period of a month without doing anything in the way of firing and airing.

But then I think, according to the rule laid down by Erskine, that a tenant must use a reasonable degree of diligence in preserving the house from injury. The tenant here failed in her duty. She left the house, taking the keys with her, in the depth of winter, when the pipes were most likely to be exposed to freezing, and she took no precautions to prevent the injury that might arise from the water in the pipes freezing and bursting the pipes and causing a leakage. She was quite alive to the risks, because before she left the house her son went to ascertain whether there was a stop-cock by means of which he could shut off the water. If he had found such a stop-cock he would, according to his own account, have prevented the water from the main from getting into the house, and he would also have run the water out of the cistern. The house would then have been left in a safe condition, even if there were severe frost. But finding no stop-cock, and thinking, apparently, that there was a legal obligation on the landlord to provide such a stop-cock if he wished to avoid the risk of his pipes freezing and the water escaping from the burst pipes, he did nothing further. In the particular circumstances of this case I do not think it was the defender's duty to have searched for the toby outside or to have turned off the water there. In the first place she had not been furnished by the landlord with any means of turning the water off at the toby; she had not even been told that such a toby existed. Accordingly I think she would have fulfilled her duty to her landlord, and used reasonable care in the protection of her landlord's property, if she had notified the landlord that she was going away leaving nobody

May 16, 1913. in charge, and that, if anything required to be done in the way of shutting off the water supply and emptying the pipes, the landlord must see to it that it was done. The landlord did not know that she was leaving, and he was entitled, in the absence of such a notification, to assume that the tenant was remaining in occupation, and that if anything occurred, such as the bursting of the water-pipes, he would be immediately notified by the persons who were occupying the house.

Mickel v.
M'Coard.

Lord Salvesen.

Accordingly, the duty which I think the tenant failed to perform towards her landlord was the duty of intimating to him that she was going to leave the house unoccupied and uncared for, and with the cistern and pipes still connected with the water supply. Had she made this intimation, the landlord could have taken means to guard against the risk of bursting pipes, a duty he could not reasonably expect the tenant to perform in the circumstances already narrated.—[His Lordship then dealt with the assessment of damages.]

LORD GUTHRIE.—I agree with your Lordships, both on the points on which your Lordships agree with the Sheriff-substitute and on the points on which you find him wrong. I think that the pursuer is entitled to damages, but that he himself was in fault as well as the defender, and that his fault must be taken into account in estimating the amount of the damages.

In regard to the defender's fault the Sheriff holds that the initial blame was on her, and I think he rightly so holds. But then, as your Lordships have pointed out, he mistakes the nature of the blame. The second finding is: "That on 25th December 1909 the defender vacated said house and left no person therein to fire and air the house, and that she continued thus to vacate it until 26th January 1910." In my view, the failure was of another kind, namely, that, leaving this house for a month in winter, the weather at the time being frosty, she failed either to turn off the water or to intimate the closing of the house to the landlord. The question is a jury one—whether she took or did not take reasonable precautions for the safety of the property let to her. It seems to me that the injury which occurred was not only a possible one, as in the case of gas being left not turned off, but it was ordinary, familiar, and probable. She answers that there were no means inside the house of cutting off the water, and that no key had been given for the outside toby and no information tendered to her about it. That is no answer to the pursuer's alternative suggestion, that, assuming it to be so, she ought to have given intimation to the landlord. Mr M'Coard's view was that the felting should have been sufficient to prevent any possible burst from frost. But the pipes are felted on the assumption that, if the water is allowed to remain on, the house will be occupied and firing and airing will take place. It appears to me, therefore, that the defender has no answer to the liability the Sheriff has found, although I think on the wrong ground, for the initial injury which took place.—[His Lordship then dealt with the assessment of damages.]

The LORD JUSTICE-CLERK concurred.

THE COURT recalled the interlocutor of the Sheriff-substitute, and after findings in fact which are summarised in the preceding

narrative, found in law that "the defender, having left the villa May 16, 1913. empty between 25th December 1909 and 26th January 1910, without having turned off the water, or informed the landlord of her intended absence, is responsible for the damage caused thereby," assessed the damage due by the defender at £50, and decerned against her for that sum. Mickel v. M'Coard.

WM. B. RANKIN, W.S.—CUMMING & DUFF, S.S.C.—Agents.

SIR COLIN GEORGE MACRAE, Petitioner.—*Hon. W. Watson.*

No. 122.

DAVID LEITH, Respondent.—*W. T. Watson.*

May 21, 1913.

Right in Security—Heritable Security—Bondholder in possession under decree of maills and duties—Right to delivery of leases and other estate documents—Retention—Factor's right to retain estate documents in security of debt due by estate—Agent and Principal—Law-agent. Macrae v. Leith.

Held that a bondholder in possession of a landed estate under a decree of maills and duties was entitled to obtain delivery of the leases and other estate documents showing the contractual relations between the landlord and his tenants, for the purpose of enabling the bondholder to appear as a party to proceedings in the Land Court; and that the factor on the estate had no right to retain the leases or documents in security of a debt due to him by the estate.

Observed by the Lord President that the only person who has such a right of retention available against everyone is a law-agent.

On 11th December 1912 Sir Colin George Macrae, W.S., presented a 1st Division. petition to the Court in which he prayed that David Leith, Wick, should be ordained to deliver to the petitioner "the whole leases, writs, books, accounts, vouchers, and all other documents whatever, of or in connection with the estate of Thrumster, to which the petitioner, as heritable creditor in possession, has right, and in the possession or under the control of the said David Leith."

The petition narrated that the petitioner was in right of a bond and disposition in security granted by the now deceased Robert Innes of Thrumster over the said estate, and that "The principal sum and interest due under the said bond and disposition in security having fallen into arrear, the petitioner, on 1st June 1911, obtained decree in an action of maills and duties at his instance in the Court of Session, whereby it was found and declared that the petitioner had right to the rents, maills, and duties of the said estate of Thrumster, and the petitioner entered on possession under said decree, and proceeded to draw the rents in virtue thereof. The petitioner has, notwithstanding his foresaid right, been hindered, and to a considerable extent frustrated, in his endeavours to recover the said rents, maills, and duties through the want of the leases, accounts, and other documents belonging to the estate which are in the possession of Mr David Leith, of the Savings Bank, Wick, who refuses to deliver or even to exhibit them, alleging a right of lien over the same." It was then narrated that the estate of Thrumster was vested in certain trustees; that one of the latter had been formally appointed to be factor on the estate, but that this gentleman having recently left for Australia, "the whole leases, books, and papers connected with the estate fell into the hands of the said David Leith, who now claims that he is entitled to retain them in respect of a balance

May 21, 1913. which he alleges to be due to him as factor by the trustees, of whom he is one."

Macrae v.
Leith.

The petition further stated:—

"The petitioner submits that no lien exists in the circumstances on which the said David Leith can found a claim to retain the documents, seeing that he was not factor on the estate, and was disqualified from accepting the office or acting as factor in virtue of his being Assessor for the county of Caithness.

"Further, the petitioner believes and avers that no such balance is due as is alleged, but that, on the contrary, a very considerable balance is payable by Mr Leith to the trustees. Mr Leith refuses to exhibit his accounts, and the petitioner has never had any opportunity of knowing how the alleged balance is arrived at.

"The necessity of obtaining the said documents has recently become a matter of extreme urgency, owing to intimation having been received by the petitioner that the Land Court appointed under the Small Landholders Act of 1911 is to begin its sittings in Wick on the 13th September next, for the purpose of adjudicating on claims by the landholders and statutory small tenants on the estate of Thrumster for valuation or revaluation of holdings under the provisions of the said Act. No less than fifty-four claims have been lodged by small tenants on the estate of Thrumster, and the petitioner finds it essential to have immediate access to the said leases, books, and other documents of the estate for the purpose of answering these claims. The petitioner has applied to the said David Leith on more than one occasion for production of these documents, but the said David Leith declines to comply with his request unless and until a sum of £112 is paid to him as aforesaid, and the petitioner avers that the said David Leith is using the circumstances of the present Land Court inquiry as an occasion for causing the petitioner inconvenience and prejudice, and thereby obliging him to pay the said amount."

Answers were lodged by Mr Leith in which it was stated that he was factor on the estate, and had been recognised as such by the petitioner. It was also stated that the true sum in which the estate was indebted to him was £95, 16s. 3d., and that no sum was due by him to the estate. The answers contained this passage:—"The said books, documents, and others referred to in the petition are the property of the trustees on said estate, and the petitioner, as a mere encumbrancer thereon, has no right or title to delivery thereof. Moreover, the respondent, as factor on said estate, has a good and valid lien thereon, and cannot be compelled to part therewith until his just and lawful claims against the said estate are satisfied."

Counsel were heard upon the petition and answers before the First Division (consisting of the Lord President, Lord Dundas, and Lord Johnston) on 21st January 1913.

Argued for the petitioner;—The respondent was not factor on the estate of Thrumster, and had therefore no title to possession of the estate documents. But assuming him to be the factor, he had, in that capacity, no lien upon the estate documents in his hands for debts due to him by the estate. The only lien of this class known to the law of Scotland was that of a law-agent in respect of his business account, and the Court should not extend the scope of this lien by making it available to factors. It was not on the assignation to writs or on the assignation to rents contained in the bond and disposition, as was

assumed in the respondent's argument, that the petitioner based his claim, but on the conveyance of the lands contained in the bond and disposition. The petitioner was, as far as title went, the heritable proprietor of the lands. He was entitled also, by virtue of his decree, to uplift the rents stipulated for in the leases. The petitioner required the documents in question for his appearance as a party at proceedings in the Land Court, where he had an interest and a title to appear.¹

Argued for the respondent;—The petitioner's claim was founded on the assignation to writs contained in the bond and disposition in security. That assignation was only to the titles,² and was not to the documents called for in the petition. But, assuming that the petitioner was under the assignation to writs entitled to recover the leases, his right did not extend further to the books and other documents he claimed. In any case, he could only recover what was assigned to him at the date of the bond. He could not recover leases whose date was subsequent thereto. Further, the assignation to the rents did not justify the present claim. Were it otherwise, that assignation would put the bondholder in possession in the place of the proprietor, to the effect of enabling him to uplift the rents without the necessity of obtaining a decree of mails and duties. The petitioner could not make a greater demand upon the respondent than could his own constituents, the heritable proprietors of Thrumster, and these proprietors would not be in a position to recover from the respondent the documents called for, in respect that he had an agent's lien over them, and was entitled to retain them until his claim for indemnity against the estate was satisfied.³

At advising on 28th January 1913,—

LORD PRESIDENT.—This is a petition at the instance of Sir Colin Macrae, and it asks for an order upon the respondent, David Leith, to deliver to the petitioner the whole leases, writs, books, accounts, vouchers, and all other documents whatever, of or in connection with the estate of Thrumster, to which the petitioner, as heritable creditor in possession, has right, and which are in the possession or under the control of the said David Leith.

The petitioner is a trustee, who is the holder of a bond and disposition in security in ordinary form granted by a predecessor of the present possessors of the estate of Thrumster. The estate at this moment is in the hands of trustees so far as the title is concerned, but the interest on the bond not having been duly paid, the petitioner on 1st June 1911 entered into possession by means of a decree in an action of mails and duties, and is now in possession under the decree. The estate was managed by the trustees through a factor, and the respondent, Mr Leith, in his answers alleges that he is factor. The reason why the petitioner asks for these various documents is that a sitting of the Land Court has been arranged

¹ Small Landholders (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 49), sec. 7 (10).

² Titles to Lands Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), sec. 119; Juridical Styles, (5th ed.) vol. 1, p. 29; Gloag & Irvine on Rights in Security, p. 90; Schaw v. Blacks, (1888) 26 S. L. R. 545.

³ Glendinning v. Hope & Co., 1911 S. C. (H. L.) 73, per Lord Kinnear, at p. 78.

May 21, 1913. for this part of the country, and various tenants are in the course of making applications for reduction of rent. The petitioner wishes to appear at the Land Court in order to be heard. Now, the petitioner's interest in that matter is quite clear. He is in possession under his decree of mails and duties, and if a rent is reduced by the Land Court he will, of course, get less at the next term when he uplifts. I think his title and interest to appear would have been sufficiently evident even if nothing had been said in the Small Landholders Act; but the matter is made perfectly clear by the Act itself, because it provides—section 7 (10)—with reference to the orders which the Land Court can make for settling a fair rent that, before making such an order, the Land Court shall give all parties having a right or interest in the land an opportunity of being heard. Now that clearly gives a title to the bondholder. He is in possession under his decree in the action of mails and duties, and his reason for wishing the documents is obviously legitimate.

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Leith.

Ld. President.

The petition is resisted by the respondent upon two grounds. In the first place he says that the petitioner has no right as heritable creditor to the various estate documents. I shall have a word or two to say afterwards as to the nature of the documents, but for the moment I am going to take the simplest documents, namely, the leases, and the respondent contends that the petitioner has no right to the leases. I think that is an entire mistake, and the only way in which the argument became possible was that at first it rather seemed from some words used in the petition as if the demand were based upon the clause of assignation of writs. I do not think the clause of assignation of writs has anything to do with it. The bondholder under a bond and disposition in security has got a conveyance of the estate. It is a conveyance which is redeemable, although irredeemable in a certain set of circumstances—the old well-known form of words, “heritably and redeemably, but irredeemably in the case after mentioned,” shows that. There is also a clause of assignation of rents, but although the assignation of rents is a clause in common form, I do not think it would have made any difference if there had not been any such clause. That is clearly indicated by Erakine (iv. 1, 49), who says that the action of mails and duties “is competent, not only to a proprietor who has a feudal right perfected by seisin, but to a simple disponee or assignee; because a right to the rents is included virtually under a disposition of the lands.”

Now there is here a disposition of the lands. It is only a redeemable disposition and may be got rid of. I think it follows that anything that the petitioner may get here does not go to him as his property. He merely gets the right to use it for legitimate purposes. Take the ordinary and most simple case, where a man is in possession of a decree of mails and duties, and goes to the tenant and says, “There is my decree, pay me your rent of £50” or whatever it is, and the tenant says, “No, my rent is not £50, it is £25.” How is that question to be determined unless the demand for the lease is granted? The learned counsel for the respondent tried to say that the ordinary custom was to go to the Valuation-roll. No doubt for convenience it is; but, after all, the Valuation-roll has got no more to do with the question than a directory has, and the action of mails and duties has been part of the law of Scotland for hundreds of years, whereas the

Valuation-roll came into being only in 1854. That part of the argument May 21, 1913. therefore was quite inept.

But then the respondent went on to contend that, notwithstanding, he had a right of retention as factor. Now it seems very doubtful from the documents produced before us whether this gentleman is factor or not. That he has been acting as factor is pretty clear, but that he holds the position of factor is more than doubtful. I do not think it necessary to go into that question. I assume that he is factor. What right has he to resist the production of the leases which he holds? The only person, according to the law of Scotland, who has got such a right against all and every other person is a law-agent, and he doubtless has that right even against the heritable creditor, although the heritable creditor's infestment was dated long before the law-agent's account was incurred. That was settled a very long time ago by the case of the *Creditors of Hamilton of Provenhall*,¹ and that case has been followed and regretted ever since, and in the various judgments—I do not need to quote them, there is a whole series of them which deal with that case—the learned Judges have always said that they cannot go back on the *Creditors of Provenhall*,¹ because it was settled so long ago, but that the doctrine is never to go one whit further, and certainly it has never been extended to anyone other than a law-agent. It was pled that the effect of the case of *Glendinning v. Hope & Company*,² which was decided in the House of Lords about two years ago, was to extend that rule. I do not think that case has anything to do with it. That decision was based on the old doctrine that where there are contracts between A and B, A cannot call upon B to fulfil his part of either one or several contracts, while he, A, is refusing to fulfil his part of one or more of the contracts. In that case a stockbroker who refused to deliver a transfer which he had got was held to be entitled to refuse, because the client was himself refusing to pay under another stockbroking transaction. There is no contract whatever between this bondholder and the gentleman who calls himself factor. There is no question of mutual prestations between them, and therefore the case of *Glendinning*² has no application.

I now come to the question of what the petitioner is entitled to get. I do not think that the petitioner here can be blamed for having put his prayer in a general form, and for having used words which probably, indeed I might say certainly, go beyond the measure of his right, because, as he was refused all access to the documents, he really does not know what the respondent has got. I think the way out of that is very clear. It is to pronounce a summary order on the respondent to lodge an inventory of what he has got, and then the petitioner will be able to say what he conceives he is entitled to. But, in order to assist the parties, I may say generally that, while I think that the petitioner is entitled to have the leases, and every thing that shows the relation of contract between the estate and the tenant, I do not think he has any right to ask for estate documents which have been created simply for the proprietor's own uses, and which have nothing to do with the contract between him and his tenants, and therefore the crave for books and so on may go far beyond what the petitioner is entitled to

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Leith.

Ld. President.

¹ (1781) M. 6253.

² 1911 S. C. (H. L.) 73.

May 21, 1913. *get.* I do not think books are necessarily outside the crave, because it might be that a contract between the landlord and his tenant was made by an entry in the books; but ordinary books which are for the proprietor's own use, and for his own purposes, seem to me not to fall within the class of documents which the bondholder ought to get.

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LORD JOHNSTON.—I agree with your Lordship. I do not think that this gentleman is factor, although it is not necessary to decide that question, because there is a passage in his own answers which, I think, practically prevents him saying that he is so. But assuming that he is factor, it seems to me that the use of the term "factor's lien" is misleading. There is a common enough use of the expression "factor's lien," but the use is, I think, confined to cases of mercantile agency, and has not been extended beyond that. It was because in mercantile agency goods are often bought and sold, shipped and received, advances made thereon, and responsibilities undertaken thereon that the lien was given to mercantile agents over what could be turned into money, such as goods, claims, bills, and so on, and I do not think it has ever in practice been held that this factor's lien could or should extend to an estate manager, who is called in Scotland a factor, but who in England would be called a land-agent.

Now this gentleman pleads, and must plead, his alleged lien as high as if he were a law-agent. No case has arisen in Scotland in which the demand has been put forward. But I have come across a case in England to which I think it is worth while to draw attention. The report is so very brief that I may read it. It is the case of *Champernown v. Scott*,³ in which the precise question we have here came up for consideration. The case came before the Vice-Chancellor, Sir John Leach. "A motion was made that the defendant might deliver up books and papers. The defendant was a solicitor, and insisted that he had a lien upon them, and his answer stated that he received them in his capacity of steward of a manor, and not as solicitor. The Vice-Chancellor held that though a solicitor had a lien upon all papers delivered to him in that character, not only for professional business in the matter of the papers, but for all professional business whilst they remained in his hands, yet that he had no lien, as solicitor, on papers which he received as steward."

That seems to be exactly in point. And in accordance with it I hold that this alleged lien cannot be sustained.

The Lord President intimated that LORD DUNDAS (who was absent at advising) concurred in his opinion.

LORD KINNEAR and LORD MACKENZIE were present when the case was advised.

THE COURT pronounced the following interlocutor:—"Order the respondent, David Leith, within eight days to deliver up to the petitioner the whole leases mentioned in the prayer of the petition; and further, to lodge in process within eight days an

³ (1821) 6 Madd. 93, 22 R. R. 248.

inventory of all other writs and documents in his possession ; May 21, 1913.
and decern."

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On 21st May 1913 the Court, in respect that the respondent had now delivered up to the petitioner all the writs and documents required by him, dismissed the petition as unnecessary.

MACRAE, FLETT, & RENNIE, W.S.—MELVILLE & LINDSAY, W.S.—Agents.

ANGUS S. CLYNE, Pursuer (Respondent).—*Moncrieff, K.C.*—*T. G. Robertson.*

No. 123.

THE REVEREND CHARLES CHALMERS COWIE AND OTHERS (Adam Sharp's Trustees), Defenders (Appellants).—*Murray, K.C.*—*Hon. W. Watson.*

May 23, 1913.

Lease—Small Holdings—Statutory small tenant—Right to renewal of lease on determination of tenancy—Application to Land Court to renew lease and fix rent—Objection that tenancy not determined owing to tacit relocation—Small Landholders (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 49), sec. 32 (4).

Clyne v.
Sharp's
Trustees.

In August 1912 a tenant in occupation of a holding, whose lease had expired at Whitsunday without notice of removal either on his part or on that of the landlord, applied to the Land Court as a statutory small tenant under the Small Landholders (Scotland) Act, 1911 (which came into operation in April 1912), for an order renewing his lease and fixing an equitable rent. The Land Court fixed the period of renewal as from Whitsunday 1912. In an appeal by special case the landlord contended that the Land Court could only renew the lease as from Whitsunday 1913, in respect that under sec. 32 (4) of the Act, renewal could only be granted "on any determination of the tenancy," and that in the present case the tenancy did not terminate until Whitsunday 1913, having been continued to that date by tacit relocation.

Held that the determination of the Land Court was right, in respect that the Act itself, at the date when it came into operation, gave the tenant a right to a renewal of his tenancy at the expiry of his lease at Whitsunday 1912.

On 16th August 1912 Angus S. Clyne, farmer, Torraviasch, Caithness, as a "statutory small tenant" in a holding there, presented an application to the Land Court, under the Small Landholders (Scotland) Acts, 1886 to 1911, for an order renewing his tenancy and fixing an equitable rent to be paid by him for his holding. The proprietors of the holding were the Reverend Charles Chalmers Cowie and others, the testamentary trustees of Adam Sharp, of Clyth. The Land Court pronounced an order to take effect from Whitsunday 1912, and, on the request of the proprietors, stated a special case for the opinion of the First Division.*

1ST DIVISION.
Land Court.

The case stated as follows:—

"(2) The respondent became tenant of the said holding at the term of Whitsunday 1907, at a rent of £25 per annum, under a missive of lease for five years. The said lease expired through the running out of the said stipulated term of endurance at Whitsunday 1912. No notice of removal had been given by either party to the other in terms of the Agricultural Holdings Act, 1908. The respondent continued after Whitsunday 1912, and continues in possession

* The case was stated in terms of sec. 25 (2) of the Small Landholders (Scotland) Act, 1911.

May 23, 1913. of the holding. Nothing was done by either party in reference to the terms and conditions of the tenancy beginning at Whitsunday 1912, until the application referred to in the next paragraph was presented.

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"(3) The respondent's application to the Land Court was presented on 16th August 1912.

"(4) The application was duly served on the said trustees and was heard by the Land Court at Wick on 30th September 1912. No objection was taken to the competency of this application. Proof was led, and the holding inspected by members of the Court. Applicant asked renewal for one year: the proprietors asked that the term should be fixed at seven years. By consent of parties the period was fixed at seven years, subject to a break at the end of three years.

"(5) On 13th December 1912 the appellants received intimation from the Sheriff-clerk at Wick that the following final Order had been pronounced in the application by the Land Court:—'Edinburgh, 4th December 1912.—The Land Court having resumed consideration of this application, find that the applicant is a statutory small tenant in and of the holding described in the application, and that no ground of objection to the applicant as tenant has been stated: Therefore find that he is entitled to a renewal of his tenancy of the said holding, and to have an equitable rent fixed: And having considered all the circumstances of the case, holding, and district, fix and determine the period of renewal at seven years from the term of Whitsunday 1912, . . . and fix and determine the equitable annual rent payable by the applicant at Twenty pounds sterling, to run from the term of Whitsunday 1912.'

The contentions of parties were stated as follows:—

"6. The appellants object to the final Order of the Land Court (1) in so far as it fixes and determines the period of renewal of the respondent's tenancy of the holding as from the term of Whitsunday 1912, and (2) in so far as it reduces the rent of the holding as from the same term, and maintain that under the provisions of section 32 (4), (5), (6), and (7) of the Small Landholders (Scotland) Act, 1911, it was *ultra vires* of the Land Court to fix an equitable rent for, or the period of the respondent's tenancy of, the holding for the current year to Whitsunday 1913, in respect (a) that the respondent's existing tenancy has not 'determined,' and (b) that the respondent failed to give notice requisite to terminate his tenancy at Whitsunday 1912 in terms of the Agricultural Holdings (Scotland) Act, 1908. The appellants do not maintain that the term of removal must have arrived before the application is dealt with by the Land Court.

"7. The respondent maintains (1) that in virtue of the definition of the expression 'termination of the lease' contained in section 31 of the Act of 1911 and of section 2 (1) (iii.) the tenancy under the said lease terminated at Whitsunday 1912, and the Act of 1911 then applied to the holding, and that his renewed tenancy is from Whitsunday 1912, a tenancy to which subsections (4), (5), (6), (7), and (9) of section 32 apply; and (2) that neither the notice of removal prescribed by section 18 of the Agricultural Holdings Act, 1908, nor any other notice, is required to bring the Act of 1911 into operation."*

* The Small Landholders (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 49), enacts:—

Sec. 2. "Who to be Landholders.—(1) In the Crofters Acts and this Act

The questions of law were:—(1) Whether, on the facts as stated, May 23, 1913. and having regard to the provisions of the Small Landholders (Scotland) Act, 1911, the Land Court were entitled to fix the renewal of the respondent's tenancy of said holding and the equitable rent to be paid by him therefor, as from Whitsunday 1912? (2) Whether it is competent for the Land Court to entertain any application by the respondent for fixing an equitable rent and determining the period of renewal of the tenancy until he has given the notice of removal required to terminate an existing tenancy under the Agricultural Holdings (Scotland) Act, 1908, section 18?" Clyne v. Sharp's Trustees.

The case was heard before the First Division on 13th May 1913.

Argued for the appellants;—No notice of removal at the ish of the respondent's lease had been given as was required by the Agricultural Holdings Act, 1908, and the Land Court had erred in holding that that Act did not apply. In the absence of such notice the

(hereinafter referred to collectively as the Landholders Acts) the word 'holding' means and includes—

"(i.) As from the commencement of this Act, every holding which at the commencement of this Act is held by a crofter to whom in respect of such holding the Act of 1886 applies (hereinafter referred to as an existing crofter);

"(ii.) As from the commencement of this Act, and subject as hereinafter provided, every holding which at the commencement of this Act is held by a tenant from year to year who resides on or within two miles from the holding, and by himself or his family cultivates the holding with or without hired labour (hereinafter referred to as an existing yearly tenant);

"(iii.) As from the termination of the lease, and subject as hereinafter provided, every holding which at the commencement of this Act is held under a lease for a term longer than one year by a tenant who resides on or within two miles from the holding, and by himself or his family cultivates the holding with or without hired labour (such tenant, or his heir or successor, as the case may be, holding under the lease at the termination thereof being hereinafter referred to as a qualified leaseholder):

"Provided that such tenant from year to year or leaseholder—

"(a) shall (unless disqualified under section twenty-six of this Act) be held an existing yearly tenant or a qualified leaseholder within the meaning of this section in every case where it is agreed between the landlord and tenant or leaseholder, or in the event of dispute, proved to the satisfaction of the Land Court, that such tenant or leaseholder or his predecessor in the same family has provided or paid for the whole or the greater part of the buildings or other permanent improvements on the holding without receiving from the landlord or any predecessor in title payment or fair consideration therefor; and

"(b) in every other case shall not be held an existing yearly tenant or a qualified leaseholder within the meaning of this section, but shall (unless disqualified under section twenty-six of this Act) in respect of the holding be subject to the provisions of this Act regarding statutory small tenants;

"(iv.) As from the date of registration, every holding which is constituted by the registration of an applicant in respect thereof on his application under the provisions of this Act respecting

May 23, 1913. respondent's existing tenancy under that lease was renewed by tacit relocation for the year ending Whitsunday 1913.¹ At that term, but not until then, was the respondent entitled as a "statutory small tenant" under the Small Landholders (Scotland) Act, 1911, to a renewal of his lease at a fair rent, because under section 32 (4) it was only on the "determination of the tenancy" that the right emerged, and the tenancy did not terminate until Whitsunday 1913.

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Argued for the respondent;—Independently of any notice the respondent's tenancy was terminated at Whitsunday 1912 by force of the Small Landholders Act, 1911, the old status of tenancy being replaced by a new status with statutory rights. The respondent's status under the Act being that of a statutory small tenant, an order fixing the terms and conditions of renewal of his tenancy, on the statutory determination thereof as at Whitsunday 1912, had been

the constitution of new holdings (hereinafter referred to as a new holder).

"(2) In the Landholders Acts the word 'landholder' means and includes, as from the respective dates above mentioned, every existing crofter, every existing yearly tenant, every qualified leaseholder, and every new holder, and the successors of every such person in the holding being his heirs or legatees."

Sec. 31 (1). ". . . The expression 'termination of the lease' means the expiration of the lease through the running out of the stipulated term of endurance or through the parties, or either of them, exercising their right to take advantage of a break stipulated for in the lease or through any agreement between the parties being made, or other circumstances arising whereby the lease is terminated. . . ."

Sec. 32. "*Provisions as to statutory Small Tenants.*—With respect to statutory small tenants, the following provisions shall have effect:—

"(1) A statutory small tenant means and includes a tenant from year to year, or leaseholder, not otherwise disqualified in terms of this Act, in regard to whom section two of this Act provides that he shall not be held an existing yearly tenant or a qualified leaseholder, and the successors of such tenant or leaseholder in the holding, being his heirs, legatees (if within the relationship specified in section sixteen of the Act of 1886), or assignees (if assignation be permitted by the lease):

"(2) Except so far as expressly applied by this Act, the Landholders Acts shall not apply to statutory small tenants:

"(4) Except in any case where the landlord satisfies the Land Court that there is reasonable ground of objection to a statutory small tenant (hereinafter in this section referred to as the tenant) and the Land Court find accordingly, the tenant for the time being shall, notwithstanding any agreement to the contrary, be entitled on any determination of the tenancy to a renewal thereof on the terms and conditions hereinafter specified:

"(5) Except so far as varied by this section, the Agricultural Holdings (Scotland) Acts, 1908 and 1910, shall apply in the case of the tenancy of a statutory small tenant in the same manner as if the tenancy were a lease, and, for the purposes of those Acts and otherwise, the tenancy, as renewed from time to time, shall be deemed to be a lease current for the period of renewal:

"(6) Subject to the provisions of the last-mentioned Acts and of this

¹ Agricultural Holdings (Scotland) Act, 1908 (8 Edw. VII. cap. 64), sec. 18 (2); Ersk. ii. 6, 35 and 44.

competently pronounced by the Land Court, upon his application May 23, 1913. made in exercise of rights conferred by the Act.¹ It was only subject to the provisions of the Act that the doctrine of tacit relocation could be appealed to,² and under the Act the fact that no notice of removal had been given by tenant or landlord did not effect a continuation of the old lease. Clyne v. Sharp's Trustees.

At advising on 23rd May 1913,—

LORD PRESIDENT.—This is a special case stated by the Land Court requesting your Lordships' opinion upon a question of law. The facts upon which the matter arises are these. Angus Clyne was tenant of a holding upon the estate of Clyth, the proprietors of which are certain testamentary trustees. Clyne became tenant of the holding at a rent of £25 a year at Whitsunday 1907, under a missive of lease for five years. The ish of the lease was, accordingly, Whitsunday 1912. No notice of removal was given either by the landlord or the tenant before that term, but on 16th December 1911—that is to say, not quite six months before the ish of the lease, the Small Landholders (Scotland) Act was passed, which came into operation on the 1st April 1912. Nothing happened as between the parties at the time of the expiry of the tenancy, but on 16th August 1912 Clyne presented an application to the Land Court, asking the Land Court to fix the term of renewal of the tenancy and the equitable rent. The Land Court having considered the application, pronounced an order or judgment in which they found that the applicant was a statutory small tenant: "Therefore find that he is entitled to a renewal of his tenancy of the said holding, and to have an equitable rent fixed: And having considered all the circumstances of the case, holding, and district, fix and determine the period of renewal at seven years from the term of Whitsunday 1912"—I leave out other matters which are not of moment—"and fix and determine the equitable annual rent payable by the applicant at £20 sterling, to run from the term of Whitsunday 1912."

The point of law upon which our judgment is asked is whether that order was *intra vires* of the Land Court in respect that it made a new tenancy, or renewal of tenancy, run from Whitsunday 1912. The contention of the proprietors before your Lordships was that that was impossible, because the moment that the term of Whitsunday 1912 arrived—no notice having been

section, the landlord and the tenant may agree upon the terms and conditions of the renewed tenancy:

- "(7) Failing agreement, the landlord or the tenant may apply to the Land Court to fix an equitable rent, or to fix the period for which the tenancy is to be renewed, and the Land Court may thereafter determine the rent to be paid by the tenant, or the period of renewal, or both, as the case may be:
- "(9) Subject as aforesaid, the terms and conditions of the renewed tenancy shall (except so far as agreed to be varied) be those of the determining tenancy, in the same way and to the same effect, as nearly as may be, as if the tenancy had been continued for the full period of renewal under tacit relocation, and the tenant shall be entitled, if he so desires, to a renewal on those terms and conditions."

¹ Sec. 32 (4) and (7).

² Sec. 32 (6) (9).

May 23, 1913. given—a new tenancy was *ipso facto* constituted for one year by tacit relocation, and that, although the Land Court had a power to ordain a renewal of a tenancy where a person was a statutory small tenant—which they did not deny that this man was—yet they could only arrange for a renewal of the existing tenancy. Now the existing tenancy, according to the argument, was a tenancy that began at Whitsunday 1912 and only expired at Whitsunday 1913; and therefore the landlords argued that this judgment of the Land Court was *ultra vires*, inasmuch as, instead of dealing with the tenancy as from Whitsunday 1913, it dealt with it as from Whitsunday 1912.

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Ld. President.

The matter depends entirely upon the provisions of the Small Landholders (Scotland) Act, and this is the first time we have had an opportunity of considering its provisions. The scheme of the Act, or rather the way in which the provisions of the Act are arranged, is somewhat peculiar. The Act begins by reading in the expression "landholder" into the Crofters Acts, and then it goes on, in section 2, to define what a landholder is. It first of all says that the word "holding" means and includes every holding which is held by a crofter. That we have nothing to do with in this case. Then it goes on (subhead (ii.) of section 2 (1)) to include tenants from year to year—[His Lordship read the subhead]. I pause to note that, if the matter stopped there and we had nothing more, that would bring every yearly tenant in Scotland within the purview of the Act. Then subhead (iii.) deals with those who have leases—[His Lordship read the subhead]. There again, if nothing else was said, that would bring in every leaseholder in Scotland. But I may, without actually reading them, at once give the effect of subsequent sections of the Act by saying that many persons are excluded by what is called disqualification, and one of the disqualifications which prevent a person being an existing yearly tenant or a qualified leaseholder is where his holding is worth more than £50 a year. Accordingly, whereas, with the first breath, the whole existing leases in Scotland are brought in, by a subsequent part of the Act they are all cut out so far as they represent holdings worth over £50 a year. But the point which I think is to be noted is this—that the period at which the inquiry is to be made to find out whether people are within the statutory classes of existing yearly tenants or qualified leaseholders is at the commencement of the Act—in other words, it is the date of 1st April 1912 that once and for all fixes the character of existing yearly tenant and qualified leaseholder. But although the section has defined existing yearly tenants and qualified leaseholders in the way in which I have just read, yet it goes on, in words which I shall gloss instead of reading, to say that they shall only be so considered if they have made their own improvements; but that if the landlord has made the improvements instead of them, then, although they are existing yearly tenants and qualified leaseholders by force of definition, yet they shall not be held to be such, but instead they shall be subject to the provisions of the Act regarding statutory small tenants.

Now, I shall apply the definitions of the statute to the facts here, before I go further, for the sake of simplicity. That matter seems to me very clear. Mr Clyne was a person who, on 1st April 1912, held land under a lease for a term longer than one year, he resided upon the holding, and cul-

tivated it himself and the holding was not worth more than £50 a year. May 23, 1913. Accordingly, he quite clearly fell within the definition of subhead (iii.) of section 2 (1)—that is to say, he was a qualified leaseholder. But then we are told that, as a matter of fact, Mr Clyne had not made his own improvements. Accordingly, under the provisions of clause (b) of section 2 (1) (iii.), although he is a qualified leaseholder, he cannot be held to be a qualified leaseholder, but he is a person to whom the provisions of the Act applying to statutory small tenants applied. The position of Mr Clyne being thus defined, we are at once sent to the portion of the Act which tells us what is the position of a statutory small tenant, namely, section 32. That section begins, "With respect to statutory small tenants, the following provisions shall have effect." The first subsection is practically a repetition of the definition which I have already extracted from the different provisions of section 2. Then, leaving out some subsections which I do not need to read, I come to subsection (4)—[His Lordship read the subsection]. Then there is a provision that the terms and conditions of the renewed tenancy may be fixed, if the parties so choose, by agreement; and then it is provided—[His Lordship read subsections 7 and 9].

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Ld. President.

Now I think that the effect of those provisions is not doubtful. We have, as I have already pointed out, to look at the date of 1st April 1912 to find out whether Mr Clyne was within the Act or not. On considering the circumstances of his case, we find that at 1st April 1912 he was a qualified leaseholder, who, in the somewhat curious terms of the Act, is not to be held to be a qualified leaseholder, and he was a person, therefore, to whom the provisions as to statutory small tenants applied. He could not get the benefit of his right of renewal until his lease expired, and accordingly he did not get what you may call a practical right under the Act until Whitsunday 1912; but as soon as the Whitsunday term arrived, it seems to me that he was, in terms of the Act, notwithstanding any agreement to the contrary, "entitled . . . to a renewal thereof on the terms and conditions hereinafter specified" (section 32 (4)). And the terms and conditions after specified were that, failing agreement between the parties—and no agreement here is alleged—all the conditions of the old lease were to remain as before, except only that the tenant had a right to ask the Land Court to fix for him the period of the renewed lease and the rent which he was to pay under it. Now he did both those things, and I think he went quite timeously to the Land Court, for he really went almost as soon as the Land Court was constituted. Accordingly, I think the Order of the Land Court was justified.

My view is that under the Act a person in this condition is entitled, as soon as his lease has expired, to this statutory right of renewal, and that this statutory right of renewal, so to speak, suspends the operation of what I may call common law tacit relocation, which, under these circumstances, would have taken place if the Act had not been passed. I say "suspends," because I can imagine that, if no application at all was made to the Land Court, and if nothing else was said, and if the man simply went on year after year, it might be that he would be sitting under tacit relocation, he not having taken advantage of the provisions of the Act. And I think that that consideration gets rid of the difficulties which were suggested in

May 28, 1913. argument as to what would have happened if the tenant had gone on for years and then come to the Land Court. I think that in that case it would have been found that he was too late. I think a person may disable himself from taking advantage of the provisions of the Act of Parliament by

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Ld. President. not being timeous. But here there was nothing of that sort. The fallacy, I think, of the argument for the landlord—which, upon the first statement of it, seemed convincing—lies in this, that it really presupposes that the right which the man gets to the renewed tenancy is a right which he gets from the Land Court on application. I do not think he does. I think he gets the right *ipso facto* under the statute and that all that the Land Court does is to fix certain terms of the lease—very weighty ones certainly, namely, the *ish* and the rent; but, nevertheless, the lease itself—the renewed tenancy—depends upon the provisions of the statute and not upon the decision of the Land Court. That view really gets rid of the seeming difficulty which was put interrogatively in the argument, namely, on what title was this man sitting during, say, the month of June. “Tacit relocation,” said the landlord. But I think the answer is that he was not. He was sitting under a statutory renewal of which the terms had not yet been fixed.

That being my opinion, I think the Land Court decided rightly on this matter, and that we should answer the question put to us in the affirmative.

LORD KINNEAR.—I agree with your Lordship for the reasons which you have stated, and I do not think it necessary to repeat them in other words.

LORD JOHNSTON.—I also agree with your Lordship, but, with some hesitation, I shall give my own view upon one part of the case. I have felt the difficulty, perhaps more strongly than your Lordship, which arises on a portion of the Act with which your Lordship has dealt, but I have been relieved by considerations which are somewhat different from those which your Lordship has stated.

The difficulty which I have experienced is in reconciling the common law idea of tacit relocation with the particular provisions of this 32nd section. Because it has seemed to me that if the judgment of the Land Court is correct, there is an opening for a tenant to sit on until the term arrives and then to say—“After all, I do not want this renewed and I am going away,” and so to leave the landlord at the term in the lurch without a tenant. Let me turn to the provisions of section 32 of the Act. In the first place, in subsection (4) there is the expression “on any determination of the tenancy,” and that at once raises the question, why should the interpretation clause in section 31 use the expression “termination of the lease,” when one does not find “termination of the lease” used in section 32 (4) but a different term—“determination of the tenancy.” I think that that difficulty may be got rid of by this consideration, that the determination of the tenancy includes not only the termination of the lease, but also the determination of a tenancy precedent to a statutory extension of the lease under the provisions of section 32. But then subsection (5) raises a much greater difficulty in respect that it declares the provisions of this section to be subject to all the provisions of the Agricultural Holdings Acts, 1908 and 1910. Amongst

other things these Acts not only recognise tacit relocation but make special provision for statutory notices to take the place of the common law notices required to prevent tacit relocation, and it is somewhat difficult to see how these provisions can apply to a current lease or to a tenancy extended under the Act and yet that the tenant should be entitled to delay until after the determination of the lease, when, *ex hypothesi*, tacit relocation must have taken place, without giving notice that he wants reconsideration of the terms of his tenancy. But I think that the difficulty is obviated by this consideration: I think tacit relocation has in a case such as the present really taken place, and that the tenant who has allowed the proper time of notice to pass without giving notice has become tenant for at least another year in terms of subsection (5); but there is this expression in the beginning of subsection (5): "Except so far as varied by this section." And I think that tacit relocation, though it has occurred, is so far affected by this subsection that it is tacit relocation of the holding on the terms and conditions of the lease, all except those two items which the tenant or landlord, as the case may be, may call on the Land Court to determine for them under subsection (7), namely, the rent and the duration. And in that way the idea of tacit relocation may be reconciled with the provisions of this section of the statute.

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Ld. Johnston.

For these reasons I agree with your Lordship in thinking that the judgment of the Land Court is sound.

LORD MACKENZIE.—The only question which need be decided in this case is the first. The appellants contend that the Land Court had no power to fix a rent for the respondent's holding as from Whitsunday 1912, when the period fixed by the lease expired. Their argument is that from Whitsunday 1912 down to Whitsunday 1913 Clyne held by tacit relocation; and that there accordingly was for that year a legal tack the terms of which could not be altered. This contention appears to me not to be consistent with the provisions of the statute. The title of the respondent to the benefits of the Act (which came into operation on 1st April 1912) was that of a leaseholder, and under 2 (1) (iii.) (b) a statutory small tenant. His title could not be that of a tenant from year to year at the commencement of the Act, because the lease stipulated in the lease was subsequent to the date when the Act came into operation. If, however, he was a leaseholder, the date of the "termination of the lease" means (under section 31 (1)) the expiration of the lease through the running out of the stipulated term of endurance, that is to say, Whitsunday 1912. This under section 32 (4) was the "determination of the tenancy." That expression was, in my opinion, used in that subsection because different classes are being dealt with, and it was intended to cover termination of the lease in the case of the leaseholders, as well as the expiry of the year in the case of a tenant from year to year. The true construction of the Act is, in my opinion, this:—On the Act coming into operation a right vested in the parties entitled under section 2, postponed only, in the case of leaseholders, to the termination of the existing lease, and in the case of tenants from year to year, to the expiry of the year then current. The right which so vested could be made effectual by an application to the Land Court. To this

May 23, 1913. extent the Act innovates upon the doctrine of tacit relocation. It is not necessary to decide what effect the doctrine of tacit relocation would have if the person in whom the right vested delayed, after the right had vested, in making his application.

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In the present case I think it was not incompetent for the Land Court to do what they did.

THE COURT answered the first question in the affirmative, and found it unnecessary to answer the second question.

GORDON, FALCONER, & FAIRWEATHER, W.S.—J. & A. F. ADAM, W.S.—Agents.

No. 124. HUGH CARMICHAEL AND JAMES CARMICHAEL, Pursuers (Respondents).
—*Moncrieff, K.C.—Morton.*

May 23, 1913. DUNCAN MACCOLL, Defender (Appellant).—*Chree, K.C.—Macgregor.*

Carmichaels
v. Maccoll.

Lease—Small holdings—Statutory small tenant—Joint tenants—Small Landholders (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 49), secs. 2 (1) (iii.) (b) and 26 (8).

Held that the provisions of sec. 32 of the Small Landholders (Scotland) Act, 1911, as to statutory small tenants applied to the case of a holding which at the commencement of the Act was held by joint tenants, and continued to be held by the same tenants at the date of their application to the Land Court.

1ST DIVISION. ON 18th June 1912 Hugh Carmichael and James Carmichael, joint tenants of a farm on the estate of Achindoun, in the county of Argyll, presented an application as "statutory small tenants" of their holding, to the Land Court under the Small Landholders (Scotland) Act, 1911, for an Order, *inter alia*, fixing a fair rent for the holding, of which the proprietor was Duncan Maccoll of Portcharren and Achindoun, Lismore, Argyllshire. The Land Court pronounced an Order. The proprietor asked for and obtained a special case for the opinion of the First Division.

The case stated, *inter alia*, as follows :—

"1. Hugh Carmichael senior and James Carmichael were joint tenants of the farm of Mid Achindoun and one-sixth share of the Island of Bernera, on the estate of Achindoun, Lismore, under a lease, which is printed in the appendix, and made a production in this case, granted by Duncan Maccoll, the proprietor of the said estate.* The stipulated period of endurance of the said lease was nine years from Whitsunday 1903, the yearly rent being £48. The stipulated period expired at Whitsunday 1912. Neither party gave notice of removal at the termination of the stipulated period of endurance. The tenants continued and continue in possession. . . .

"3. . . . After proof before answer and inspection, the Land

* The lease bore :—"It is contracted and agreed between Duncan M'Coll, Esquire of Portcharren and Achindoun, Lismore, on the one part, and Hugh Carmichael senior and James Carmichael, farmers, Achindoun, Lismore, on the other part, in manner following—That is to say, the said Duncan M'Coll hereby lets to the said Hugh Carmichael senior and James Carmichael, and their heirs . . ."

Court issued an interlocutor in the following terms :—' Wick, 1st May 23, 1913. October 1912.— . . . Find that the applicants are joint statutory small tenants in and of the holding described in the application, and became entitled to a renewal of their tenancy as at and from the term of Whitsunday 1912, under and in terms of section 32 of the Small Landholders (Scotland) Act, 1911 . . . '

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"4. The said Duncan Maccoll disputes this decision on the ground that the application is incompetent (1) in respect that the provisions of the said Act with regard to statutory small tenants do not extend to joint tenants ; (2) in respect that tacit relocation having, by neither party having given notice of removal, taken place before the said Act came into operation, there was no determination, and therefore there could be no renewal of the tenancy at Whitsunday 1912 within the meaning of section 32 (4) (9) and (11) of the said Act.*

The questions of law included the following :—" (1) Whether the provisions of section 32 of the Small Landholders (Scotland) Act, 1911, apply to the case of a holding which at the commencement of the Act was held, and continues to be held, by joint tenants ? "

The case was heard before the First Division on 13th May 1913.

Argued for the appellant :—The Small Landholders (Scotland) Act, 1911, specified certain classes of joint tenants to whom the provisions of the Act should extend,¹ and, as "statutory small tenants" were not included in that specification, the inference was clear that the Legislature did not intend the benefits provided for "statutory small tenants" to be available to joint tenants. This was in accordance with the policy of the Act which clearly did not favour the multiplication or continuation of joint tenancies.¹

Argued for the respondents ;—There was no reason to think that the Legislature intended to exclude joint tenants in the position of the present respondents from the privileges of statutory small tenants. There was nothing in the Act to lead to such a conclusion except perhaps section 26 (8), but if that proviso was carefully considered it became plain that its only object was to make it clear that no new holders were to be registered as joint tenants. Section 2 covered persons in the position of the respondents.

At advising on 23rd May 1913,—

LORD PRESIDENT.—This case raises, to begin with, precisely the same point as the one that your Lordships have just decided in the case of

* The case is not reported upon the point raised by the second objection, which is the point decided by the case immediately preceding the present, viz., *Clyne v. Sharp's Trustees*, *supra*, p. 907.

Sec. 2 of the Small Landholders (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 49), is quoted *supra*, p. 908.

Sec. 26 (8) enacts :—"The provisions of section two of this Act shall extend to and include joint tenants being existing crofters, existing yearly tenants, or qualified leaseholders ; but not more than one person shall be registered as a new holder in respect of any holding, and (without prejudice to the continuance of a joint tenancy through statutory successors) where at any time after the commencement of this Act a holding is held by a single landholder, or a holding which has been held in joint tenancy ceases to be so held, it shall not be competent for more than one person to be a landholder in respect of such holding."

¹ Sec. 26 (8).

May 23, 1913. *Clyne*.¹ The judgment, necessarily, will be the same. But there is the additional point in this case, that the applicants are joint tenants, and it was argued to your Lordships that the provisions of the Act which I have gone through do not apply to joint tenants.

Carmichael

v. Maccoll.

Ld. President.

I cannot disguise from myself that I think this question is one of some difficulty, but, upon the whole, I have come to the conclusion that here again the judgment of the Land Court is right, and that joint tenants are admitted to the benefit of the provisions of the Act applicable to statutory small tenants. The whole difficulty arises from the terms of subsection (8) of section 26, which is a general section of supplementary provisions. If that section had not been there I do not think there can be much doubt that we should have construed the word tenant in the Act as including a joint tenant. But subsection (8) of section 26 provides:—[His Lordship read the subsection]. And it is argued that inasmuch as the section says specially that joint tenants shall be included where they are existing crofters, existing yearly tenants, or qualified leaseholders, and does not mention statutory small tenants, it is meant that statutory small tenants should be excluded.

I am not driven to that result, which I think would be an unfortunate one. I do not think that the subsection that I have just read was really put in for any purpose whatsoever except to make it clear that there were to be no new holders registered as joint tenants, and that if in any case an existing holding under joint tenancy ceased to be so held by one of the tenants going away and not wishing to renew, a new joint tenant should not be put into the holding. In other words, the Act did not want to foster joint tenancy. But I think that the answer to the strict legal argument is to be found in the curious phraseology of section 2, to which I referred in the case of *Clyne*¹ which we have just decided, where persons are first defined as crofters, existing yearly tenants, and qualified leaseholders, and then in a certain case it is said not that an existing yearly tenant and qualified leaseholder is not to be so but that he is not to be held so, and certain things are to apply to him. I think that, on a strict reading of the words, these persons are existing yearly tenants or qualified leaseholders in the sense of section 2, and that therefore the joint tenants in this case are included although they are not to be held so, and, accordingly, have not the benefit of the other sections which apply to existing small tenants and qualified leaseholders, but instead have only the benefit of the section applying to statutory small tenants.

The total result is, I think, that the judgment here is right, and that so long as these two people come forward to ask for renewal they are entitled to have it. If one of them, for any reason, disappears, then I do not think any other joint tenant can ever be put in his place.

LORD KINNEAR.—I have more difficulty in this case than in the last one, but I have come to the same conclusion as your Lordship and do not find myself bound to put the strictest verbal interpretation upon the mere words of the 8th subsection of section 26 to the effect of depriving joint tenants of

¹ *Supra*, p. 907.

the right which the statute would otherwise clearly give. I agree with your Lordship's conclusion.

Carmichaels
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LORD JOHNSTON.—I concur. There is no doubt that subsection (8) of section 26 of the Act does create considerable difficulty by reason of the use of the words "existing" and "qualified." Had those words not been there, there would have been no difficulty. But I think that the explanation which your Lordship has given is sufficient, and that if the word "such" in the proviso which precedes section 2, subsection (1) (iii.) (b) is considered in relation to what precedes and what follows, it really explains what the Legislature meant, namely, to include the statutory small tenant within the purview of section 26, subsection (8).

LORD MACKENZIE.—I have had great difficulty in this case, occasioned by the way in which this Act has been drafted, but I agree in the result at which your Lordships have arrived.

THE COURT answered the first question of law in the affirmative.

M. GRAHAM YOOL, S.S.C.—HUME M'GREGOR & Co., S.S.C.—Agents.

CLAUDE J. PERCEVAL AND ANOTHER (Morison's Trustees), Appellants. No. 125.

—D. M. Wilson.

GEORGE GRANT, Respondent.—W. Mitchell.

May 24, 1913.

Lease—Small holdings—Tenant from year to year—Application by tenant who, before passing of Act, received notice to quit after Act came into operation—Competency—Small Landholders (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 49), sec. 2 (1) (ii). Morison's
Trustees v.
Grant.

A yearly tenant in possession of a holding at 1st April 1912, when the Small Landholders (Scotland) Act, 1911, came into operation, had, before the passing of that Act, received notice to remove at Whitsunday 1912. In an application by him to the Land Court for an Order fixing the rent and the period of renewal of his tenancy—

Held that the service of the notice of removal did not exclude the application as incompetent.

THIS was a special case stated by the Scottish Land Court at the request of Claude J. Perceval and others, trustees of the late Lieutenant-Colonel Morison of Bognie and Mountblairy, the respondents in an application by George Grant, crofter, Waulkmill, Banff, to the Scottish Land Court. 1ST DIVISION.
Land Court.

The facts as set forth in the case were as follows:—Grant was tenant of Waulkmill, a croft extending to fifteen acres or thereby. His lease of the croft expired at Whitsunday 1911, and was renewed, or held as renewed by tacit relocation, for one year from that date in virtue of sec. 18 of the Agricultural Holdings (Scotland) Act, 1908.* Grant resided on the holding and cultivated it during this year.

On 19th August 1911 the proprietors of the croft, the trustees of Lieutenant-Colonel Morison, served a notice of removal as at Whitsunday 1912 upon Grant in terms of the above-cited section of the Agricultural Holdings (Scotland) Act, 1908. On 16th December

May 24, 1913. 1911 the Small Landholders (Scotland) Act, 1911, was passed, and on 1st April 1912 it came into operation.

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On 7th May 1912 Grant presented an application to the Scottish Land Court for an Order to determine whether he was a landholder or a statutory small tenant in the holding of Waulkmill, and for an Order fixing a first fair rent therefor, or alternatively, for an Order fixing a first equitable rent therefor, and the period of renewal of his tenancy thereof. When the application came before the Land Court for hearing the proprietors objected to the competency of the application, in respect that the applicant, having received notice prior to the passing of the Small Landholders (Scotland) Act, 1911, to remove from the holding at Whitsunday 1912, was not, as at 1st April 1912, a "tenant from year to year" within the meaning of the Act, and particularly of section 2, subsections (1) (ii.) and (2), and section 32, subsection (1) thereof,* and was therefore neither a landholder nor a statutory small tenant within the meaning of the Small Landholders (Scotland) Act, 1911.

On 31st May 1912 the Land Court pronounced an interlocutor finding that the applicant (Grant) was, on 1st April 1912, in lawful possession as a resident tenant from year to year of the holding, and repelling the objection founded on the notice of removal.

The question of law in the case (with another not dealt with in this report) was:—“(2) Whether, and in respect that the applicant had been served, before the said Act passed, with notice to remove from his said holding at the term of Whitsunday 1912, the said application was competently made to the Land Court?”

The case was heard before the First Division on 24th May 1913.

At the hearing counsel for the appellants cited *Lord Macdonald v. Finlayson*.¹ Counsel for the respondent was not called on.

The opinion of the Court (consisting of the Lord President, Lord Kinnear, Lord Johnston, and Lord Mackenzie) was delivered by the

LORD PRESIDENT.—[After referring to the decision in *Clyne v. Sharp's Trustees*, *supra*, p. 907]—It is argued here that the tenant does not come within the words of section 2 (1) (ii.) of the Act, because he received a notice of removal at Whitsunday 1912. Doubtless, if the law had not been altered, the effect of that notice of removal would have been that, when Whitsunday came, the tenant would not enter upon another year on tacit relocation but would have to go. But then the Act of Parliament was passed which puts the statutory right in front, so to speak, of the landlord's right to let the holding to whom he pleases; and it seems to me that, if it had been intended to exclude from the statutory right any tenant who was sitting under notice to quit, nothing would have been easier than for the Act of Parliament to say so. The Act, however, does not say so, and I think that that determines the matter.

THE COURT answered the second question in the affirmative.

DUNCAN & HARTLEY, W.S.—GRAHAM, JOHNSTON, & FLEMING, W.S.—Agents.

* The sections referred to are quoted *supra*, p. 908, in a footnote to *Clyne v. Sharp's Trustees*.

¹ (1884) 12 R. 228.

MAGNUS CHARLES MANSON, Pursuer (Appellant).—*Moncrieff, K.C.*—*Fenton.* No. 126.

THE FORTH AND CLYDE STEAMSHIP COMPANY, LIMITED, Defenders
(Respondents).—*Horne, K.C.*—*Carmont.*

May 23, 1913.

Manson v.
Forth and
Clyde Steam-
ship Co.,
Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—
Accident arising out of and in the course of the employment—Ship's car-
penter burned by shavings accidentally set on fire by shore labourer.

A ship's carpenter, working on the poop of a vessel lying in harbour, was severely burned owing to some shavings by which he was surrounded being ignited by a match carelessly thrown down by a shore labourer. The carpenter's trousers happened to be saturated with inflammable oil which had leaked from a barrel he had shifted in the course of his work, and thus readily caught fire from the shavings.

Held that he was injured by an accident arising out of and in the course of his employment.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Glasgow, between Magnus Charles Manson and the Forth and Clyde Steamship Company, the Sheriff-substitute (Glegg) refused compensation, and, at the request of the applicant, stated a case for appeal.

1st DIVISION.
Sheriff of
Lanarkshire

The case stated, *inter alia*:—“(1) That appellant signed on as carpenter on board the s.s. ‘Crest,’ owned by respondents, the Forth and Clyde Steamship Company, Limited, on 21st December 1911; . . . (3) that on 15th January 1912, when appellant was working in the poop of the said s.s. ‘Crest’ in Leghorn Harbour, a shore labourer came down the ladder lighting a cigarette, and threw a match down, which fell, still alight, among some shavings on the floor of the poop, setting fire to said shavings; (4) that the fire thus caused lighted appellant's trousers, burning him severely; (5) that appellant had previous to said fire been shifting a barrel of kerosene oil, from which some oil had leaked on to his trousers; . . . (7) that he is still incapacitated as the result of the injuries sustained on 15th January 1912. . . .”

The Sheriff-substitute found that “. . . (2) the accident to the appellant did not arise out of and in the course of his employment with the respondents.” He therefore assoilzied the respondents, and found them entitled to expenses.

The questions of law included the following:—“(2) Was I entitled to hold that the injury to the appellant was not caused by accident arising out of and in the course of his employment with the respondents within the meaning of the Workmen's Compensation Act, 1906?”

The case was heard before the First Division on 23rd May 1913.

Argued for the appellant;—Admittedly the accident arose “in the course of” the appellant's employment. It also arose “out of” his employment, because injury by fire was a risk incidental to all work on board ship, and in a special degree to the appellant's work on the occasion in question, when he had in the course of his duty to be in the neighbourhood of an accumulation of shavings, wearing clothes saturated with inflammable oil. The risk to which he was exposed from careless persons throwing lighted matches was very much greater

May 23, 1913. than that run by persons in ordinary circumstances, and was entirely due to the nature of his employment.¹

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ship Co.,
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Argued for the respondents;—The accident did not arise out of the appellant's employment, but out of the tortious act of a third party, for which the respondents were not liable.² It was not because he was working among shavings or because his clothes were oily that the accident happened, but because the labourer carelessly threw down the lighted match. Accordingly the actual cause of the accident did not arise out of and in the course of the employment.³ The case of *Challis*⁴ and the other cases founded on by the appellant were distinguishable from the present case, because in them the risks encountered were risks reasonably incidental to the various employments concerned. The undernoted cases were favourable to the respondents.⁵

LORD PRESIDENT.—[After stating the facts]—Under those circumstances I think that only one result can be arrived at, namely, that the accident did arise out of and in the course of the employment of the pursuer. That it arose in the course of his employment is not doubtful. It has been argued to us that it did not arise out of the employment. Now I think it did, and for a very simple reason: the pursuer had got the oil upon his trousers owing to the work to which he was put; he was surrounded by shavings on the poop owing to the work to which he was put; and therefore it was a result of the work to which he was put that the pursuer, at that moment, was working in a position in which he was in more than ordinarily inflammable surroundings. An accident occurred by which the inflammable surroundings were set on fire and the pursuer was injured. That, in my view, is an accident arising out of the pursuer's employment.

I think that the fallacy of Mr Horne's argument was that he treated the throwing down of the match as the accident. It was not the throwing down of the match that was the accident—the fire was the accident; but the throwing down of the match was the cause of the accident. It was through the accident, namely, the fire, that the pursuer was injured. Well, I think that was a risk to which he was exposed to a greater extent than

¹ *Challis v. London and South-Western Railway Co.*, [1905] 2 K. B. 154; *Murray v. Denholm & Co.*, 1911 S. C. 1087, Lord Justice-Clerk, at pp. 1092-3, Lord Salvesen, at p. 1102; *M'Intyre v. Rodger & Co.*, (1903) 6 F. 176; *M'Lauchlan v. Anderson*, 1911 S. C. 529; *Wicks v. Dowell & Co., Limited*, [1905] 2 K. B. 225. The following cases were also referred to:—*Morgan v. Owners of s.s. "Zenaida"*, (1909) 25 T. L. R. 446; *Andrew v. Failsworth Industrial Society, Limited*, [1904] 2 K. B. 32; *Kelly v. Kerry County Council*, (1908) 1 Butterworth's W. C. C. 194; *Warner v. Couchman*, [1912] A. C. 35.

² *Fitzgerald v. W. G. Clarke & Son*, [1908] 2 K. B. 796.

³ *Clifford v. Jay*, (1909) 2 Butterworth, 32.

⁴ [1905] 2 K. B. 154.

⁵ *Andrew v. Failsworth Industrial Society, Limited*, [1904] 2 K. B. 32; *Kelly v. Kerry County Council*, 1 Butterworth's W. C. C. 194; *Rodger v. Paisley School Board*, 1912 S. C. 584; *Burley v. Baird & Co., Limited*, 1908 S. C. 545; *Falconer v. London and Glasgow Engineering and Iron Shipbuilding Co., Limited*, (1901) 3 F. 564; *Craske v. Wigan*, [1909] 2 K. B. 635; *Mitchinson v. Day Brothers*, [1913] 1 K. B. 603; *Armitage v. Lancashire and Yorkshire Railway Co.*, [1902] 2 K. B. 178.

other people because of his employment. Other people were not exposed to the risks of that fire, because they had not to work on the poop among these shavings and to work in oily trousers. He was bound to work under those conditions.

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Manson v.
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Clyde Steam-
ship Co.,
Limited.

I am therefore for sending back the case to the learned Sheriff-substitute with an instruction to him to find that the accident arose in the course of and out of the pursuer's employment, and to assess the proper compensation.

LORD KINNEAR.—I quite agree with your Lordship. I think it clear, upon the admitted facts, that the accident from which this man suffered occurred in the course of his employment, and I think it equally clear that it arose out of the employment, because the risk to which he was exposed was incidental to the particular work which he was required to do at the time, and was very much greater than the risks to which other people might be exposed from the same cause. I think that his duty compelled him to run a greater risk than people ordinarily run from being in the neighbourhood of careless persons who throw about lighted matches, because his duty was to work among very inflammable material with his clothes more or less saturated with inflammable oil, and a lighted match having been thrown among this material and having set it on fire, I think he met with an injury to the risk of which his employment specially exposed him and to which he would not have been exposed otherwise.

LORD JOHNSTON.—I agree. I think that this accident has occurred from a normal risk to which all are exposed, but to which this man was abnormally exposed, and that he was so exposed by reason of the nature of his employment; and I therefore think that the accident arose out of, as well as occurred in the course of, his employment, and that he is entitled to compensation.

LORD MACKENZIE concurred.

THE COURT answered the second question of law in the negative.

T. M. POLE, Solicitor—J. & J. Ross, W.S.—Agents.

ORLANDO CHARNOCK BRADLEY, Pursuer.—*George Watt, K.C.*—*J. R. Christie.*

No. 127.

MENLEY & JAMES, LIMITED, Defenders.—*Constable, K.C.*—*Hon. W. Watson.*

May 29, 1913.

Bradley v.
Menley &
James,
Limited.

Expenses—Jury Trial—Slander—Tender—Verdict for nominal damages—Right of defender to recover expenses prior to date of tender.

In an action of damages for slander, in which the pursuer refused a tender of £5 made prior to the closing of the record, the jury found for the pursuer and awarded him 6d. of damages on each of the three issues submitted to them.

Held that the fact that the jury had returned a verdict for the pursuer and had awarded him damages, although merely nominal, excluded a motion made by the defenders for their expenses prior to the date of tender.

May 29, 1913. **ON** 7th December 1912 Professor Orlando Charnock Bradley, Principal of the Royal (Dick) Veterinary College, Edinburgh, brought an action of damages for slander against Menley & James, Limited, dealers in medical preparations for veterinary purposes in London.

**Bradley v.
Menley &
James,
Limited.**
1ST DIVISION.
Ld. President
and a Jury.

The pursuer complained that the defenders had caused to be published or put into circulation, through advertisement and otherwise, certain statements which falsely represented that he had given to the defenders, for the purpose of publication, written testimonials regarding a certain preparation of veterinary medicine. He averred that the giving of such testimonials by veterinary surgeons was forbidden, and was regarded as a breach of professional propriety and disgraceful to members of the veterinary profession, and that he had, in consequence, suffered injury and damage to his feelings and to his professional reputation.

Three issues were allowed for the trial of the case in each of which the question put to the jury was whether the defenders had, in circumstances specified, caused to be published or circulated the statements complained of, "and whether the defenders thereby falsely represented that they had received from the pursuer a written testimonial for publication in these terms, and thus falsely and calumniously represented of and concerning the pursuer that he had done an act contrary to professional etiquette, and professionally disgraceful, to the loss, injury, and damage of the pursuer?" Damages were laid cumulatively on the three issues at £500.

Before the record was closed, the defenders made a tender of £5 in full of the pursuer's claims, but this tender was refused.

The case was tried before the Lord President and a jury on 23rd March 1913 and the following days.

The jury returned a verdict for the pursuer and assessed the damages at 6d. on each issue.

On 29th May 1913 counsel for the defenders in the Single Bills of the First Division (consisting of the Lord President, Lord Justice-Clerk, Lord Dundas, Lord Johnston, and Lord Guthrie, who had met to hear Justiciary appeals), on a motion to apply the verdict, moved the Court to find them entitled to expenses, including expenses incurred prior to the date of the tender.

Argued for the defenders;—The correspondence produced showed that prior to the raising of the action the defenders had written offering an explanation and apology, and further, payment of any expenses to which the pursuer might have been put in the matter. The Lord President in his charge to the jury had examined this correspondence, and had said that if the jury were satisfied that the defenders' letters were sufficient for the occasion, they were entitled to say that no practical damage had been done, and to award nominal damages. The verdict of the jury was, in these circumstances, equivalent to a finding that the action should never have been brought.

Argued for the pursuer;—It was not disputed that the defenders might recover their expenses since the date of the tender, in respect that the amount of the tender exceeded the sum of damages recovered, but there should be no order with regard to expenses prior to that date. The verdict of the jury affirmed the pursuer's contention that he had suffered a wrong at the hands of the defenders, viz., damage in the eyes of the veterinary profession; he was therefore entitled

to raise the action and to persist in it, at any rate until the date of May 29, 1913. the tender.

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LORD PRESIDENT.—The point that is raised here is one, I think, more of novelty than of difficulty. This was an action of damages at the instance of Professor Bradley, and the issue that was sent to the jury was whether the defenders caused certain things to be published, and whether these things were of and concerning the pursuer. It was then innuendoed that they represented him as being guilty of disgraceful professional conduct, to the loss, injury, and damage of the pursuer.

Now, the jury really affirmed everything in the issue and innuendo except the averment as to loss, injury, and damage. They held that the defenders had published the statements, that the statements were of and concerning the pursuer, that they did contain a slur upon his professional conduct, but that the pursuer had no real damage done to him by them; and, accordingly, they assessed the damage at 6d. on each of the three issues. This they did following the view of the facts I had suggested to them in my charge.

Now, it is the fact that a tender was put in at some period immediately after the lodging of the defences, and the tender being for a larger sum than the 1s. 6d. recovered, the defenders are entitled to expenses after the date of the tender, in accordance with the well-known rule. But then, in asking us to apply the verdict, the defenders move also for expenses prior to the tender, and they do so upon the ground that the action, as they say, never ought to have been raised.

Now, the pursuer does not move for those expenses, and he does not move for them for this very good reason—that he comes within the words of the fortieth section of the Court of Session Act of 1868,¹ which provides that “Where the pursuer in any action of damages in the Court of Session recovers by the verdict of a jury less than £5, he shall not be entitled to recover or obtain from the defender any expenses in respect of such verdict, unless the Judge before whom such verdict is obtained shall certify on the interlocutor sheet that the action was brought to try a right besides the mere right to recover damages; or that the injury in respect of which the action was brought was malicious; or, in the case of actions for defamation or for libel, that the action was brought for the vindication of character and was, in his opinion, fit to be tried in the Court of Session.” Well, no such certificate was asked from me, and, accordingly, the pursuer is not in a position to ask for expenses. I may say at once, in order that counsel may not think I am putting any slur upon them, that I should never have granted a certificate in this case if I had been asked to do so, because I am clearly of opinion that this action should never have been raised, and that it was persisted in after it should have been given up. I think that the offers of apology in the letters of the defenders were very proper offers and ought to have been accepted. But then the defenders ask that they should have expenses up to the tender. I think, if we granted that, we should be, so to speak, going against the verdict of the jury. After all, the jury has

¹ 31 and 32 Vict. cap. 100.

May 29, 1913. affirmed, as I say, certain propositions which put the defenders not only technically, but in one sense really, in the wrong. No doubt the publications did not cause any damage to the pursuer, and the pursuer ought not to have gone on with the action, but still the verdict of the jury shows that, in one sense, the pursuer was right in raising the action.

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Ld. President.

Accordingly, I think that the motion of the defenders, so far as it asks expenses prior to the date of the tender, should be refused, that we should apply the verdict, and, in accordance with ordinary practice where there has been a tender of a sum exceeding the damages recovered, find the defenders entitled to all expenses since the date of the tender.

LORD JUSTICE-CLERK.—I am of the same opinion. When a case such as this is brought, and the Court see fit to send it to a jury, it is a proper case of an action of damages, and the law implies, if the facts are made out, that there was damage. The jury cannot find a verdict for the pursuer—where the claim is for damages—without finding some damages due; but there are cases in which the facts present themselves so unsatisfactorily for the pursuer, that the jury, although the pursuer is entitled to a verdict, may give a very small sum of damages, as was done in this case. There are also cases in which the purpose of the action, although it may take the form of an action of damages, is to establish some particular fact of importance to the pursuer, and he may often not ask any substantial damages, and in such a case the jury being required to find damages due, will award but a nominal amount.

In the case where the verdict is given for a very small sum, it is, in the first place, for the Judge who tried the case to consider, as your Lordship did in this case, the question whether he would give a certificate that the action was properly raised for the vindication of character. I have heard from your Lordship that you would not have given such a certificate.

Further, there is the case where nominal damages are given because substantial damages are not sought. The purpose of the action is, by giving a sum of damages, however small, to mark the fact that there was a wrong done.

Now, I must concur with your Lordship in thinking that the fact that the verdict of the jury was for the pursuer, and that, fulfilling their duty, they had to assess damages, even although they assessed them at so small a sum, implies that the action was an action which might be raised and for which the pursuer could bring facts entitling him to a verdict in his favour.

In these circumstances I cannot see that there is any ground for holding that the defenders are entitled to get expenses up to the date when, by their practical act of putting in a tender of a certain sum of money, they placed the pursuer in a position of considering whether he would go on with the action and try to get more or would accept what was offered. If he had accepted the tender he would certainly have been entitled to expenses up to its date. I entirely agree with what your Lordship has said.

LORD DUNDAS, LORD JOHNSTON, and LORD GUTHRIE concurred.

THE COURT applied the verdict, and in respect thereof decerned against the defenders for the sum of 1s. 6d., being the *cumulo*

amount of the damages assessed by the jury, found neither party entitled to expenses up to the date of the tender, and found the defenders entitled to expenses subsequent thereto.

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ROBERT ANDERSON, S.S.C.—FINLAY & WILSON, W.S.—Agents.

ALEXANDER COWAN (Andrew Cowan's Trustee), First Party.—
D. P. Fleming.

No. 128.

ALEXANDER COWAN, Second Party.—*D. P. Fleming.*

June 4, 1913.

MRS MARY COWAN OR JARDINE, Third Party.—*Pitman.*

MRS MARY DOBBIE COWAN OR SINCLAIR AND OTHERS, Fourth Parties.
—*A. M. Mackay.*

Cowan's
Trustee v.
Jardine.

Succession — Vesting — Fee or Liferent — Direction to "divide" residue among children—Restriction of child's share to liferent with fee to issue—Repugnancy.

By his settlement a testator directed his trustees "to divide" the residue of his estate "equally among" his children, and "with regard to the portion of residue which may effier or belong to" one of his sons, he appointed his trustees to "hold and invest the same in their own names" for the son and the son's widow in liferent allenary and for the son's issue in fee.

The son having died unmarried, held that his share of residue had vested in him in fee.

By his settlement, dated 6th May 1878, and registered in the Books^{2D} Division of Council and Session 24th January 1879, Andrew Cowan senior conveyed his whole estate to trustees, and directed them, in the fifth place, "to set apart and to invest with the Clyde Navigation Trustees, or in the purchase of good railway debentures, or to lend on good heritable security, for behoof of my son Peter Cowan, the sum of One thousand pounds sterling, and to pay to him half-yearly during his life for his liferent and alimentary use allenary the whole interest or income that may be derived therefrom, and in the event of the said Peter Cowan dying and being survived by his wife, I will and appoint that she shall so long as she continues unmarried receive half-yearly for her liferent and alimentary use allenary the interest or income which may be derivable on said sum of One thousand pounds sterling, and after the decease of the longest liver of the said Peter Cowan and his wife or of her entering into a second marriage, whichever of these events shall first happen, I direct and appoint my said trustees to divide the said sum of One thousand pounds equally among the lawful issue of the said Peter Cowan: Declaring, however, with regard to this last-mentioned legacy that I give my trustees a full discretionary power in the event of the said Peter Cowan being desirous to establish himself in business to advance and pay to him for that purpose such sum as my trustees may consider proper, but in no case to exceed the sum of Five hundred pounds, and whatever sum my said trustees shall think proper to advance to my said son not exceeding Five hundred pounds as aforesaid, shall be imputed as part payment of said legacy of One thousand pounds, and which will proportionally reduce the liferent of said legacy to the said Peter Cowan or his wife, and also the amount to be divided ultimately among the children of the said Peter Cowan: And the rest, residue, and remainder of my said means and estate I direct and appoint my said trustees to divide equally among the said James Cowan, Peter Cowan, Andrew Cowan, and

June 4, 1913. Alexander Cowan, and the said Helen Cowan, Isabella Cowan, and Mary Cowan, and in the event of any of my said residuary legatees dying leaving lawful issue, such issue shall succeed equally to the share which would have fallen to the parent if alive, and in the event of any of my said residuary legatees predeceasing me and without leaving lawful issue, the share of the predeceaser shall be divided equally among my said residuary legatees who shall survive me, and with regard to the portion of residue which may effeir or belong to the said Peter Cowan, I will and appoint that my said trustees shall hold and invest the same in their own names for behoof of the said Peter Cowan, whom failing, for behoof of his wife so long as she may remain unmarried after his decease, and for behoof of the lawful issue of the said Peter Cowan in the same way and manner as is provided in regard to the sum of One thousand pounds mentioned in the fifth place hereof, only it shall not be in the power of my said trustees to break upon the capital of the portion of residue that may effeir to the said Peter Cowan, with the view of making any advance to him to establish him in business or otherwise."

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The residuary legatees were children of the testator, and they all survived the testator except Andrew Cowan junior, who predeceased him without issue. Peter Cowan never married, and died in 1911, leaving a settlement. Questions having arisen with regard, *inter alia*, to the distribution of his share of residue, a special case was presented to the Court.

The *first party* was the sole surviving trustee under Andrew Cowan senior's settlement; the *second party* was the residuary legatee under Peter Cowan's settlement; the *third party* was one of the residuary legatees under Andrew Cowan senior's settlement; and the *fourth parties* were the children of a son of the testator who survived him but was not one of his residuary legatees.

The second party contended that Peter Cowan's share of residue under the testator's will vested in him and belonged to the second party as his residuary legatee.

The third party contended that the share in question fell into the residuary estate of the testator at the death of Peter Cowan, or alternatively, that it fell into intestacy.

The fourth parties contended that the share of residue in question fell into intestacy at Peter Cowan's death.

The following question of law was, *inter alia*, presented for the opinion and judgment of the Court;—" (1) Did the fee of the share of residue which effeired to the late Peter Cowan (a) vest in him, or (b) fall into residue, or (c) form intestate estate of the testator? "

The case was heard before the Second Division on 23rd May 1913.

Argued for the second party;—There was in the will an absolute gift of the residue in favour of the testator's children, followed, in Peter's case, by a direction that his share was to be held for him in life and his issue in fee. It was now well settled that this direction did not detract from the initial gift of fee, and that Peter's share vested in him *a morte testatoris* subject only to defeasance in the event which did not happen, of his leaving issue.¹ A direction to "divide among" the children was equivalent to a gift of fee.

¹ Tweeddale's Trustees v. Tweeddale, (1905) 8 F. 264; Dunlop's Trustees v. Sprot's Executor, (1899) 1 F. 722; Mackay's Trustees v. Mackay's Trustees, (1897) 24 R. 904; Stewart's Trustees v. Stewart, (1896) 23 R. 416.

Argued for the third party;—The rule of *Tweeddale's Trustees*¹ had June 4, 1913.
 no application, for that rule required that there should be an initial gift of fee, expressed in such words as a declaration that the residue was to "belong to" the beneficiaries.² A mere direction to trustees to "divide" the fund, as in this case, did not amount to a gift. The case accordingly belonged to the class of which *Macgregor's Trustees v. Macgregor*³ was a type, where the right was held to be limited to one of liferent. The share of residue provided for Peter, not being disposed of by the settlement and not being subject to accretion, fell into intestacy.⁴

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The fourth parties adopted the argument for the third party.

At advising on 4th June 1913,—

LORD DUNDAS.—[After narrating the facts]—The first question put to us in the case is: "Did the fee of the share of residue which effeired to the late Peter Cowan (a) vest in him, or (b) fall into residue, or (c) form intestate estate of the testator?" No argument was submitted to us in favour of the second of these contentions. As between the first and third of them, I am of opinion that the first must prevail. I think the case falls within the principle of a well-known series of cases—I shall allude to some of them presently—of which the earliest important example is *Lindsay's Trustees*,⁵ and one of the latest is *Tweeddale's Trustees*.¹ I use the word "principle" in the sense in which Lord President Dunedin (in *Tweeddale's Trustees*¹) considered it "convenient, if not strictly accurate, to speak of the principle of so-and-so as laid down in a case or a series of cases." In the same case Lord Low said, at p. 272: "The principle recognised in all these cases seems to me to be that where there is a direct bequest, or a direction to trustees to pay or convey to a daughter, in terms, which according to the natural meaning of the language used, import a gift, that gift will not be recalled by a subsequent direction to the trustees to hold the fund for, or settle it upon, the daughter in liferent, for her liferent use alienably, and her children in fee, except in so far as may be requisite to give effect to these purposes, and, accordingly, if there are no children, the fee will vest absolutely in the daughter, and be *in bonis* of her at her death." It may be worth while to note that the provision there in question was declared to be purely alimentary. I think the principle thus stated applies, *mutatis mutandis*, to the present case. I cannot accept the argument that there are here no sufficient words of original gift to Peter Cowan of his share of residue to bring the case within the doctrine expressed by Lord Low. I consider that the direction to the trustees to "divide" the residue "equally among" the beneficiaries imports, according to the natural meaning of the language used, a gift to each of his share; and one may note, for what it is worth, the use of the word "belong," which is used disjunctively along with "effeir" in regard to Peter's share. It seems to me that "divide among" is as good a phrase of gift as the words occurring in some, at least, of the series of cases to which I have alluded. In *Lindsay's Trustees*⁵ the residue

¹ 8 F. 264.

² *Logan's Trustees v. Ellis*, (1890) 17 R. 425.

³ 1909 S. C. 362.

⁴ *Paxton's Trustees v. Cowie*, (1886) 13 R. 1191.

⁵ (1880) 8 R. 281.

June 4, 1913. was directed to be "divided equally among" the truster's whole children, the shares to vest at his death. In *Dalglish's Trustees*¹ the direction was to divide into equal shares to be paid to the beneficiaries. In *Logan's Trustees*² the residue was to "belong to and be divided among" the children in equal proportions. In *Stewart's Trustees*³ the direction was to convey equally among them share and share alike. In *Mackay's Trustees*⁴ the direction was to "divide or convey or pay and make over" to and among the children equally. In *Dunlop's Trustees*⁵ the trustees were directed to hold and set apart the principal sum of £10,000 which the truster left and bequeathed to the children of his deceased sister. In *Tweeddale's Trustees*⁶ the direction was to "make payment." By way of contrast, it may be worth while to refer to *Muir's Trustees*,⁷ where the trustees were directed to retain the whole residue for behoof of the truster's children, and to divide the same amongst them in certain proportions, the shares of sons and daughters respectively being to be set aside and held and invested and otherwise dealt with as after mentioned; and as regards the shares falling to sons, the trustees were directed to hold and invest the same in their own names as trustees for behoof of the sons respectively in liferent, for their alimentary liferent uses alienably and for behoof of their respective issue in fee, but with power notwithstanding to make advances in their discretion to the sons out of the capital of their respective shares. The Court held that the trust-deed did not import an absolute gift of the capital of their shares of residue to the sons. But Lord McLaren, who gave the opinion of the Court, stated the general rule as follows, at p. 557: "If a testator begins by making an unqualified division of his estate or residue amongst children, and then by a subsequent clause empowers his trustees to retain the shares of one or more of them, and to pay the income to the child or children for life, and the fee or capital to their issue, it may very well be that the power is only given to the trustees for the protection of the immediate beneficiaries. Accordingly, if one of these should die without issue, and leaving a will, it may be held that the original gift was not displaced, but its effect only suspended during the lifetime of the beneficiary, and for his or her protection. . . . It is, however, essential to the proper application of this principle of construction that there should be an independent unqualified gift to the immediate beneficiary, capable of taking effect when the special trust fails or is exhausted." Again, in the recent case of *Macgregor's Trustees*,⁸ where the residue was directed to be held "in trust for behoof of such of my children as shall survive me, . . . equally, share and share alike, subject to the conditions following, viz., . . . in the case of my daughters I direct my trustees to retain and hold their shares, original and accreting, for their liferent alimentary use alienably, . . . and for the issue of their bodies, equally among such issue in fee," the Court held that the share of a daughter who survived the truster, but died unmarried, had not vested in her, because, as the Lord President put it, "you must first find words which purport to bestow a

¹ (1889) 16 R. 559.² 17 R. 425.³ 23 R. 416.⁴ 24 R. 904.⁵ 1 F. 722.⁶ 8 F. 264.⁷ (1895) 22 R. 553.⁸ 1909 S. C. 362.

certain gift or interest. Now here there is no direct provision of a gift or interest at all." It seems to me, therefore, that as matter of construction of the settlement before us, and in the light of the authorities, we must hold (adapting Lord Low's criterion to the present circumstances) that the testator's settlement imported a gift to Peter Cowan of his share of residue, which was not recalled by the subsequent direction to hold and invest it for his liferent alimentary use and for that of his widow, if he had left one, and for his children in fee, except in so far as it might be requisite to give effect to these purposes; and accordingly, that as Peter Cowan was never married, the fee vested absolutely in Peter, and was *in bonis* of him at his death.—[His Lordship then dealt with a question with which this report is not concerned.]

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The LORD JUSTICE-CLERK, LORD SALVESSEN, and LORD GUTHRIE concurred.

THE COURT answered head (a) of the first question of law in the affirmative, and heads (b) and (c) in the negative.

DUNCAN SMITH & MACLAREN, S.S.C.—WISHART & SANDERSON, W.S.—
A. & A. S. GORDON, W.S.—Agents.

ALEXANDER BUTTERY M'ARA AND OTHERS, Pursuers (Appellants).— No. 129.
D. P. Fleming.

JOHN ANDERSON, Defender (Respondent).—*D. Anderson, K.C.*— June 4, 1913.
A. M. Stuart.

M'Aras v.
Anderson.

Right in Security—Bond and disposition in security—"Default in payment"—Notice requisite to constitute default and justify action of maills and duties—Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), sec. 119, Sched. FF (1) (2).

The creditor under a bond and disposition in security in the statutory form given in Schedule FF (1) of the Titles to Land Consolidation Act, 1868, served upon the debtor a schedule of intimation, requisition, and protest in the form given in Schedule FF (2) of the Act, which stated that "payment is now required" of the principal sum due under the bond with interest to date, and that if after the expiry of three months the sums "of which payment is now required" should not be paid, then the creditor "may proceed to sell" the lands disposed in security. Ten days later he brought an action of maills and duties to obtain possession of the lands and to uplift the rents. The debtor was not in arrear with interest.

Held that the schedule of intimation was a demand for immediate payment; that the debtor not having paid instantly was in "default in payment" within the meaning of sec. 119 of the Titles to Land Consolidation Act, 1868; and that accordingly the action was competent.

ON 21st February 1913 Alexander Buttery M'Aras, Armadale, and others, brought an action of maills and duties in the Sheriff Court at Airdrie against John Anderson, builder, Airdrie. The action concluded for declarator that the pursuers had right to the rents, maills, and duties of the heritable subjects No. 53 Kippen Street, Airdrie, belonging to the defender, or to so much thereof as would satisfy and pay to the pursuers the sum of £750 due to them by the defender.

2D DIVISION.
Sheriff of
Lanarkshire.

On 8th December 1904 the defender had granted a bond and dis-

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position in security, recorded on 12th December 1904, for £750, by which he disposed in security, *inter alia*, the subjects 53 Kippen Street, Airdrie, belonging to him in favour of Thomas Chapman, Airdrie. The pursuers became the creditors under the bond by various assignments in their favour. The bond was in the statutory form provided by the Titles to Land Consolidation (Scotland) Act, 1868,* Schedule FF (1), and contained the clause,—“ I assign the rents.” The defender was by the bond taken bound to repay the principal sum of £750 at Whitsunday 1905 with interest at 5 per cent per annum to said term, and half-yearly thereafter at Whitsunday and Martinmas during non-payment.

On 11th February 1913 schedules of intimation, requisition, and protest in the form provided by the Titles to Land Consolidation (Scotland) Act, 1868, Schedule FF (2), were served upon the defender. The schedules stated that “ payment is now required of [the sum due under the bond] and of the sum of . . . being the interest due at present on the said principal sum with such further sum of interest as shall accrue on the said proportion of principal sum till paid: And I further give you notice that, if at the expiry of the period of three months from the date hereof, the sums, principal and interest, and liquidate penalty incurred and to be incurred, of which payment is now required shall not be paid in terms of the said bond and disposition in security, then the said Alexander Buttery M'Ara or the person or persons who may then be in right of the said bond and disposition in security, may proceed to sell the lands and others thereby conveyed in the manner provided by the Titles to Land Consolidation (Scotland) Act, 1868, and with all powers and privileges conferred on or competent to creditors under bonds and dispositions in security by that Act.”

The pursuers averred:—(Cond. 5) “ The defender the said John Anderson has been frequently called upon to pay said bond, and in particular schedules of intimation, requisition, and protest were served upon him on 11th February 1913, notifying him that payment was then required of the principal sum due under the said bond, and of the interest due at that date on the said principal sum,

* The Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), enacts:—Sec. 119. “ The import of the clauses of the form of No. 1 of the Schedule FF occurring in any bond and disposition in security . . . shall be as follows:— . . . the clause of assignment of rents shall be held to import an assignment to the creditor . . . to the rents to become due or payable from and after the date from which interest on the sum in the security commences to run . . . including therein a power to the creditor . . . on default in payment to enter into possession of the lands disposed in security and uplift the rents thereof . . . the clause . . . on default in payment granting power of sale shall have the same import . . . as if it had been thereby further provided and declared that if the grantor should fail to make payment of the sums that should be due by the personal obligation contained in the . . . bond and disposition in security within three months after a demand of payment intimated to the grantor . . . in or as nearly as may be in the form of No. 2 of Schedule FF hereto annexed—[Schedule of intimation, requisition, and protest]— . . . then and in that case it should be lawful to and in the power of the grantee immediately after the expiration of the said three months, and without any other intimation or process at law, to sell and dispose . . . of the . . . lands.”

with such further sum of interest as should accrue on the said principal sum till paid, but he has failed to do so, and the present action has been rendered necessary to enforce the pursuers' rights to the rents of the subjects disposed in security under the said bond. The averments stated in defence are denied. Prior to the statutory demand above mentioned being served upon him, the appearing defender intimated to the pursuers' agents that he was quite unable to make payment of the sum due under the said bond." June 4, 1913.
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In answer the defender averred :—(Ans. 5) "Admitted that pursuers have, on 11th February 1913, served schedules of intimation, requisition, and protest demanding repayment of said bond within three months from the said date, and that the present action has been served on 21st February 1913. Explained and averred that no demand for repayment of said bond or any part thereof was ever made by pursuers before serving said schedules. *Quoad ultra* denied, and explained and averred that all interest due and payable on said bond has been paid and discharged without reservation."

The pursuers pleaded, *inter alia* ;—(1) The defender the said John Anderson not having paid to the pursuers the sums due by him to them as condescended on, the pursuers are entitled in virtue of the bond and disposition in security held by them to obtain decree of mails and duties as craved, with expenses.

The defender pleaded ;—(1) The action is irrelevant and incompetent and should be dismissed, with expenses. (2) The pursuers' statements are insufficient to support the conclusions of the action, which should be dismissed, with expenses. (3) The defender not being in default of payment of principal or interest to pursuers the action should be dismissed, with expenses.

On 20th March 1913 the Sheriff-substitute (Lee) sustained the first and third pleas in law for the defender, and dismissed the action as incompetent and unnecessary.

The pursuers appealed to the Sheriff (Millar), who, on 14th April 1913, adhered to the judgment of the Sheriff-substitute.

The pursuers appealed to the Court of Session, and the case was heard before the Second Division on 21st and 22nd May 1913.

Argued for the appellants ;—The action of mails and duties was competent. Admittedly before the action was brought it was necessary that there should have been a demand for payment followed by "default in payment."¹ Default meant failure to pay either principal or interest.² In the present case formal demand for payment was made when a schedule of intimation was sent to the defender stating that "payment is now required" of the sum due under the bond. There was also an averment, which should be remitted to probation, to the effect that the defender had been frequently called upon to pay. There was no statutory method of demand, and it could be made informally.³ Although three months' premonition must be given to the debtor before the power of sale could be put into operation, there was no specified period which must elapse after a demand for payment, and before the creditor could enter into possession of the security subjects. A

¹ *Saxty v. Smiths & Co.*, (1893) 1 S. L. T. 61; Titles to Land Consolidation (Scotland) Act, 1868, sec. 119.

² *Cf.* Heritable Securities (Scotland) Act, 1894 (57 and 58 Vict. cap. 44), sec. 5.

³ *Cf.* *Davidson v. Gibb*, (1839) 2 D. 159, 12 Sc. J. 211.

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creditor, who intended to enforce his power of sale, was not thereby precluded from taking in addition his alternative remedies, either by a charge under the personal obligation in the bond or by bringing an action of mails and duties.¹ Whether the action was necessary was another matter which might have a bearing on the question of expenses, but could not affect that of competency.

Argued for the respondent;—The action was incompetent because there was no "default in payment" within the meaning of section 119 of the Titles to Land Consolidation (Scotland) Act, 1868, which provided that default in payment was a condition precedent of the creditor's right to enter into possession. There could be no question as to the interest, for that had always been punctually paid at the terms when it was due. As to the principal, all that the creditors had done (the averment as to other demands being too vague to be remitted to probation) was to serve upon the defender a notice which, read fairly and as a whole, was a demand for payment only on the expiry of three months. This intimation was appropriate only with reference to the power of sale, and was not meant to be, and should not be held to be, a demand for instant payment such as could put the defender in default if he did not make payment forthwith. The pursuers could have made a demand for immediate payment, but they had not done so, and therefore the defender was not in default at the date when the action was brought.

At advising on 4th June 1913,—

LORD DUNDAS.—[After narrating the facts]—It is not averred that the interest due at Martinmas 1912 was not duly paid, or that the defender's estates had or have been sequestrated, or that he was *vergens ad inopiam*. The defender in these circumstances pleads that the action is incompetent and irrelevant. The Sheriff-substitute sustained these pleas and the Sheriff adhered.

I am unable to agree with the conclusion at which the learned Sheriffs have arrived. It seems to be settled law that a creditor in a bond and disposition in security is entitled either to record the bond, in virtue of the clause consenting to registration thereof for execution, and charge the debtor thereon upon the personal obligation contained in the bond, and make him notour bankrupt, if payment is not made before expiry of the days of charge; or to call up the bond by service of the statutory schedule, and failing payment within three months thereafter, to sell the security subjects; and that, although the latter procedure has been instituted, the former may competently be resorted to during the currency of the three months—*M'Whirter*² and *M'Nab*.³ In *M'Whirter's* case² Lord President Inglis observed: "The bond gives two remedies—the first, that of charging upon the personal obligation; the second, that of calling up the bond, and failing payment within three months, of proceeding to a sale of the security subjects. It cannot be doubted that the respondents were entitled to both remedies." The present pursuers did not resort to their remedy upon the personal obligation. They brought this action of mails and duties, and

¹ *M'Whirter v. M'Culloch's Trustees*, (1887) 14 R. 918; *M'Nab v. Clarke*, (1889) 16 R. 610.

² 14 R. 918.

³ 16 R. 610.

seek to impound the rents for immediate satisfaction of principal and interest, as above explained, on the ground that default in payment has occurred. Their object seems to be to get control of the management of the security subjects, which are already under a decree of mails and duties obtained on 7th January 1913 at the instance of postponed bondholders. The pursuers' right is undoubtedly preferable to that of the postponed bondholders; and they may have a substantial interest to enforce it. The clause in the bond, "I assign the rents," is defined by section 119 of the Act, as, *inter alia*, entitling the creditor "on default in payment" to enter into possession of the subjects and uplift the rents. The clause "and on default in payment I grant power of sale" and the immediately preceding clauses are defined by the said section as having the same import as if the bond had specially provided that the subjects should be redeemable at the term and place of payment, or at any term of Whitsunday or Martinmas thereafter, "upon premonition of three months." It is a condition precedent of the exercise by the creditor of his right either to enter into possession or to sell that there should be default in payment. In the case of sale the right can only be exercised after the expiry of three months after premonition. There is no similar provision as regards entering into possession. The pursuers' counsel argued that the first portion of the schedules of notice served by them on the defender contained a clear demand for immediate payment of the principal sum in the bond, and interest to the date of demand; that the further notice given by the schedules about sale after three months was immaterial to impair their validity as a sufficient preliminary demand for immediate payment; and that, from and after service of the schedules, the defender was in default in payment, until payment was made. I think the pursuers' argument is in the main correct. The Sheriffs' view, in holding the action to be incompetent, seems to be that the debtor was not in default in payment at the date of the action, because no explicit demand for immediate payment had previously been made. The only written notice the defender had received was one in the well-known statutory form which in practice, and in conformity with the intention of the Act, is used when a creditor desires to intimate that, in the event of non-payment within the stated period of three months, he will (or may) proceed to sell the subjects. I have considerable sympathy with the view that the defender was reasonably entitled to read the schedule as a whole, and in its ordinarily accepted sense, as importing that the pursuers would (or might), after the expiry of the three months indicated, proceed to a sale; and that he might not understand it as a demand for immediate payment, to be followed in a few days by an action of mails and duties. But that does not seem to me to be a sufficient reason for holding the action to be incompetent. It would rather point to care being taken by the Court to avoid anything like oppression resulting from a justifiable misapprehension by the debtor of the force and meaning of the notice he had received, and to a reasonable amount of time being allowed to him before decree was pronounced. I am unable to affirm that the notice was not in law a demand for immediate payment and that the defender was not, after its receipt, in default in payment of the principal and any interest due thereon, as he would have been if he had been certiorated by a charge or other unmistak-

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June 4, 1913. able form of demand. I do not think the action can be dismissed as incompetent or irrelevant. We ought, in my judgment, to recall the interlocutors of the Sheriff-substitute and the Sheriff, and remit the case to the Court below with instructions to the Sheriff-substitute that it must proceed. It will be for him to consider, when the case comes before him, whether in the circumstances, as they then stand, there is any reason for granting an extension of time before decree is pronounced, and to proceed in the matter as may be just.

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LORD SALVESEN.—With every desire to reach the same conclusion as that at which the Sheriffs arrived, I find myself unable to do so; and I agree in the opinion which has been delivered. After all, the point is mainly of academic interest, because it is conceded that if a written notice had been given by letter that payment was demanded within a reasonable time, or it may be immediately, there could have been no answer to the action; and a period of ten days elapsed between the time that the schedule was served and the raising of the action. When one keeps that in view and also the law which entitles a heritable creditor to record his bond and to give a six days' charge upon it, although the interest may not be in arrears, and so to enforce payment of the bond, I do not think it is introducing any additional hardship into the debtor's position that this action should be held competent.

But taking the case from the strict legal point of view, I think the debtor here was in default when, after having received the schedule of intimation, he did not make payment of the principal sum and interest of which he was thereby notified that the creditor required payment. I agree with what Lord Dundas has said that there may be circumstances in which the Court will protect a debtor from anything savouring of oppression, but that is a matter for the inferior Court to decide: it was not a point on which we were asked to pronounce.

LORD GUTHRIE.—The pursuers are only entitled to raise this action of mails and duties if, in terms of section 119 of the Titles to Land Consolidation (Scotland) Act, 1868, there has been on the part of the defender "default in payment" of the principal or of the interest due under the bond named in the summons. There has been no default in payment of interest; but the pursuers, founding on schedules of intimation, requisition, and protest served on the defender by them in the form given in Schedule FF (No. 2) of the Act, allege that the defender was at the date of the summons in default of payment of the principal sum due under the bond. It is said that the pursuers had a simple and direct way of making a demand for payment in which they would have intimated that, if payment was not made within a certain short space of time, other proceedings would follow. Instead of taking this course, to which it is admitted there would have been no answer, they chose to make their intimation in accordance with the above schedule, that is to say a form which was designed not as a preliminary to an action of mails and duties, but as a preliminary to a sale of the heritable subjects. This course has resulted in the defender's plausible defence. I was at first inclined to think that the course taken by the pur-

suers had not resulted in the circumstances in producing default in payment, June 4, 1913. and to concur in the view expressed by the Sheriff when he says,—“All that was done was the serving of the schedule, which is the ordinary first step in the process for realising the property, and he [the defender Anderson] had no notice of any intention of taking the present proceedings, as he had paid up the interest to the present time, and it is not averred that he has been sequestrated or is *vergens ad inopiam*.” But I have come to think with Lord Dundas, subject to the suggestion contained in the last sentence of his opinion, that if all that is needed is default of payment on the part of the defender, such default is sufficiently created by a failure to make payment upon any demand made by the pursuers on him in clear terms, and that such demand is contained in the schedule of intimation, requisition, and protest in question.

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LORD JUSTICE-CLERK.—I have had an opportunity of reading the opinion of Lord Dundas, with which I entirely concur.

THE COURT pronounced this interlocutor:—“Recall the said interlocutors appealed against, and remit the cause to the Sheriff-substitute to proceed as may be just.”

LAING & MOTHERWELL, W.S.—BALFOUR & MANSON, S.S.C.—Agents.

MRS CATHERINE M'DONALD OR FANN, Pursuer (Respondent).—

A. J. P. Menzies.

MRS MARGARET NICOLSON OR M'DONALD, Defender (Reclaimer).—

M'Lennan, K.C.—Morton.

No. 130.

June 11, 1913.

Fann v.
M'Donald.

Succession—Legitim—Extent of legitim fund—Unrevoked donation inter virum et uxorem—Husband and Wife.

Held (aff. judgment of Lord Dewar, diss. Lord Dundas) that an unrevoked inter vivos gift of moveables made bona fide by a husband to his wife was subject to a claim for legitim, in respect that such claim could only be excluded by a gift which was absolute and irrevocable, whereas the gift in question was revocable as a donatio inter virum et uxorem.

ON 18th December 1912 Mrs Catherine M'Donald or Fann brought an action of count, reckoning, and payment against her stepmother, Mrs Margaret Nicolson or M'Donald, widow of the deceased John M'Donald, and against David Munro and Archibald Macdonald, his executors nominate. The summons concluded for an accounting and for payment of the amount of legitim due to the pursuer.

2D DIVISION.
Lord Dewar.

The pursuer averred that she and her brother, who was not a party to the action, were the children of John M'Donald, who died in 1910, leaving a settlement by which he bequeathed his whole means to the defender, Mrs M'Donald, who was his second wife, and appointed David Munro and Archibald Macdonald as executors. (Cond. 1) “ . . . There was no estate whatever standing in the name of the deceased at his death except his furniture, which the female defender has taken possession of. . . .” (Cond. 2) “During the marriage between the female defender and the said John M'Donald the latter transferred large sums of money to the former by handing the same to her to deposit in bank or elsewhere in her own name, or by deposit-

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ing the same at his own hand in her name. The following sums were so transferred:—In the latter part of 1905 he handed her £100 or thereby, which she at his desire deposited in bank in her own name; in September 1905, at Broadford, in Skye, he paid her £50, which by his direction she deposited in her own name; in April 1906, also at Broadford, he deposited the contents of a bank draft for £200 in bank in her own name, but afterwards transferred the money to the Clyde Trust; in December 1906 he deposited £700 in bank in her name; on 16th November 1907 he directed his banker to transfer to her name a deposit for £70 then standing in his own name, and the banker did so; in 1908 he again took a bank draft for £200 to bank and deposited the contents in her name. All these deposits still stood in her name at the death of the said John M'Donald in the form in which he had directed them to be made. The defender during the lifetime of the deceased John M'Donald did no act of ownership in regard to said deposits and investments, the same, although in her name, being really the property of her husband, who collected the revenue and directed the investment thereof. It is believed that he similarly placed in her name other sums of money to the amount of about £200, which she also put in her own name, and which remained there at his death. . . .” (Cond. 3) “The female defender maintains that the deceased gifted the said sums of money to her *inter vivos*. The pursuer, on the other hand, claims that they were invested in her name as a trust for the deceased, or alternatively, were a donation *mortis causa*. The revenue of the said sums of money which had been transferred as aforesaid was accumulated during the lifetime of the deceased and falls to be accounted for. The amount of the said funds at the death of John M'Donald was about £1850.” (Cond. 4) “The pursuer has called on the female defender to account to her for legitim, but she maintains that there is no estate available. The pursuer claims that the said funds should bear legitim whether they were a donation *inter vivos* or *mortis causa* or a trust for deceased. The deceased placed the property in question in his wife's name in order to defraud the pursuer and her brother (who had done nothing to offend him) of legitim, and this object was instigated by the defender. The alienation in favour of the defender was a device in order that he might disappoint his children's legal rights and was so treated by the deceased and the defender.”

Defences were lodged for Mrs M'Donald who admitted that sums, amounting to £1436, had been transferred to her by her husband during his lifetime, substantially in the manner averred by the pursuer. She averred:—(Ans. 2) “. . . From the respective dates when they were gifted to her she dealt with them entirely as her own property, collected the revenue derived from them, and paid it into her own bank account.”

The pursuer pleaded, *inter alia*;—(1) The pursuer being entitled to legitim out of the funds condescended on, and the same being in possession of the female defender as universal legatory or donee, the latter should be ordained to account therefor as craved.

The compearing defender pleaded, *inter alia*;—(3) The averments of the pursuer are irrelevant and insufficient to support the conclusions of the action.

On 4th March 1913 the Lord Ordinary (Dewar) pronounced this interlocutor:—“Sustains the first plea in law for the pursuer: Repels the . . . third plea in law for the defender: Finds that the pursuer

is entitled to legitim out of the funds transferred by her father, the late John M'Donald, to the defender, and that the defender must account to the pursuer therefor: Appoints the cause to be enrolled for further procedure, and grants leave to reclaim." * June 11, 1913.
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* "OPINION.—The question in this case is whether a father can defeat his children's claim to legitim by making over his whole property to his wife during the marriage. The pursuer is the daughter of the late John M'Donald, Broadford, Skye, and she brings this action against Mrs Margaret Nicolson or M'Donald, her stepmother, concluding for £400 in name of legitim. The pursuer's father married the defender on 15th July 1905, when he was about seventy years of age, and he died on 7th January 1910. He left a trust-disposition and settlement, but it is admitted that there was no estate standing in his name at the date of his death. It was all made over to the defender during the marriage. She admits that on various dates between May 1905 and November 1907 she received as gifts from her husband sums amounting in all to £1436. The money was sometimes handed over and deposited by her in bank in her own name, and at other times the deceased directed his bankers to transfer the money which stood in his name to the name of the defender. In this way he disposed of all he had, and it stood in the defender's name at his death. The pursuer avers that this was done at the defender's instigation to defeat her claim and her brother's claim to legitim, and that, although the said funds stood in the defender's name, they were truly the property of the deceased who directed the investment thereof and collected the revenue, and must, therefore, be regarded as having been held in trust for the deceased, or alternatively were a donation *mortis causa*. And further, and in any event, if they were, as the defender claims, donations *inter vivos*, they still must bear legitim on the ground that they were donations *inter virum et uxorem*, liable to be revoked at any time during the deceased's life; that the gift did not become absolute until his death, when legitim had fully vested in the pursuer.

"I do not think that it is necessary to inquire whether it was truly a trust or donation *mortis causa*, because I am of opinion that it must bear legitim even if it be, as the defender contends, a donation *inter vivos*.

"The right of legitim belongs to the children independently of the father, but it is settled that the father may so dispose of his property during life as to defeat his children's claims. He may, for example, give away his money, or deliver securities transmissible by delivery, or by deed *inter vivos*, provided the deed of alienation or gift be absolute and irrevocable. But he is not entitled to defeat legitim by any scheme or device having merely the appearance of disposing of his means and estate *inter vivos*, but in reality not doing so until after his death. Thus if a conveyance though *ex facie* absolute and irrevocable is of such a nature that the disponent has yet power over it, legitim is not barred. The test appears to be whether the donor has absolutely and irrevocably divested himself of his estate. If he has, the claim for legitim will be defeated, but not otherwise—(*Craigie v. Craigie*, (1811) Hume, 288; *Black v. Black*, (1795) Hume, 290; *Buchanan v. Buchanan*, (1876) 3 R. 556).

"If I am right in this, I think it follows that a gift from one spouse to another, being revocable at any time during the lifetime of the donor without the knowledge of the donee, does not fulfil the condition which is essential to defeat the claim of legitim. It appears to be in the same position as a donation *mortis causa* in a question of legitim, and it is settled that although a *mortis causa* deed may in express terms bar legitim it will be unavailing because the legitim has vested in the child at the same moment as the deed comes into operation. In the present case the gift to the defender did not become absolute till the donor's death, and at that period the legitim had fully vested in the pursuer. . . . On the whole matter I am of

June 11, 1913. The defender reclaimed, and the case was heard before the Second Division on 16th and 20th May 1913.

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Argued for the claimer;—The question whether an unrevoked donation by a husband to his wife was subject to a claim for legitim was novel. The point was raised, but not decided, in *Balmain v. Graham*.¹ The question should be answered in the negative. Legitim could be claimed "only out of the moveable property belonging to the father at his death."² The subject of a gift which he might have revoked but did not—since a general settlement did not operate revocation³—was not "property belonging" to him at his death.⁴ The wife was not in the position of a trustee. She could deal with the property in any way she pleased, even contrary to her husband's wishes,⁴ and if he revoked the gift, she was not bound to restore what she had *bona fide* consumed.⁵ His estate being solvent, his creditors did not possess the power of revocation which they would otherwise have had.⁶ The gift took effect from the date on which it was made, subject only to a resolutive condition in the event of revocation,⁷ and accordingly from that date the donor was completely divested.⁸ The nature and effect of a donation *inter vivos* between spouses became clear by contrasting it with a donation *mortis causa*, which only took effect on and as from the death of the donor.⁹ The institutional writers in saying that a father's deed must be "irrevocable" in order to defeat the right to legitim¹⁰ had in contemplation another case, namely, the case of a simulate transaction where the father did not in reality part with control of the property. In such a case the claim to legitim was no doubt unaffected,¹¹ and this was the ratio of the decisions relied on by the Lord Ordinary.¹² These authorities had no application to a case where the father had divested himself as completely as it was in his power to do. If he had expressly reserved the power to revoke, that might have prevented divestiture as indicating an intention to retain the control of the fund. But the same result did not follow from the mere existence of a power of revocation

opinion that the pursuer is entitled to legitim out of the funds transferred by her father, and that the defender must account to her therefor."

¹ (1721) M. 8199.

² *Lashley v. Hog*, (1804) 4 Pat. 581, *per* Lord Chancellor Eldon, at pp. 610, 622; *M'Laren on Wills*, (3rd ed.) vol. i. p. 124.

³ *Thomson's Trustees v. Thomson*, (1879) 6 R. 1227, *per* Lord Gifford, at p. 1231.

⁴ *Wright's Executors v. City of Glasgow Bank*, (1880) 7 R. 527.

⁵ *Edward v. Cheyne*, (1888) 15 R. (H. L.) 37.

⁶ *Kemp v. Napier*, (1842) 4 D. 558.

⁷ *Fraser on Husband and Wife*, (2nd ed.) vol. ii. p. 959, 960; *Bell's Prin. secs.* 1616, 1617; *Ersk. Inst.* i. 6, 32.

⁸ *Spalding v. Spalding's Trustees*, (1874) 2 R. 237, *per* Lord President Inglis, at p. 242.

⁹ *Morris v. Riddick*, (1867) 5 Macph. 1036, *per* Lord President Inglis, at p. 1041; *Crosbie's Trustees v. Wright*, (1880) 7 R. 823, *per* Lord Shand, at p. 834.

¹⁰ *Bell's Prin. sec.* 1585; *Fraser on Husband and Wife*, (2nd ed.) vol. ii. pp. 1001, 1003.

¹¹ *Mackintosh and Nicolson v. Hunter and Others*, (1841) 16 Fac. 8vo. 728, *per* Lord Justice-Clerk Boyle, at p. 736, 3 D. 675.

¹² *Craigie v. Craigie*, (1811) Hume's Dec. 288; *Black v. Black*, (1795) Hume's Dec. 290; *Buchanan v. Buchanan*, (1876) 3 R. 556.

conferred on him by force of law. The averment that the gift was made "to defraud" the children of their legitim was wholly irrelevant.¹ The case of *Lord Advocate v. Gunning's Trustees*,² cited by the respondent, had no application. That case decided that the subject of a gift by a husband to his wife was property of which he was "competent to dispose" in the sense of the Finance Act, which was merely equivalent to saying that he had a power of revocation. It threw no light on the situation which arose if that power were not exercised.

Argued for the respondent;—The law was clearly laid down by the institutional writers to the effect that a claim of legitim could only be defeated by an irrevocable alienation of the property.³ A *donatio inter virum et uxorem* was revocable, and therefore legitim was payable out of the subject of the gift. The rights of the donee in this property could not be "established until the death of the donor, for until then they were liable to be avoided by a revocation."⁴ It followed that the property belonged to the donor at his death.⁵ Further, the husband's settlement was an implied revocation of the gift, for it dealt with his "whole means." The argument for the respondent was fully stated in the opinion of the Lord Ordinary.

At advising on 11th June 1913,—

LORD JUSTICE-CLERK.—The question to be decided in this case is whether a donation made by a husband to his wife *stante matrimonio*, and which he has taken no steps to recall during his life, does, at his death, form part of the fund on which the children have a claim for a share as legitim, it being undoubted that the right to revoke was in the husband until the time of his death, such a right being implied in law. This question the Lord Ordinary has answered in the affirmative. Giving the best attention I can to the matter, and the more so as I understand there is a difference of opinion among your Lordships, I have come to be of opinion that the judgment is right and ought to be affirmed. It appears to me that the true criterion in such a case is expressed by Lord Justice-Clerk Boyle in the case of *Nicolson's Assignee*,⁶ where he says that "if we are satisfied that power over the estate is still retained . . . the claim of legitim will be sustained." It seems to me that the passages quoted to the Court at the debate from the institutional writers bear out the pursuer's contention, that where a donation is not so given as to be irrevocable, and nothing is done during the granter's life to stamp it as irrevocable, the fact that the donor could have revoked it at any time during his life, places the subject of the donation under liability for his obligations after his death. It forms part of the fund liable to meet his debts, and legitim being a debt in law due by his estate, the claim of those entitled to legitim must be satisfied from it if it is necessary, in whole or in part, to meet the claim. At the moment of the husband's death it is true that he can no longer exercise his right of revocation, but equally at

¹ *Bonstead v. Gardner*, (1879) 7 R. 139.

² 1907 S. C. 800.

³ *Buchanan v. Buchanan*, (1876) 3 R. 556, *per* Lord Ormisdale, at p. 560.

⁴ *Fraser, Husband and Wife*, (2nd ed.) vol. ii. p. 959.

⁵ *Lord Advocate v. Gunning's Trustees*, 1907 S. C. 800.

⁶ (1841) 16 Fac. 8vo. 728, at p. 736; also (less fully reported) 3 D. 675.

June 11, 1913. that moment the legitim claim emerges. And the legitim claim being a claim for a debt, it cannot be ousted by what was a revocable gift, which Fann v. M'Donald. was not made absolute while the maker of the gift otherwise revocable was alive.

Lord Justice-Clerk.

I do not consider it necessary to go at length into the authorities and cases which were quoted at the debate. I have had an opportunity of considering an opinion which has been prepared by Lord Salvesen, in which he has gone most fully into the matter. And concurring as I do in the result at which he has arrived, and in the grounds he gives for his decision, I content myself with expressing that concurrence, and would therefore move your Lordships to adhere to the interlocutor of the Lord Ordinary.

LORD DUNDAS.—The question we have here to decide is, as conditioned by the argument, whether moveable property the subject of a gift (or series of gifts) made by a husband to his wife some years before his death, and with which she has ever since dealt as her own property, must be reckoned as part of the husband's moveable estate at his death for the purpose of computing legitim, on the sole ground that donations *inter virum et uxorem* are by law revocable. The Lord Ordinary has decided in the affirmative. He considers that the gift, in order to be good against a claim for legitim, must be absolute and irrevocable in the sense that the donor must not only have divested himself of the subject absolutely but must also have placed it beyond his power to recall; and that, inasmuch as a donation *inter sponsores* is by law revocable by the donor during lifetime, it necessarily fails to satisfy this essential test or condition. The reasoning is plausible; but at the conclusion of the debate I had formed an impression that it was unsound, and I thought (and think) that the Lord Ordinary is palpably in error when he adds—what enters deeply into the problem—that such a gift is “in the same position as a donation *mortis causa* in a question of legitim.” I have had an opportunity of studying the much fuller and more elaborate opinion written by my brother Lord Salvesen, with which I understand your Lordships agree, and which reaches the same conclusion as the Lord Ordinary upon substantially the same grounds. Having given the best consideration I can to the matter, I find myself unable to agree with your Lordships and the Lord Ordinary. It appears to me that a gift under the conditions postulated, being *ab initio* not void but merely voidable, is a valid alienation *pro tanto* of the donor's moveable estate as from its date, provided that the resolute condition inherent by law in its nature has not come into operation.

One must consider somewhat closely the legal nature and quality of a claim for legitim on the one hand, and of a *donatio inter sponsores* on the other. Legitim, the *legitima pars liberorum*, may, I take it, with sufficient accuracy be described as the share of the deceased's personal estate to which his surviving children are by law entitled on his death. Their claim emerges only on the father's death. It is a claim, not against the living father, but against his executors for a share of the executory estate, and cannot extend to anything not comprehended within that estate. I do not see how the subject of such a gift as we are here discussing can be *in bonis defuncti*, part of the executory estate of the deceased husband and father. The case of

*Gunning's Trustees*¹ was founded on as supporting the affirmative of that June 11, 1913. contention. It seems to me to have no bearing in that direction. It *Fann v.* decided that the Crown was entitled to estate-duty upon a sum of money *M'Donald.* which the deceased had gifted to his wife, and had never recalled. The *Lord Dundas.* decision was reached on the ground that it was "property of which the deceased was at the time of his death competent to dispose" within the meaning of section 2 (1) (a) of the Finance Act, 1894, as the words quoted are defined by section 22 (2) (a) thereof. To put it otherwise, the donor was entitled to revoke; therefore it was within his competency to dispose of the money by revocation. But that is very different from affirming that the gift unrevoked did form part of his executory estate. The two things seem to me to have no true relation to one another. Thus, by another sub-head of the same section of the Finance Act (section 2 (1) (c)), duty is claimable upon gifts made *inter vivos* by the deceased, if within twelve months of his death; yet it could never be maintained that these formed part of his executory estate. It is not *hujus loci* to consider whether or not the Crown may have a claim for duty in this case, or against whom; but I think one may discard *Gunning's Trustees*¹ as an authority in point for the present discussion. Now, it seems to me that a claim by this pursuer against her father's executors for payment of a share of the moneys gifted by him to his wife would have been completely met by the executors with the defence that the moneys sued for were neither in their possession nor under their control. The executors could not, so far as I see, have successfully sued the wife for recovery of the moneys; for a trust-settlement in general terms does not revoke a donation *inter virum et uxorem*.² *Thomson's case*³ is worth notice as being, so far as I know, the only direct authority on the point before us. The question was raised in that case not (as here) by a child claiming legitim, but by testamentary trustees claiming the subject of the wife's gift, as forming part of the deceased husband's general estate. The Court repelled the claim on the ground that the gift, not having been recalled, could not be held to be part of the husband's estate at his death. If the decision was sound (and I see no reason to doubt it) it is clear that a claim to a part of the subject in name of legitim must have been refused on the same ground, viz., that the subject gifted was not *in bonis* of the father at his death. Such a donation, as already said, is by our law not void, but only voidable; it is a valid gift, subject only to a resolutive condition.⁴ In the present case the condition cannot now come into operation; for the husband did not revoke the gifts, and there is no suggestion that there is any creditor in a position to do so. I think, therefore, that the gifts were valid alienations of his moveable estate, vesting in the donee at their respective dates, subject only to a possible defeat which cannot now take place; and that they cannot be held as forming part of the donor's executory estate in this question of legitim.

¹ 1907 S. C. 800.

² Ersk. Inst. i. 6, 31; Fraser, Husband and Wife, (2nd ed.) vol. ii. p. 953; Thomson's Trustees, 6 R. 1227.

³ 6 R. 1227.

⁴ Ersk. Inst. i. 6, 32; Bell's Prin., sec. 1617; Fraser, Husband and Wife, (2nd ed.) vol. ii. p. 959.

June 11, 1913. A gift of this sort does not constitute a trust for the donor in the person of the donee: it is something very different; at the moment of gift, the husband is divested and the wife vested, not in the mere title, but in the beneficial right of ownership. The gift is, indeed, subject to the risk of recall; but unless and until that event shall happen, her right of ownership is as full and complete as that of any other donee; and on the husband's death the gift holds good as against the executors under his general settlement. It is equally clear that such a gift does not stand *in pari casu* with a mere testamentary bequest; for if the wife should predecease the husband, and he thereafter die leaving the gift unrecalled, the gift, having vested in her as at its date, would pass to her own executors or representatives as part of her estate.¹ Nor is it, I respectfully think, a tenable view—though it seems to commend itself to the Lord Ordinary and to your Lordships—that a gift *inter sponsos*, such as we are here considering, is in the same position as a donation *mortis causa*. In the latter case, “the property is immediately transferred to the grantee, upon the condition that he shall hold for the granter so long as he lives, subject to his power of revocation, and, failing such revocation, then for the grantee on the death of the granter. It is involved of course in this definition, that if the grantee predecease the granter the property reverts to the granter, and the qualified right of property which was vested in the grantee is extinguished by his predecease.”² I have already referred to sufficient authority to show that a gift *inter sponsos* is not held in trust for the donor, and that, if the donee predeceases, the gift still remains good, and will pass to her own executors or representatives, if not subsequently recalled by the donor. It vests in the donee *ab initio*, subject only to a risk of defeat.

It was, however, strongly maintained that, inasmuch as donations *inter sponsos* are by law revocable, and the donor cannot effectively discharge his or her right to revoke, they fall short of what the Lord Ordinary calls the “test” or “essential condition” necessary to defeat a claim of legitim, viz., the absolute and irrevocable divestiture of the property by the donor. Lord Salvesen observes that the defender's counsel put himself out of Court by conceding “that where a gift has been made in favour of a third party by a deed which expressly reserved the granter's power to revoke it at any time, the gift would not be effectual to bar legitim.” I did not recollect, and have not noted, that such a concession was made; but if it was, I should not be prepared to hold a party litigant as bound by a concession in law made by counsel in the course of a somewhat perfunctory debate, if, as I consider to be the case, the legal point conceded was erroneous. The element of irrevocability is no doubt important in all questions of gift or alienation; and it is dealt with by the text-writers and by the Judges in discussing gifts to third parties. But one must be careful to read any particular passage in the light of the decisions cited as supporting it, and any dictum along with its full context; and I do not think that, if that is done, there will be found either authority or decision for the proposition that a

¹ Fraser, Husband and Wife, (2nd ed.) vol. ii. pp. 952, 959.

² *Per* Lord President Inglis in *Morris v. Riddick*, (1867) 5 Macph. 1036, at p. 1041.

gift to a third party is subject to a claim for legitim on the sole ground that June 11, 1913.
 it was not irrevocable. I believe that all the cases where the claim was ^{Fann v.}
 allowed were decided on the ground that the alienation founded on was truly ^{M'Donald.}
 of a testamentary character; i.e., not merely revocable, but also intended to ^{Lord Dundas.}
 be prestable, and taking effect, only after the granter's death. There are
 some cases where the deed or transaction under review has been set aside or
 disregarded as being "simulate"—by which I apprehend, is meant a trans-
 action *ex facie* and in form duly completed *inter vivos*, but in truth and sub-
 stance not taking, or intended to take, effect during life. A recent type of
 this class of case is *Buchanan*.¹ In the case before us, however, upon the
 postulates of the argument, there is no "simulate" transaction or alienation,
 for *ex hypothesi* the donee dealt with the subjects of gift throughout as her
 own property. Reverting now to the institutional and text writers, Mr
 Erskine,² under the title "Of Succession in Moveables," observes that "the
 husband, though he should be in *liege pousie*, cannot dispose of his move-
 ables to the prejudice of the *jus relictæ*, or right of legitim, by way of testa-
 ment, or indeed by any revocable deed; for revocable grants create no debt
 till the death of the granter, and at that period the right of the society goods
 is fully vested in the widow and children." I think the words which I
 have italicised can mean no more than that a claim for legitim is not to be
 defeated by any revocable deed which does not take effect until after the
 death of the granter; for the only case cited by Mr Erskine³ was clearly of
 that nature, as appears from the report in Morison. Lord Fraser, writing
 more than a hundred years later than Erskine, says, under the head of
 "Legitim,"⁴ that a father's deed or gift, in order to effectually defeat a
 claim for legitim, must be (1) absolute and irrevocable, (2) *inter vivos*, and
 not *mortis causa*. In considering the first of these propositions one must
 not lose sight of, nor entirely disjoin it from, the second. Under the head-
 ing that "the father's deed must be irrevocable," the learned author, after
 citing the passage in Erskine I have just referred to, discusses a series of
 cases. The first is the well-known case of *Lashley v. Hog*.⁵ The subject of
 controversy there was certain bank shares, part of which the father had
 ostensibly given to his son, while continuing to draw the dividends, &c.,
 himself, and another part of which he had ostensibly given to the son, while
 in fact the latter held them upon an agreement or understanding that he
 would invest the same in land to be entailed after the father's death. The
 House of Lords held, in regard to both classes of shares, that a claim for
 legitim was not excluded; in regard to the former class, upon the ground,
 as I gather from the report, that the fact of the father having continued to
 receive the dividends, &c., was sufficient to warrant the legal inference that
 he had never ceased to be the true beneficial owner, in other words, that
 there was truly no gift at all to the son; and as to the latter class, that, in
 respect of the understanding between father and son as to the application
 of the shares after the father's death, there was no true gift to the son, who
 was to be merely the instrument for carrying out his father's testamentary
 intentions. I do not think *Lashley v. Hog*⁵ touches the present question;

¹ 3 R. 556.² Inst. iii. 9, 16.³ Henderson, (1728) M. 8199.⁴ Husband and Wife, (2nd ed.) vol. ii., p. 1001.⁵ 4 Pat. App. 581.

June 11, 1913. for, on the assumption postulated by the argument, there was here a *bona fide* gift (or series of gifts) of which the donee thereafter received the interest as her own property, without any understanding or restriction as to the ultimate disposal of principal or interest. Lord Fraser next cites the important case of *Nicolson's Assignee*.¹ But the decision in that case, so far as it supported the claim for legitim, proceeded, I think, plainly upon the ground that the deed under consideration was of a testamentary character. The counter pleas on the point were as follows. The defenders pleaded that the granter "had irrevocably" (the deed bore *ex facie* to be irrevocable) "by a proper and rational deed conveyed away his property *inter vivos*, reserving only to himself an annuity." The pursuer pleaded that "the claim of legitim was in no way cut off or affected by the execution of the deed in favour of the defenders, in respect it was of a testamentary and *mortis causa* nature, and, in so far as it had reference to the testator's lifetime, was, for his own behoof, gratuitous, and revocable." The Lord Ordinary (Moncreiff), in making *avizandum* to the Court, pointed out that the deed consisted of two parts; one for payment of debts and a life annuity to the granter; "the other is a universal settlement, *mortis causa*, for the disposal of his property at his death." Lord Moncreiff went on to say, "The question here is, whether Mr Macalister's whole personal estate in possession, or still to be realised, was so completely alienated by the trust-deed, that after all the existing debts were paid nothing remained in his own person, and all was vested in gratuitous legatees, to whom no right was given till his death. And the more particular question is, whether the right of legitim, existing during his life, though not coming into operation as a debt till his death, could be defeated by such a gratuitous trust. The Lord Ordinary doubts much whether any mere trust, which substantially was for the trustor's own benefit after the payment of debts, could have this effect. He has as yet seen no example of its being so held. A man may, indeed, injure or impair the right of legitim by *bona fide* converting personal funds into heritable estate, or *bona fide* giving away or spending his money in his lifetime; but it is a very different thing to make a universal settlement of his whole property *mortis causa*, by the mere interposition of trustees to act as his executors at his death. Supposing such a deed to be effectual for its purposes otherwise, it is thought that it cannot prejudice the right of legitim competent to the children." The Court, agreeing with these views, held the first purpose of the deed to be a proper alienation *inter vivos*, but were of opinion that the ulterior purposes were testamentary, and therefore ineffectual to exclude the claim of legitim.² I need not notice in detail the other cases referred to or commented on by Lord Fraser. They include *Buchanan*.³ In each and all, the point seems to have been that a deed or gift which is in substance of a revocable nature (whether declared to be irrevocable or not), in the sense that it was not truly intended by the granter to take effect during his life, will not defeat legitim. The same observation is, I think, true of the cases (which are mainly those referred to by Lord Fraser) cited by

¹ 3 D. 675, more fully reported 16 Fac. 8vo, 728.

² Cf. M'Laren on Wills and Succession, (3rd ed.) vol. i., pp. 128, 129.

³ 3 R. 556.

Professor Bell in support of his statement¹ that legitim may be defeated June 11, 1913. by an "irrevocable deed *inter vivos*, though the term of payment is after ^{Fann v.} the husband's death, and although a life rent or any annuity is reserved; ^{M'Donald.} but not by a deed *mortis causa*, or by one which does not absolutely divest ^{Lord Dundas.} the father." The absolute divestiture desiderated is a *bona fide* alienation *inter vivos*, not one where the beneficial right is to take effect only after the grantor's death. In this sense again I think one must read Lord M'Laren's statement,² based on the same (or similar) cases as those referred to by the other text-writers, that "the legitim fund is therefore effectually diminished by deeds of alienation or conversion executed *inter vivos* and in *liege poustie*, provided they are absolute and irrevocable, and are not intended as a mere device for diminishing the children's legal provisions." It seems to me, therefore, that revocability, or the reverse, has never been made *per se* the test or essential condition of the validity or otherwise of a gift or alienation *inter vivos* to diminish or extinguish the legitim fund. I am not aware of any case where a gift has been made of moveable property (e.g., a yacht, a family jewel, or even of stock or investments) to a third party, the donee having thereafter exclusive use and enjoyment of it, but upon an express condition that the grantor should be entitled at any time during his life to recall the gift. Such a case would form a close analogue of the kind of donation *inter vivos* we are here considering. It appears to me that, upon principle, the gift (in the case I have supposed) would, if not revoked, plainly be no part of the executry estate of the grantor; and that the same is true in the present case.

I have now stated the reasons which lead me to a conclusion opposite to that of the Lord Ordinary. I think (differing from your Lordships) that his interlocutor ought to be recalled. But the case would, in that event, have to go back to the Outer House for proof. The argument at our bar was necessarily conducted on the footing that, as averred by the defender, she dealt with the subjects of gift, from the respective dates of gift, entirely as her own property, collected the revenue derived from them, and paid it into her own bank account. This is denied by the pursuer, who avers that the defender during the lifetime of her husband did no act of ownership in regard to the deposits and investments, the same, although in her name, being really the property of her husband, who collected the revenue and directed the investment thereof. If the latter account of the matter were proved to be true, it might well be that the result of the case would be different from that which, upon the postulates of the argument before us, I think we ought, upon the legal question, to affirm.

LORD SALVESEN.—In this case I am so well satisfied with the reasons assigned by the Lord Ordinary for his judgment that I should not have been disposed to add anything, but for the fact that the precise circumstances in which the present claim is made have never formed the subject of express decision. This is somewhat strange, seeing that donations by a husband to a wife are of frequent occurrence and often remain unrevoked

¹ Bell's Prin., sec. 1585.

² M'Laren's Wills and Succession, (3rd ed.) vol. i., p. 128.

June 11, 1913. at the death of the donor, and I can only account for there being no decision precisely in point on the footing that the principles that fall to be applied have been long settled.

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M'Donald.

Lord Salvesen.

The defender's counsel conceded that according to the law of Scotland a donation by a husband to his wife (subject to certain exceptions with which we are not here concerned) is revocable at any moment, and may be revoked even by a *mortis causa* settlement. It follows that the subject of the donation is, up to the moment of the donor's death, under his control. If he dies bankrupt without having revoked, his creditors are entitled to claim the subject of the gift as part of his estate, and this even although sequestration is only taken out a considerable time after death. It follows, I think necessarily, that such a donation cannot operate an exclusion of the children's legitim from the subject of the gift, for they are entitled to claim legitim from all moveable estate which was *in bonis* of their father at the time of his death. The failure of the husband to revoke the donation only makes the gift absolute in favour of the donee as in a question with the husband's representatives, but legitim is a claim of debt and not a right of succession, and while it cannot even rank alongside of the claims of ordinary creditors it takes precedence of any testamentary provision in favour of third parties. It was argued that the right of revocation which is inherent in the donating husband, and of which he cannot deprive himself when it becomes absolute by his death without revoking, draws back to the date when the gift was made. I do not doubt it, but here the gift only became absolute subject to the right of creditors and to the children's right of legitim, which vested in them the moment the breath was out of the father's body.

I put one illustration which I think demonstrates that legitim cannot be excluded from the subject of a donation revocable during the father's life. Suppose that in this instance the deceased, instead of leaving his whole estate to his widow, had by his will directed that it should be conveyed to third parties, and expressly included in the conveyance the donations to his wife, I apprehend it could not have been contended for a moment that any part of his moveable estate would have been exempt from a claim of legitim. Can there be a different result because he leaves unrevoked the donations in favour of his wife? The legitim fund in each case must be precisely the same whoever may be the object of the testator's bounty.

It has been suggested that as the claim for legitim only arises on the father's death and is a claim against his executory estate it cannot be payable out of moveable property which has been made the subject of a donation *inter vivos*, which donation has become absolute on his death without revocation. Precisely the same thing might be said of a claim by the Government for succession-duty. Yet it was held in the case of the *Lord Advocate v. Gunning's Trustees*¹ that the estate upon which succession-duty fell to be paid included donations made by the testator to his wife *stante matrimonio*. The executor maintained there, as here, that as the testator had not revoked his gift the subject of it formed no part of his estate at the time of his death; but the Court held that it was still property of which the deceased was at the date of his death competent to dispose, and

¹ 1907 S. C. 800.

was therefore liable to duty. The test seems to me to be exactly the same June 11, 1913. in the case of legitim. I know of no case, and can conceive none, where ^{Fann v.} moveable property over which the testator had the full control during his ^{M'Donald.} life, and right to dispose of after his death, has been excluded from the ^{Lord Salvessen.} legitim fund. There may in certain circumstances be a difficulty in recovering the donations, and if these have been consumed by the donee who has no other funds, the legitim fund must suffer abatement in the same way as if the estate consisted partly of a debt which proved to be irrecoverable. Here there is no such difficulty, as the widow is the universal legatory of her husband's estate and is the leading defender in the present action. Moreover, no such plea has been stated on her behalf.

One other concession which the defender's counsel made seems to me to put him out of Court. He conceded that where a gift has been made in favour of a third party by a deed which expressly reserved the granter's power to revoke it at any time, the deed would not be effectual to bar legitim. I should certainly not hold a party bound by his counsel's concession in law if I believed it to be erroneous; but an examination of the authorities satisfies me that the concession was rightly made. All the text-writers seem agreed that while a father may defeat legitim by alienating his moveables onerously or gratuitously, the alienation must be such as to divest him completely of the property. Thus Fraser on Husband and Wife says, page 1001:—"1. The deed of alienation or of gift must be absolute and irrevocable. 2. It must be *inter vivos*, and not *mortis causa*." So again Bell in his Principles, section 1585, deals with the matter thus:—"Legitim may be defeated by an irrevocable deed *inter vivos* although the term of payment is after the husband's death and although a liferent or any annuity is reserved; but not by a deed *mortis causa* or by one which does not absolutely divest the father." It is true that in the original edition the word "irrevocable" does not appear, nor the last clause above quoted, but there is nothing in the original text inconsistent with these additions; and they have the authority of a distinguished lawyer. In M'Laren's Wills and Succession¹ the proposition is stated in different terms, but to the same effect:—"The legitim fund is therefore effectually diminished by deeds of alienation or conversion executed *inter vivos* and in *liege poustie*, provided they are absolute and irrevocable, and are not intended as a mere device for diminishing the children's legal provisions." In Erskine's Institutes the matter is dealt with precisely on the same lines. It would be remarkable if all the text-writers who deal with the subject should have misread the authorities on which their statement of the law is based. I have studied some of these for myself, and I think they have rightly apprehended their import. I shall cite only two or three as examples. In the case of *Nicolson's Assignee*² the question was whether estate settled by a gratuitous trust-deed for payment of debts and of a restricted liferent annuity to the granter and disposing otherwise of the fee of his property barred the children's claim to legitim; and it was held that it did not. The ground of decision was thus expressed by the Lord Ordinary, Lord Mon-

¹ (2nd ed.) vol. i., p. 128.

² 3 D. 675, also more fully reported 16 Fac. 8vo, 728.

June 11, 1913. *creiff*,¹ a very weighty authority on a subject like this: "For it appears to him to be a very clear matter of law, that the truster was not by the trust-deed divested of his estate and funds to all effects whatever. That trust might have been superseded altogether, if the truster's condition and the state of his affairs were such as to admit of sequestration, or of a process of ranking and sale. . . . The question is, whether the truster was so divested that diligence directed against him would not have been effectual to attach the residue of the funds, not through the trustees, but directly through the truster himself, and such proceedings might have arisen in consequence of new debts by the truster, after the execution of the trust-deed." This decision was affirmed by the Second Division. Lord Justice-Clerk Boyle² in giving the leading opinion says: "But if there is the least indication on the face of the deed, that the divestiture is not total and absolute (for it may be such, that the granter has no power to attach the subjects conveyed, but is divested out and out), we must look at the deed to ascertain this; and if we are satisfied that power over the estate is still retained, then the other principle comes into play, and the claim of legitim will be sustained." I pause to observe that it is long settled that in the event of sequestration of a donor, whether during his lifetime or after his death, a donation to the bankrupt's wife would fall under the sequestration.

Again, in the case of *Collie*,³ the circumstances were that a party had lent a sum of money on a bond taken payable to trustees for behoof of his two grandsons reserving his own liferent right to the interest and the debtors had by his direction delivered the bond to his son-in-law, one of the trustees whom he desired to keep it till he should receive further notice. Interest was paid to the son-in-law both before and after the lender's death. Parole evidence was led which showed that it was the lender's intention that the deed should be irrevocable; and it was accordingly held that it was effectual to exclude a claim of legitim at the instance of a daughter. Apart from the parole proof, it is plain that all the circumstances indicated that the granter had completely divested himself of the fee by the deed in question. The beneficiaries were two of his grandchildren, his own liferent interest was reserved, and the deed was in possession of one of the trustees whom he had appointed to hold the estate. Nevertheless the Court thought it necessary to have parole evidence that there was no sort of understanding between him and the trustees that he should be reinvested in his property if he so desired. The whole reasoning of the Judges proceeded upon the view that the granter had been completely divested of his estate so far as it related to the fee of the subjects, and it is plain that they would have reached the opposite result if they thought it could have been revoked by him. Lord Medwyn said: "Considering the object and character of this bond, and the circumstances under which it was granted, I think it may be inferred that it was the intention of old Pirie to make it an irrevocable deed." And again: "There does not appear the slightest ground for supposing any change of intention as to this money, or that he wished to retain any power over it"; and Lord Moncreiff thus stated the case for the pur-

¹ At p. 733 of 16 Fac. 8vo.

² At p. 736 of 16 Fac. 8vo.

³ *Collie v. Pirie's Trustees*, (1851) 13 D. 506.

suer: "As I have understood the pleas maintained, the case appears to be June 11, 1913. rested on the ground that the deed was never delivered—that it continued Fann v. M'Donald. revocable till the death of Mr Pirie—and that it was therefore ineffectual as a deed *inter vivos* to divest the deceased of the funds in question, and so Lord Salvesen. ineffectual to impair the fund of legitim." The whole of that learned Judge's opinion is then directed to showing that in the particular circumstances of the case there had been an irrevocable donation of the fee to take full effect *inter vivos* in favour of the beneficiaries.

These cases appear to me to establish beyond question in the case of donations to third parties *inter vivos* that, if they are revocable during the grantor's life and do not completely divest him of his estate, they are ineffectual to exclude legitim. If so, I think it impossible to differentiate such a case from one where the right of revocation, although not expressly reserved, is implied by law. Suppose that the deposit-receipts which are here in question had been assigned by a writing which expressly reserved the husband's right of revocation, such a case would admittedly have been within the scope of previous decisions. How can it make any difference that the condition is not expressed but is implied by law? The donee must be assumed to know the law and to take the gift subject to the implied condition that the donor may at any time revoke it.

Can it then be said there is anything in the quality of an *inter vivos* gift between man and wife which differentiates it from other similar gifts? There may certainly be distinctions, but they are not favourable to the wife. Thus in *Collie's* case¹ the donation could not have been revoked by a testamentary act of the donor although ineffectual as in a question with his creditors; whereas it is certain that a donation to a wife may be revoked by will. The truth is that where the donee is a husband or wife the property donated is held on a highly precarious tenure. "The donee cannot . . . alienate the subject nor charge it with any burden to the prejudice of the donor, and consequently the donor returns, upon his revocation, to the full property of the subject, free from the consequences of all the intermediate deeds granted by the donee even to his creditors or singular successors."²

This passage probably refers primarily to a donation of heritable estate; and so far as the rights of third parties are concerned it probably falls to be qualified when the subject of the donation is money or moveables, as explained in *Fraser on Husband and Wife*, (2nd ed.) vol. ii, p. 960. As in a question with the donee, however, the rule holds good; and it may even be that the donee is accountable for the income of the subject gifted unless it has been consumed with the consent, express or implied, of the donor. Until the donor's death, therefore, the donee is a mere trustee for the donor, having the chance of becoming absolutely entitled to the gift in the event of the donor dying without revoking it. If the donor in his last settlement expressly confirmed a donation it would become absolute in virtue of a testamentary act; and it cannot be any better that the law implies such a confirmation where no inconsistent testamentary act can be founded on.

In short, in order that the donation *inter vivos* may be effectual to exclude legitim, it must, to use the language of Professor Bell, "be absolute and

¹ 13 D. 506.

² Ersk. Inst. i. 6, 32.

June 11, 1913. irrevocable"; and the gifts which are treated in this case are admittedly not in that position. On these grounds, I have no difficulty in reaching the same conclusion as the Lord Ordinary.

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M'Donald.

LORD GUTHRIE.—The pursuer claims legitim out of certain sums, amounting, according to her, to £1850, and according to the defender to £1436, which, during the marriage of the pursuer's deceased father with the defender, the deceased's second wife, the pursuer's stepmother, formed the subject of donations from him to the defender. The pursuer has allegations on record to the effect that the so-called donations were simulate, and remained the absolute property of her father; and, alternatively, that they were truly held by the defender in trust for the deceased. The Lord Ordinary has decided the case on a ground which obviates consideration of these averments, because he has held that, even if, as alleged by the defender, the sums in question were *bona fide inter vivos* donations by the deceased to the defender, they are still liable to legitim in favour of the pursuer and her brother, being the only children of the deceased. The circumstances that the deceased at his death left no estate other than the sums in question, and that the defender is, under her husband's settlement, his universal legatory, obviously exclude any attempt to exclude claims of legitim either on the ground that the sums in question were presents, or that they constituted no more than a reasonable provision for a widow. The donations were unrevoked at the deceased's death, and no question arises with outside creditors. It is settled law that a general settlement like that, executed by the deceased, containing no indications of intention to affect the donations, cannot operate as a revocation.

The question at issue is whether *bona fide inter vivos* donations, made *inter virum et uxorem* without a deed, and unrevoked at the donor's death, exclude claims for legitim of the donor's surviving children. But I think the question may be stated more broadly, namely, if A gifts, whether *inter vivos* or *mortis causa*, personal estate to B, with a right of revocation reserved to A, whether express or implied in law, and dies without revoking, is the gift, in the hands of B or of B's representatives, liable to the legal claims of A's surviving spouse and children? There is no sound distinction between the case where a right of revocation is expressly stipulated and the present case where it is implied by law, or between the case where the gift is accompanied by a deed and where it is given without a deed, or between the claims of children and those of a surviving spouse.

The pursuer contends, and the Lord Ordinary affirms the proposition, that, by the law of Scotland, no donation of moveable estate, although *bona fide* and *inter vivos*, can exclude the legal claims of the donor's surviving children, unless it be originally, or have been made prior to the donor's death, irrevocable. The pursuer says that, apart from the claims of the Revenue and of outside creditors, a revocable donation of moveable estate can only take full effect in Scotland in favour of the donee, in the event of the donor leaving no surviving spouse, and no children, whose claims have not been discharged. In the case of a *mortis causa* donation, this result, admitted by the defender, is attributed by her to the fact that, in that case, the donor remains in full control of the donation till his death, at which

date it is still *in bonis*. But the pursuer maintains that the same principle June 11, 1913.
 applies to the case of an *inter vivos* donation, which is subject to recall, Fann v.
 because, although, in the case of an *inter vivos* donation, the donor may part M'Donald.
 with the possession, he still retains control, although indirectly, being able Lord Guthrie.
 to recall it instantly and without reason assigned, if the donee is not dealing
 with it as he thinks proper.

It is scarcely disputed that, if the passages to which your Lordships have referred in the works of Erskine, Bell, Fraser, and M'Laren (and the corresponding passages in reference to *ius relictæ*) be read apart from the authorities to which they refer, the pursuer's contention must prevail. The passages say, in express terms, that, to exclude legitim claims, not only must a donation be *bona fide* and *inter vivos*, but it must also be irrevocable. It is no doubt true that there is no case referred to by these writers or subsequently decided which affirms the exact proposition now maintained by the pursuer, namely, that a *bona fide inter vivos* gift to a wife, unrevoked at the death of the donor, her husband, is liable to be affected by a legitim claim. It is also true that the cases hitherto decided turned directly not on revocability but either on whether the alleged donation was not truly simulate or on whether an alleged *inter vivos* donation was not truly *mortis causa*. But this does not seem to me to conclude the question, if the generality of the words (which must be assumed to have been carefully chosen) unambiguously covers the case we are now dealing with; unless, indeed, there be some clear reason for excluding it.

I do not find such a clear reason in the fact that legitim is only due to children, who survive the parent, out of whose estate legitim is claimed. It was argued that legitim cannot be claimed out of an unrevoked *inter vivos* donation, because, before the right to legitim has vested, the right of the donee has become irrevocable. But what truly happens at the death of the donor is that the donee's right to the donation as irrevocable and the children's right to legitim arise at the same moment; and the emergence of the right to legitim prevents the right to the donation becoming irrevocable, so far as the donation is required to satisfy the legitim claim. As Mr Erskine puts it,¹ "The husband cannot dispose of his moveables to the prejudice of the right of legitim by way of any revocable deed; for revocable grants create no debt till the death of the granter, and at that period the right of the society goods is fully vested in the widow and children."

Then it was said that, seeing that, on the death of the donor, the donation draws back to the original date of the gift, no right like legitim, which arises only on the death of the donor, can affect it. But this consideration (which obviously does not apply to the case of a sequestration after the death of a donor) loses all force, if I am right in thinking that the right to legitim prevents (to the extent above mentioned) the donation becoming irrevocable and so drawing back to its original date.

It was also maintained that legitim was excluded because, if the donation was *bona fide inter vivos*, and unrecalled at the donor's death, it was not *in bonis* of the deceased at his death. Now no doubt, in the ordinary case, if a subject is *in bonis* of a deceased, the executors are entitled and bound

¹ Ersk. Inst. iii. 9, 16.

June 11, 1913. to include it in the inventory, and they have a title to sue for it, if it is in the hands of a third party. In a case like the present the executors (supposing the estate had not been destined to the donee) could only have included in the inventory, or, at all events, could only have sued for, such part of the donation as was required to satisfy the legal claims of the surviving spouse and children, and to pay the revenue. But this does not seem to me to prevent the donation being *in bonis* of the deceased at the date of his death, so far as requisite to satisfy these claims. Equally, in the case of sequestration, the revocation which is affected either by the sequestration itself or by express recall by the trustee does not necessarily void the whole donation, for the trustee can only recover such a part as is necessary to render the estate under his charge solvent. I do not see why, if sequestration taken out after a donor's death, and after a donation whether *inter vivos* or *mortis causa* has therefore become irrevocable, operates as a partial recall of the donation, a claim like legitim should not operate to prevent the donation, so far as required to satisfy the legitim claim, from becoming irrevocable. I am, therefore, unable to adopt a view, which would, I think, read out one of the conditions laid down by the institutional writers in the case of donations as necessary to exclude claims of legitim, namely, irrevocability.

Like Lord Dundas, my opinion is not affected by the case of *Gunning's Trustees*.² The question in that case turned entirely on the construction of the Finance Act of 1894, section 2 (1) (a). Lord Kinnear put it thus:—"The question is whether certain pecuniary interests did or did not belong to the deceased in the sense of the statute." The clause of the statute was not declaratory of the common law but involved consideration of a special provision which provided a test different from that applicable to the present case. In that case the question was whether the deceased was competent to dispose of certain funds, a provision which may be wider or narrower in its scope, but is certainly not co-extensive with the question whether funds are, even if only for a special purpose, *in bonis defuncti*.

I am therefore of opinion that the Lord Ordinary has come to a right conclusion, and I agree in the grounds of his opinion and of the opinion of Lord Salvesen.

THE COURT adhered.

W. & J. L. OFFICER, W.S.—SHIELS, MACINTOSH, & WARD, W.S.—Agents.

No. 131. THE UNION ELECTRIC COMPANY, LIMITED, Pursuers (Respondents).—*D.-F. Dickson—M. P. Fraser.*

June 5, 1913. HOLMAN & COMPANY, Defenders (Appellants).—*Horne, K.C.—Paton.*

Union Electric Co., Limited, v. Holman & Co. *Jurisdiction—Arrestment—Arrestment jurisdictionis fundandæ causa—Action for delivery of goods in terms of contract and failing delivery for damages—Foreign—Contract.*

Held that jurisdiction in an action concluding for delivery of goods in terms of a contract between the parties, and failing delivery for damages was competently founded by arrestments *ad fundandam jurisdictionem*.

ON 9th January 1913 the Union Electric Company, Limited, Glasgow, June 5, 1913.
brought an action in the Sheriff Court at Glasgow against Holman & Company, suppliers of dynamos, arc-lights, carbons, &c., who carried on business at Southwark, London, E.C. The action was founded upon an alleged breach by the defenders of a contract in terms of which they were bound to supply to the pursuers 30,000 pairs of carbons.

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Co.

1ST DIVISION.
Sheriff of
Lanarkshire.

In the initial writ the pursuers craved the Court "to ordain the defenders to deliver to the pursuers 30,000 pairs Excello yellow flame carbons 600 m/m by 10 m/m and 9 m/m in terms of the said contract between the parties, and that within such short space of time as the Court may appoint; and failing the defenders so delivering the same to grant a decree against them for payment to the pursuers of £1000 sterling, with interest thereon at the rate of 5 per centum per annum from the date of citation to follow hereon till payment; or alternatively, to decern against the defenders for payment to the pursuers of the sum of £1000 sterling, with interest thereon at the rate of 5 per cent per annum from the date of citation till payment."*

The pursuers averred in their condescendence that they had constituted jurisdiction against the defenders by arrestments *ad fundandam jurisdictionem* in the hands of a firm of engineers in Glasgow.

The defenders pleaded, *inter alia*;—(1) No jurisdiction; and *separatim*, the action is incompetent in respect that a decree *ad factum præstandum* cannot be granted by the Sheriff of Lanarkshire against an English company.

On 24th February 1913 the Sheriff-substitute (Lyell), after hearing parties on the question of jurisdiction, closed the record and appointed the case to be put to the Procedure-roll†

By interlocutor, dated 17th March 1913, the Sheriff-substitute

* The words printed in italics were subsequently added by way of amendment as is narrated *infra*.

† "NOTE.—This is an action for implement of a contract, or failing implement for damages, in which jurisdiction has been founded by arrestment. The defenders object that in respect the leading conclusion is for delivery in implement of the contract—which is just a conclusion for decree *ad factum præstandum*—no effective jurisdiction has been founded against them by arrestment. The question is not free from difficulty, and one can certainly see that such a decree would be difficult to enforce against an English defender. It could not be enforced by registration under the Judgments Extension Act of 1882, which applies only to judgments for debt, damages, or costs. It has been held that arrestment does not confer jurisdiction to try questions of status, and it appears unsettled whether jurisdiction has been thereby conferred to try declarators and reductions—*Lindsay v. London and North-Western Railway Company*, 18 D. 62, 3 Macq. 99; *Longworth v. Hope*, 3 Macph. 1049; *Shaw v. Dow and Dobbie*, 7 Macph. 449. But after full consideration of the cases Lord Kincairney sustained his jurisdiction, when so created, in an action *ad factum præstandum* in *Powell v. MacKenzie & Company*, (1900) 8 S. L. T. 182. It appears to me, however, seeing that the conclusion for damages for breach of contract is obviously competent, that the pursuers might well confine themselves to that conclusion, more especially as, on their own showing, the contract cannot now be implemented in terms as the time of the delivery stipulated is long past. I shall therefore put the case out for further procedure, and allow the pursuers, if so advised, to strike out their conclusion for delivery, and confine their crave to one for damages in respect that the defenders have failed timeously to deliver the articles contracted for."

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allowed the pursuers to amend their record, *inter alia*, by adding to the crave of the initial writ the words printed above in italics, and by interlocutor, dated 2nd April 1913, he allowed a proof before answer and also allowed the defenders to add to their pleadings the following pleas in law:—(1A) The amendments made by pursuers being incompetent and insufficient to alter or vary the *ad factum præstandum* conclusions still sought *primo*, the action should now be dismissed. (1B) In any event, in the action as amended by pursuers in terms of interlocutor dated 17th March 1913, the defenders plead "no jurisdiction" in so far as the *ad factum præstandum* conclusions are concerned; and *separatim*, the action is incompetent as regards the *ad factum præstandum* conclusions, in respect that a decree *ad factum præstandum* cannot be granted by the Sheriff of Lanarkshire against an English company; the action should therefore be dismissed, with expenses.

The defenders obtained leave to appeal against this interlocutor, and the appeal was heard before the First Division on 5th June 1913.

Argued for the appellants;—The jurisdiction which was founded by arrestment was a purely artificial jurisdiction and its scope should not be extended beyond the limits which were clearly recognised by authority.¹ Jurisdiction could not properly be so founded in actions other than those which were purely petitory; this was the ratio of the decisions excluding jurisdiction founded by arrestment in actions of declarator and in actions concerning status,² and an action *ad factum præstandum* was in the same position.³ The present action was not a purely petitory action; its main conclusion was a separate and substantive conclusion for decree of specific performance *per se* and was not merely explanatory of the petitory conclusion. In these circumstances the action must be looked upon as one *ad factum præstandum*, and there was no precedent for the foundation of jurisdiction by arrestment in such an action, even when it contained ancillary conclusions for payment. The pursuers were given the opportunity of amending their record to the effect of making the petitory conclusion the main conclusion of the action, as was done in *Lindsay v. London and North-Western Railway Company*,⁴ but they had not availed themselves thereof. In any case, if jurisdiction could not competently be founded by arrestment on the conclusions of the initial writ as they originally stood, this defect could not be cured by subsequent amendment.⁵

Counsel for the respondents were not called upon.

LORD PRESIDENT.—This is an action in the Sheriff Court at Glasgow by a Scottish firm against an English firm against whom arrestments *ad fund-*

¹ *Cameron v. Chapman*, (1838) 16 S. 907, *per* consulted Judges, at p. 918.

² *Lindsay v. London and North-Western Railway Co.*, (1855) 18 D. 62, *per* Lord Ivory, at p. 68, *aff.* (1858) 3 Macq. 99; *Longworth v. Hope, &c.*, (1865) 3 Macph. 1049, *per* Lord President M'Neill, at p. 1053, and Lord Curriehill, at p. 1055; *Morley v. Jackson*, (1888) 16 R. 78.

³ The Lord President referred to Ivory's notes on *Erskine Inst.*, i. 2, 17, and to his own opinion in *Hope v. Derwent Mills Rolling Co., Limited*, (1905) 7 F. 837, at p. 845.

⁴ 18 D. 62, interlocutor at p. 69.

⁵ *Morley v. Jackson*, 16 R. 78, *per* Lord Shand, at p. 83, and Lord Adam, at p. 84.

andam jurisdictionem had been used. The crave of the initial writ was to June 5, 1913. ordain the defenders to deliver to the pursuers 30,000 pairs of certain car-Union Electric
bons, in terms of a contract, and failing such delivery, for damages stated Co., Limited,
at £1000 sterling. The defenders appeared and submitted to the Sheriff v. Holman &
that there could be no jurisdiction, in respect that a decree of that sort could Co.
not be sought upon a jurisdiction that was admittedly only founded on Ld. President.
arrestments jurisdictionis fundandæ causa. The Sheriff said he thought the point was one of some nicety, but that he would continue the cause in order that the pursuers might abandon their claim for delivery and merely ask for damages for breach of contract. The pursuers, whether entirely understanding what the Sheriff had said or not I do not know, did amend their summons, but they did so by putting in a simple alternative conclusion for the sum of £1000 sterling. That amendment was allowed, and upon that the Sheriff sustained the jurisdiction and granted leave to appeal upon that question.

In my opinion no amendment of the writ was at all necessary, and if I thought that the jurisdiction depended upon the amendment I should have considerable doubt, because I humbly agree with what was said by Lord Adam in the case of *Morley v. Jackson*,¹ that if there is no jurisdiction when the parties join issue, it is difficult to see how you can then introduce jurisdiction by an amendment of the summons. But I do not think it at all necessary to consider that matter, because it seems to me that there was perfectly good jurisdiction irrespective of the amendment, and I cannot say that the learned counsel's address has given me any reason for forming another opinion. He quoted a great many cases with which we are quite familiar, illustrating the rule that you cannot have jurisdiction for actions such as actions of status and of pure declarator based upon an arrestment *ad fundandam*. I am tempted to say "Of course not."

I am not going to repeat what I said upon the origin of jurisdiction upon arrestment *ad fundandam* in the two cases of *Leggat Brothers*² and *Hope*³; historically the origin was that by the arrestment *ad fundandam* the pursuer got hold of something that would satisfy the judgment. In modern times that is not literally true, but the idea that something was got hold of which would satisfy the judgment was the foundation of the practice, and still remains the test of the competency. It follows, I think, that, if what you are asking from the Court is some class of decree which never can be worked out in money, then you cannot suppose that there will be a jurisdiction of the Court founded upon an arrestment of money the original use of which was merely to satisfy the judgment. But I think it is really a mistake to call the decree that is asked for in this action, an ordinary action founded upon breach of contract, a decree *ad factum præstandum* at all. There is no difficulty at all in working out this judgment in money. The point between the parties, upon the merits, is whether there is a contract or whether there is not, and this question must always, in such a case, be put for the decision of the Court. In one sense there is always a declarator *subauditus* in every decree that you ask. Take, for in-

¹ 16 R. 78.² *Leggat Brothers v. Gray*, 1908 S. C. 67.³ *Hope v. Derwent Rolling Mills Co., Limited*, 7 F. 837.

June 5, 1913. stance, a mere action for payment founded upon a bill or a bond. There must always be a finding that the bill or the bond was good. It would be a perfectly good answer to say that the bill was forged or that the bill was obtained by false pretences, and yet the action could be nothing but a petitory action. Accordingly, it seems to me that a demand for a declarator is a first stage of every action, whether declarator is expressly concluded for or not.

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It is argued that this is an action *ad factum præstandum*, and that the subjects arrested cannot satisfy the judgment in such an action. Now, it seems to me that when a person asks for delivery of a specific article of which there is a *pretium affectionis*, the decree that he wants is the true decree for specific performance; but when he says to the other person, "We have a contract: under that contract you are bound to deliver; you have not delivered; deliver or else pay damages," he is not asking for a decree *ad factum præstandum* in the proper sense at all. I think the absurdity of the situation can be illustrated by supposing that this had been an ordinary action in the Court of Session with a conclusion in the same form as the prayer of this initial writ, and that no question of jurisdiction had been raised, but decree in absence pronounced. The decree in absence would be a decree in terms of the conclusions of the summons, and the extract would echo the conclusions of the summons. Does anyone suppose that, if a person holding that decree had gone to a messenger and told him to charge upon the first portion of the summons, namely, that which asked for delivery, and had then come back to the Court, after delivery had not been implemented, that he would then have got from the Court a warrant for imprisonment? Such a thing would be absolutely inconceivable. And so the argument for the appellants really comes to this: it is incompetent because, being an Englishman, a Scotch Court could never do against him what it never would do against a Scotsman. The truth is that a person who comes and asks for a decree of this sort is not asking for a decree for specific performance at all. He is saying, "There is a contract between us, you have broken it; I am content with your giving me either what I am entitled to under the contract or, if not, paying damages."

It was said that there was no authority upon this matter. I should not expect to find authority upon it, because, as a matter of fact, it is not to be supposed that a case would be reported upon this point alone; such a case would only be found in the books if it raised some other point to be reported. But I have not a doubt that, with a little perseverance, one could find many cases in the books in which jurisdiction had been founded by arrestments on a summons in terms similar to those of this initial writ. There is not the shadow of a *dictum* to the contrary. One finds that Lord Ivory, in his well-known notes to Mr Erskine,¹ speaking of the class of actions which can and cannot be raised upon arrestment *jurisdictionis fundandæ causa*, says that there is a distinction to be observed between such questions as originate in a mere ordinary patrimonial claim for the payment of debt or the performance of a mercantile contract or the like on one side,

¹ i. 2, 17.

and questions of personal status, on the other. In other words, he absolutely assimilates an ordinary claim for payment and a claim for the performance of a mercantile contract. June 5, 1913.

On the whole matter, I think the Sheriff-substitute was quite right in sustaining his jurisdiction, although I do not think he need have gone through the process of allowing any amendment of the writ at all.

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LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

THE COURT dismissed the appeal, affirmed the interlocutor of the Sheriff-substitute dated 2nd April 1913, and remitted to him to proceed as accords.

MACPHERSON & MACKAY, S.S.C.—ERSKINE DODS & RHIND, S.S.C.—Agents.

JAMES PEARSON, Pursuer (Respondent).—*Constable, K.C.*—
T. G. Robertson.

No. 132.

BABCOCK & WILCOX, LIMITED, Defenders (Appellants).—*Horne, K.C.*—
Aitchison.

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Pearson v.
Babcock &
Wilcox,
Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Schedule, sec. 9—Memorandum of agreement—Recording of memorandum—Terms of memorandum differing from terms of agreement—Agreement to pay compensation in terms of the Act.

An injured workman and his employers verbally agreed that compensation should be paid to the former at the rate of 15s. 1d. per week. The workman thereafter signed a number of receipts, each of which bore to be for "weekly compensation to date under the Workmen's Compensation Act, 1906, under which I claim for personal injury by accident sustained by me." Thereafter the employers objected to the recording of a memorandum which bore that the agreement was to pay compensation at the foresaid rate "until the same is ended, diminished, redeemed, or suspended in terms of" the Act, on the ground that the memorandum was not genuine, because it differed in terms from the agreement which contained no obligation as to future payments.

Held that the arbitrator, who had granted warrant to record the memorandum, was right in so doing, in respect that the agreement was an agreement to pay compensation in terms of the Act, and that the memorandum merely set forth those terms.

IN an arbitration in the Sheriff Court of Lanarkshire at Glasgow under the Workmen's Compensation Act, 1906, between James Pearson, an engine-driver, and his employers, Babcock & Wilcox, Limited, engineers, the Sheriff-substitute (Glegg), on the request of Pearson, authorised the recording of a memorandum purporting to set forth an agreement between the parties, and, at the request of the employers, stated a case for appeal. 1st Division.
Sheriff of
Lanarkshire.

It was stated in the case that the memorandum which it was sought to record was in the following terms:—"The claimant claimed compensation from the respondents in respect of personal injuries to his right hand and wrist, caused by accident in the employment of the respondents at their works at Renfrew, on the 28th day of February 1912. The question in dispute, which was the amount of compensation, was determined by agreement. The agreement was made

June 5, 1913. stance, a mere action for payment founded upon a bill or a bond. There must always be a finding that the bill or the bond was good. It would be a perfectly good answer to say that the bill was forged or that the bill was obtained by false pretences, and yet the action could be nothing but a petitory action. Accordingly, it seems to me that a demand for a declarator is a first stage of every action, whether declarator is expressly concluded for or not.

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and questions of personal status, on the other. In other words, he also—June 5, 1913.
lately assimilates an ordinary claim for payment and a claim for the performance of a mercantile contract.

On the whole matter, I think the Sheriff-substitute was quite right in sustaining his jurisdiction, although I do not think he need have gone through the process of allowing any amendment of the writ at all.

Union Electric
Co., Limited,
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LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

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No. 132.

BABCOCK & WILCOX, LIMITED, Defenders (Appellants).—*Horne, K.C.*—*Aitchison.*

June 6, 1913.

Pearson v.
Babcock &
Wilcox,
Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Schedule, sec. 9—Memorandum of agreement—Recording of memorandum—Terms of memorandum differing from terms of agreement—Agreement to pay compensation in terms of the Act.

An injured workman and his employers verbally agreed that compensation should be paid to the former at the rate of 15s. 1d. per week. The workman thereafter signed a number of receipts, each of which bore to be for "weekly compensation to date under the Workmen's Compensation Act, 1906, under which I claim for personal injury by accident sustained by me." Thereafter the employers objected to the recording of a memorandum which bore that the agreement was to pay compensation at the foresaid rate "until the same is ended, diminished, redeemed, or suspended in terms of" the Act, on the ground that the memorandum was not genuine, because it differed in terms from the agreement which contained no obligation as to future payments.

Held that the arbitrator, who had granted warrant to record the memorandum, was right in so doing, in respect that the agreement was an agreement to pay compensation in terms of the Act, and that the memorandum merely set forth those terms.

In an arbitration in the Sheriff Court of Lanarkshire at Glasgow under the Workmen's Compensation Act, 1906, between James Pearson, an engine-driver, and his employers, Babcock & Wilcox, Limited, engineers, the Sheriff-substitute (Glegg), on the request of Pearson, authorised the recording of a memorandum purporting to set forth an agreement between the parties, and, at the request of the employers, stated a case for appeal.

1st DIVISION.
Sheriff of
Lanarkshire.

It was stated in the case that the memorandum which it was sought to record was in the following terms:—"The claimant claimed compensation from the respondents in respect of personal injuries to his right hand and wrist, caused by accident in the employment of the respondents at their works at Renfrew, on the 28th day of February 1912. The question in dispute, which was the amount of compensation, was determined by agreement. The agreement was made

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on the 17th day of June 1912, and was as follows:—‘The respondents agreed to pay to the claimant compensation under the Workmen’s Compensation Act, 1906, at the rate of 15s. 1d. sterling per week, being 50 per cent of his average weekly earnings, beginning the first payment as at the 6th day of March 1912, and continuing the payment thereof until the same is ended, diminished, redeemed, or suspended in terms of the above-mentioned Act.’”

The case further stated:—

“On said memorandum being intimated to the appellants they lodged a minute of objections in the following terms:—‘The said Babcock & Wilcox, Limited, object to the recording of the said memorandum of alleged agreement on the ground that the memorandum is not genuine, the respondents not having made the agreement set forth in the memorandum. The claimant met with the accident as averred, and has been paid compensation since the date of the accident under the Workmen’s Compensation Act, 1906, at the rate of 15s. 1d. per week. No agreement, however, was made for payment of compensation, except an agreement to make the weekly payments which the claimant actually received, and in particular no agreement was made to continue payments of compensation until the same should be ended, diminished, redeemed, or suspended in terms of the Workmen’s Compensation Act, 1906.’”

“Proof was led before me on this date, 7th March 1913, the only evidence in the case being that of the respondent himself, and the receipts hereafter referred to which were recovered under diligence, when the following facts were established:—(1) The respondent, aged 43, sustained severe injury to his right hand and wrist on 28th February 1912. (2) On 17th June 1912 the respondent called for compensation, which was agreed upon at the rate of 15s. 1d. per week, and on 18th June 1912 he signed a receipt for payments down to that date in the following terms, viz.:—Received this 18th day of June 1912, from Babcock & Wilcox, Limited, the sum of £11, 13s. 10d., being weekly compensation to date under the Workmen’s Compensation Act, 1906, under which Act I elect to claim for personal injury by accident sustained by me on or about the 28th day of February 1912. . . . And on the following subsequent dates, viz., 29th July, 19th August, 2nd, 9th, 16th, and 23rd September, 8th, 14th, 21st, and 28th October, 4th, 11th, 18th, and 25th November, and 2nd, 10th, 16th, and 23rd December, all 1912, and 6th, 13th, and 20th January 1913, he signed receipts which are produced in process, the terms of said receipts being similar to those in the receipt granted on 18th June 1912. (3) On the occasion of the signing of the first receipt, he was told to return the following Monday for the next payment of compensation, and on each subsequent occasion down to 20th January aforesaid he was invited impliedly, if not explicitly, to return the following Monday. Nothing more was said. (4) On 20th January 1913 it was intimated to him that compensation was to be stopped, but no reason was assigned.

“I found it proved that on 17th June 1912 it was agreed between respondent and appellants that respondent should be paid 15s. 1d. per week in terms of the Workmen’s Compensation Act, 1906, the 15s. 1d. being 50 per cent of respondent’s average weekly earnings, and the payments to begin on 6th March 1912.

“I found in law that the terms of said agreement entitle respondent to record a memorandum in the terms craved.

"I therefore granted warrant to record accordingly, and found June 6, 1913. respondent entitled to expenses."

The questions of law were:—(1) Whether there was evidence upon which the arbitrator was entitled to find it proved that on 17th June 1912 it was agreed between the parties that the respondent should be paid 15s. 1d. per week in terms of the Workmen's Compensation Act, 1906? (2) If the foregoing question is answered in the affirmative, whether the terms of such agreement entitle the respondent to obtain warrant to record a memorandum in the terms craved?"

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The appeal was heard before the First Division on 6th June 1913.

Argued for the appellants:—The arbitrator was not entitled to order the recording of a memorandum of agreement containing a condition which had not formed part of the original agreement between the parties. This was what he had in effect done by allowing the words "continuing the payment thereof until the same is ended," &c., to appear in the memorandum.¹ It was no part of his duty to construe the agreement and to determine whether the memorandum gave effect to the agreement as so construed.² This had already been decided with regard to a written agreement, and there was no reason why an agreement partly written and partly verbal, as was that in question here, should not be subject to the same rule. The arbitrator had imported his own construction into the memorandum in the present case. It was not necessary for the appellants to show that the agreement would not bear the interpretation put upon it; it was enough for them to show that the memorandum as recorded contained more than the original agreement. Granted that the effect of the agreement was to bind the appellants to pay compensation at the stipulated rate during incapacity, that was something other than an agreement to continue such payments until ended, diminished, &c., in terms of the Act. An agreement to pay compensation during incapacity was spent by the recovery of the workman without the necessity for any further process.³ The Act contemplated agreement upon three possible points, viz.:—(1) the liability of the employer, (2) the amount, and (3) the duration of compensation.⁴ There was no reason, however, why a memorandum should not be recorded of an agreement which embraced the first and second points only, and was silent upon the third, as was the case with the agreement here in question.

Counsel for the respondent were not called upon.

LORD PRESIDENT.—[After narrating the facts]—In the case which he has stated for appeal the learned Sheriff says:—"I found it proved that on 17th June 1912 it was agreed between respondent and appellants that respondent should be paid 15s. 1d., in terms of the Workmen's Compensation Act, 1906, the 15s. 1d. being 50 per cent of the respondent's average weekly earnings, and the payments to begin on 6th March 1912."

¹ Shore v. Owners of s.s. "Hyrkania," (1911) 4 Butterworth's W. C. C. 207; Hartshorne v. Coppice Colliery Co., (1912) 5 Butterworth's W. C. C. 358; Phillips v. Vickers, Sons, & Maxim, [1912] 1 K. B. 16.

² M'Lean v. Allan Line Steamship Co., Limited, 1912 S. C. 256, per Lord President, at p. 259, and Lord Kinnear, at p. 260.

³ M'Ewan v. William Baird & Co., Limited, 1910 S. C. 436.

⁴ Freeland v. Summerlee Iron Co., 1912 S. C. 1145, *affd. supra*, (H. L.) 8.

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The first question that arises upon this appeal is whether upon the evidence before him the arbitrator was entitled to come to that finding. I think he clearly was. I think that, quite apart from the evidence of the respondent, who no doubt swore to the fact of that being the agreement, the very terms of the receipt, which were of course chosen by the employer and not by the workman, show perfectly clearly that the agreement was to pay weekly compensation under the Workmen's Compensation Act at a certain rate.

Having come to that finding, the next step the Sheriff took was that he allowed the memorandum as produced to be recorded. The employers say that that is wrong, because the memorandum as recorded is not an absolute echo of the agreement as found proved by the Sheriff, and they especially rely upon the case of *M'Lean v. Allan Line Steamship Company, Limited*,¹ which was decided in this Division. In that case we decided that where parties had come to an agreement in writing and then a memorandum of agreement was tendered, it was not part of the duty of the Sheriff at that stage to interpret the writing in any way, that his action then was a purely ministerial one, and that the only way in which he could discharge that ministerial duty was to put the writing upon the register as he found it, that is to say if neither party objected to the writing being put on. But in the judgment which I pronounced there I carefully saved the case where there was no written agreement between the parties, because I said this: "In other words, I think it comes to this, that where an agreement which has been come to between the parties is admittedly in writing, the Sheriff must record that agreement as it stands and nothing else. It is otherwise if the agreement has been come to verbally and is then disputed: the Sheriff has in that case to decide on a proof what the true verbal agreement was."

To prevent misunderstanding, let me say one word about my use of the word "must"—"the Sheriff *must* record that agreement as it stands and nothing else." There was no objection by either party in *M'Lean's* case¹ to the agreement being recorded in some shape or other, and the word "must," as used by me, must be understood *secundum subjectam materiem*. I did not decide in that case anything contrary to the decision of the House of Lords in the case of *Summerlee Iron Company*.² If I did, of course I should have been deciding wrongly. I quite understand *Summerlee Iron Company*² to have decided this—that if the memorandum which the employer proposes to have recorded does not deal with the whole of the three points with which the Act deals, namely, the fact of liability, the amount to be paid, and the duration of liability to be fixed as the Act chooses to fix it under the procedure therein provided, if the memorandum tendered by the employer falls short in dealing with all those three points the workman is entitled to say, "That memorandum is not good enough for me; I am entitled to go to arbitration."

But coming back now to the present case, it seems to me that the only question is whether the memorandum, as the Sheriff has ordered it to be recorded, is in any sense different from the agreement as he finds it proved.

¹ 1912 S. C. 256.

² *Supra*, (H. L.) 8.

Now I think it is in substance absolutely the same. It is not absolutely the same textually, because there are one or two words which are different. But I think myself that the words "continuing the payment thereof until the same is ended, diminished, redeemed, or suspended in terms of the above-mentioned Act" are merely an expansion of the words "in terms of the Workmen's Compensation Act."

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The learned counsel for the appellants here, who I must say argued his case remarkably well, argued that inasmuch as there was the possibility of coming to an agreement upon less than the whole three points under the Act, therefore an agreement in terms of the Act might be an agreement which did not deal with the whole terms of the Act. I do not think it is necessary to decide the question whether an agreement which deals with less than the three terms of the Act forms a proper subject for a memorandum which may be recorded. I do not think that the question is one of practical importance. I have already said that the House of Lords has determined that, if one of the parties objects to such a truncated memorandum, he is entitled to do so. But of course that is not the same proposition as to say that if both parties are agreed to put upon the record what I am calling a truncated memorandum they may not do so. I do not think it is necessary to decide that. Let us suppose that they may; you have still got to find out what is the agreement between the parties. It seems to me that, when the employers say, "We agree to pay so much a week in terms of the Workmen's Compensation Act," they necessarily say, "We agree to pay in terms of the whole provisions of the Workmen's Compensation Act."

I ventured to put an illustration in the course of the argument which I think was quite sound. Suppose a landlord and tenant enter into a lease. They may say, "This lease is subject to the estate conditions which are authenticated in a certain way." If they say that, it will certainly import the whole estate conditions. There would be nothing wrong in their saying, if they chose, "This lease is subject to estate conditions 1, 5, and 12," and, in that case, 1, 5, and 12 would be binding and the others would not. So, for the moment, I will assume that there could be a perfectly good memorandum of agreement which imported an agreement upon less than the whole three points in the Act. But if nothing is said which cuts out certain portions, I think it is very clear indeed that "an agreement in terms of the Act" means an agreement in all the terms of the Act. And accordingly, when the Sheriff allowed the memorandum to be recorded with the words I have read in it, though the words were in one sense mere surplussage and did not add anything, to my mind the memorandum as recorded truly expressed the precise agreement which the Sheriff had already found proved.

Upon the whole matter, therefore, I am of opinion that the questions ought to be answered in the affirmative.

LORD KINNEAR.—I entirely agree with your Lordship. I think that an affirmative answer to the first question put by the learned Sheriff for the opinion of the Court concludes the whole matter. The Sheriff had to consider whether an agreement had been made in terms of the Act which could

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be put upon the register at all, and therefore he had to find upon evidence what the agreement really was which had been made between the workman and his employers, if any such agreement there were.

Now he found that it was proved that the workman and the employers had agreed that the workman should be paid 15s. 1d. a week in terms of the Workmen's Compensation Act, and he asks—and this is the only question on the agreement that is before the Court—whether there was evidence upon which he was entitled to find that proved. I think there was quite clear evidence before him which justified that finding. He had, according to his statement of fact, the evidence of the workman, who was the only witness tendered to him in the case, and he had the evidence of the receipt which was tendered by the employers to the workman in return for a weekly payment. Well, the receipt says that the workman has received a certain sum, being weekly compensation to date under the Workmen's Compensation Act, 1906. Now I apprehend that can have no meaning but one. It means that the money is tendered to him, and that he agrees to accept it as compensation fixed in terms of the Act. What the Act finds him entitled to is a weekly payment during the incapacity in a case where the incapacity has resulted from the injury.

It is said that that involves the consideration of three different points: In the first place, whether there is any liability at all in respect of the injury of which the workman complains; secondly, the amount of compensation, if there was such liability; and, thirdly, the duration of the compensation payable. I do not myself think that that third element enters into the question of agreement at all. The Act fixes that the compensation is to endure during the incapacity; and therefore the term of the duration of the compensation is fixed once for all by the statute itself. And the only question that can arise under the statute as to duration is whether, in point of fact, the incapacity is still enduring or not.

Now I agree that that is a question which, when it does arise, may be fixed by agreement or by arbitration, because, if the parties agree about it, there is no dispute; if there is any dispute, then the statute says any dispute in the course of the proceedings shall go to arbitration. There is an additional contingency which does not involve any alteration of the amount of the compensation but which affects the amount payable, because there is also a provision that the compensation may be redeemed by a single payment in certain circumstances; and therefore the Act says the compensation is to continue during incapacity and until it is ended, diminished, redeemed, or suspended. All these things appear to me to be clearly implied in an agreement that the compensation is to be a weekly compensation, payable under the Act and in terms of the Act.

That an agreement to that effect does not fix duration is perfectly clear; but no agreement fixing a definite duration would be in terms of the Act at all. The employer is not bound to undertake to pay for a fixed time, nor is the workman bound to accept a payment for a fixed time; but the amount of the compensation being fixed, the Act determines that it shall last until some change in the man's condition makes it right and proper that it should be altered. An agreement to that effect therefore appears to me to be clearly other than that implied in the terms of the receipt tendered by the

employer; and if the receipt meant anything other than an agreement in the June 6, 1913. terms which have been registered in the memorandum, I think the case of *Pearson v. Freeland v. Summerlee Iron Company*¹ is an authoritative decision that the workman would not have been bound to accept it. He is not bound to accept a tender which gives him a sum of money for a limited time only. If the employer does not give him voluntarily the full benefit of the Act in accordance with its conditions, he is entitled to an arbitration.

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It appears to me therefore that the Sheriff's first question must be answered in the affirmative, because there was evidence before him on which he could come to that conclusion; and if that be so, the second question appears to me to be of no importance whatever. If the memorandum of agreement which the Sheriff was asked to record had omitted the words between "beginning the first payment" and the words "the above-mentioned Act," I think it would have had exactly the same effect as it has in the terms which are actually expressed. I see no difference between saying that the respondents have agreed to pay a certain weekly compensation, beginning the first payment on the 6th March, "in terms of the above-mentioned Act," and saying that they have agreed to pay that amount, beginning at that date, and continuing the payment thereof until the same is ended, diminished, redeemed, or suspended, because the additional words simply express what is clearly implied in the words which are admittedly proper, namely "in terms of the Act." I therefore agree with your Lordship.

LORD JOHNSTON.—I cannot decide this question without paying some regard to the real question behind the technical question. There is no doubt that employers have felt it a very great hardship that they should under certain circumstances have to go on paying at the full rate after the workman has either entirely or partially recovered, and therefore after he should be getting only a modified amount of compensation. I sympathise entirely with that feeling, and I cannot help thinking that there is a certain defect in the Act as regards this point. But we have got to administer the Act as it stands.

Now what these employers want to ascertain is whether they can, out of their agreement made with their workman, deduce the conclusion that at their own will they may say, "This agreement is now at an end in respect that there has been recovery." Because if one looks at their minute of objections it becomes apparent that their contention is that no agreement was made for payment of compensation except an agreement to make the weekly payments which the claimant actually received, and in particular no agreement to continue payment of compensation until the same should be ended or diminished under the Act.

Now if one looks at the form of receipt granted by the workman it is hardly possible to square that statement with its terms. Because it would lead to this, that there was no agreement whatever to pay compensation, but merely the act of payment, which only involves an agreement *ad hoc*, or to make that particular payment. Thus on 29th July 1912 they would maintain:—"There is no obligation on us to pay anything, though we did pay

¹ *Supra*, (H. L.) 8.

June 6, 1913. on 18th June. Each payment constitutes a new agreement." It is in accordance with this contention that with their last payment on 20th January they intimate that compensation is to be stopped, that is to say, that there is no agreement for the future.

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Now I do not think it is possible to maintain that such an agreement would be an agreement for compensation under the statute. The whole error on the part of the appellants appears to me to be in attempting to maintain that *ab initio* there can and must be, if the agreement is to be an agreement under the statute, a determination of all the three points of liability, of amount, and of duration. There must be an agreement or a determination *ab initio* of liability, but it is always of liability under this Act. In the same way there must and can be *ab initio* a determination of amount under this Act. These things are matters which must be fixed *ab initio*. But you cannot fix the duration of the compensation *ab initio*. That must always be determined according to the event. The question of duration can only be determined when there is a call for review, as is provided for in the 16th section of the Act.

Now if that be the case, in order to make any particular agreement an agreement under the statute it is only necessary that it should contain the terms which the Sheriff has used. For it is perfectly immaterial whether the memorandum of agreement says that the appellants "agreed to pay compensation under the Act at the rate of," &c., or adds, "during total disablement," or adds, "continuing the payment thereof until the same is ended," &c. These three forms are precisely the same in result, and no agreement is an agreement under the statute which does not, in one form or another, provide for liability and amount and leave duration to be determined at the proper time and from time to time. I therefore think that though the Sheriff has sanctioned the recording of an agreement which includes the latter expression, the words are innocuous because if they were not there they would be implied. Accordingly I agree with your Lordships in the way in which you propose to answer the questions.

LORD MACKENZIE.—I am of the same opinion. I think that the conclusive answer to the first question that is put is to be found in the terms of the receipt which is quoted in the case, because that bears that the workman received from the employers a sum of money, "being weekly compensation to date, under the Workmen's Compensation Act, 1906, under which Act I elect to claim for personal injury by accident." He made the claim under the Act. The payment was made to him in satisfaction of that claim, and the employer was content to accept a receipt which expressly bore that it was received "under the Workmen's Compensation Act, 1906."

Now under those circumstances the Sheriff had ample justification for finding in fact that the agreement was made in terms of the Workmen's Compensation Act, 1906. I am unable to see, as regards the second question which is put, how, when that conclusion is reached, it is possible to say that the true construction of the agreement is not simply that it is in terms of the Workmen's Compensation Act, 1906, which is scheduled as part of the agreement. If that conclusion is reached, then all that the

Sheriff has done in granting warrant to record the memorandum in the terms June 6, 1913. which are complained of here is merely to write at greater length that which is contained in the finding of fact that he sets forth in the latter part of the case.

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THE COURT answered both questions of law in the affirmative.

ROBERT MILLER, S.S.C.—GARDINER & MACFIE, S.S.C.—Agents.

THE CLAN LINE STEAMERS, LIMITED, Petitioners (Respondents).—
Sandeman, K.C.—C. H. Brown.

No. 133.

THE EARL OF DOUGLAS STEAMSHIP COMPANY, LIMITED, Respondents
(Appellants).—*Clyde, K.C.—Hon. W. Watson.*

June 12, 1913.

Diligence—Arrestment—Ship—Maritime lien—Process—Form of process for making effective maritime lien.

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Where one vessel owing to her faulty navigation has damaged another vessel, the maritime lien over the former available to the owner of the latter cannot be made effective by arrestment of the vessel on the dependence of an action against her owner concluding for a sum of damages and *separatim* for declarator of lien and for warrant to sell. So held in an action for the recall of an arrestment so used.

Opinion (per the Lord President) that the maritime lien could be made effective by arrestment of the vessel upon special application, e.g., in the Bill Chamber, after citation of all parties interested.

ON 24th April 1913 the Earl of Douglas Steamship Company, Limited, brought an action in the Sheriff Court of Lanarkshire at Glasgow against the Clan Line Steamers, Limited, the initial writ in which was in these terms:—"The claim or demand of the pursuers is for payment of £1400, being loss and damage sustained by the pursuers through their s.s. 'Earl of Douglas,' while lying at anchor in the harbour of Newcastle, N.S.W., on 4th October 1912, being run into by the defenders' s.s. 'Clan Ogilvy,' while under way, by reason of the negligent navigation of the said s.s. 'Clan Ogilvy,' and *separatim* for declarator that the pursuers have a lien over the said s.s. 'Clan Ogilvy' for the damage so sustained, and for warrant to sell the said s.s. 'Clan Ogilvy' on said lien being declared, and to apply the proceeds in satisfaction of said lien towards the payment of said sum of £1400, being the loss and damage sustained by the pursuers. Therefore the pursuers crave the Court to decern against the defenders for payment to the pursuers of the sum of £1400, with interest thereon at 5 per cent per annum from the date of citation till payment, and meantime to grant warrant to arrest on the dependence, and *separatim* to find and declare that the pursuers have a lien over the said s.s. 'Clan Ogilvy' for said damage; [to grant decree for expenses]; to find the defenders liable in the expenses of this process, and on said lien being declared, to grant warrant for the sale of said ship at the sight of such person as the Court may appoint, and to appoint the free proceeds of sale after deducting the expenses of the said ship from the date of her arrestment, the harbour dues and other necessary charges, the expenses of sale, and the expenses of this process, to be paid to the pursuers to be applied towards payment of said sum of £1400, any balance thereafter remaining to be paid to the defenders, or dealt with in such other way as the Court may find just; and, meantime, to grant warrant to arrest on the dependence."

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The words above enclosed in brackets were allowed to be deleted, and those printed in italics were allowed to be added by way of amendment by interlocutor of the Sheriff-substitute (Thomson) dated 2nd May 1913.

On 29th April, prior to the date of the latter interlocutor, the "*Clan Ogilvy*" was arrested by the pursuers on a warrant granted by the Sheriff-substitute.

On 30th April 1913 the Clan Line Steamers, Limited, brought the present petition in the Sheriff Court of Lanarkshire at Glasgow against the Earl of Douglas Steamship Company, Limited, for recall of the arrestment.

On 5th May the Sheriff-substitute pronounced the following interlocutor in the petition:—"On the petitioners finding caution . . . to the extent of £1500 sterling, for the payment of such sums, principal, interest, and expenses, as may be decerned for in the action, on the dependence of which the arrestment in question has been laid, recalls the said arrestment." *

* "NOTE.—The principal petition, as it originally stood, and as it was served on the defenders, contained two prayers, the first for payment of £1400, and the second for declarator that pursuers were entitled to a maritime lien over defenders' ship.

"Warrant to arrest on the dependence was granted. It was plainly competent to grant it in respect of the first conclusion. It would not, I think, have been competent to grant it had there only been the second conclusion as it stood before amendment.

"An arrestment was used, and the present pursuers now petition to have it recalled, so that the ship may proceed upon her voyage. I have found that the arrestment may be recalled, provided security be found for £1500 to meet a possible decree for £1400 and expenses, being the sums specifically concluded for.

"This is satisfactory to the pursuers but not to the defenders, who, with the view of strengthening their case, proposed at the bar to amend the principal petition, which amendment I allowed in terms of their minute then and there produced.

"Four contentions, I understand, were proposed for the defenders. (1) That the second conclusion as it originally stood was of itself sufficient to justify the arrestment. This contention I have no difficulty in repelling. (2) That, seeing the first conclusion justified the warrant for, and the use of, the arrestment, the arrestment became available for the purposes of the second conclusion. They contended that the vessel having been arrested it was thereby rendered subject to the orders of the Court, so that the Court might not only provide for the specific pecuniary claim which was the subject of the first conclusion, but pronounce any further order or condition to safeguard the rights of the defenders in the event of the Court granting declarator of a maritime lien in terms of the second conclusion. This contention, I think, is unsound. As yet, no maritime lien has been established, and none attaches, although when established it may be retroactive. An ordinary lien depends upon possession of the subject, but in a case like the present the vessel is in the possession of its owners. It is by the arrestment certainly detained or arrested, but only in respect of a specific money claim, and when, in the opinion of the Court, adequate security or provision for that claim is made, it seems right that the vessel should be released. I fail to see any authority for the principle that an arrestment upon the dependence for one claim serves as an arrestment for all other claims which the defenders may have against the pursuers. (3) It is contended further, that, *apart from the arrestment altogether*, the Court may detain the ship, the defenders stating that in England application may be

The respondents (the Earl of Douglas Steamship Company, Limited) appealed to the Court of Session against this interlocutor, and the appeal was heard before the First Division on 22nd May 1913.

Argued for the appellants;—The arrestments had been wrongly recalled. The appellants had a good maritime lien over the “Clan Ogilvy,” assuming that she was to blame for the damage which had been done to the “Earl of Douglas”; she became burdened with the weight of this wrong, and the injured party could make good his remedy against the ship in whose hands soever she might be, the law of maritime lien being as much part of the law of Scotland as of England.¹ If this proposition were sound then there must be some

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made to the Courts for the attachment of a vessel in respect of an alleged claim for a maritime lien consequent upon a collision. This may or may not be the law of England, but I am not aware of any authority at all justifying such a course in Scotland, and I am not prepared to sustain this contention. (4) The fourth contention arises out of the amendment of the petition in the original action. This amendment was, as I have already stated, proposed at the bar, and I allowed it to be made. It seemed competent to allow it under rule 79 of the Sheriff Courts Act, 1907. What its effect may be as regards the pursuers has now to be considered. What its effect may be as regards third parties is a matter to be decided when it is raised by some third party.

“It seems to me that the amendment leaves the matter as it stood before the amendment was made. The amendment consists in a craving for the various successive steps of procedure which will be required in order to give pecuniary effect to the maritime lien if declared. The final step of such procedure is payment of the free proceeds of the sale of the vessel to the defenders in satisfaction of their said claim for damages and expenses. I am disposed to think that this conclusion may, on the authorities, be held to justify a warrant for and the use of an arrestment upon the dependence, but it would only be for and in respect of the specific pecuniary claim, and this claim is just the claim made in the first conclusion, and the matter stands, therefore, where it did. While I reach this result, which is favourable to the pursuers, I am against them on one of the arguments which I understood them to make, founded on the effect of the amendment, in view of rule 80 of the Sheriff Courts Act, 1907, viz., that there is no question here of ‘*validating*’ diligence used prior thereto on the dependence of the action.’ The arrestment, they contend, was valid from the first, *so far as it went*, and does not require to be validated at all. If anything, it requires to be enlarged; and they say that without a new arrestment the amendment can have no effect even in a question with the defenders. I doubt the soundness of this contention. The execution of arrestment bears that ‘all is to remain in the said harbour of Glasgow under sure fence and arrestment, aye and until sufficient caution and security be found . . . that the same shall be made forthcoming to the pursuers as accords of law.’ This, I rather think, means until security be found that the vessel be made forthcoming to the pursuers as accords of law, or that the specific pecuniary claims made in the action, whether originally or by amendment, and in respect of which arrestment on the dependence might be and was competently used, be adequately provided for in lieu of the production of the vessel itself; and, accordingly, I am against the pursuers as regards this argument.

“But, upon the whole case, I am in their favour as regards the recall of the arrestment, and I allow it to be recalled on the terms stated in the interlocutor.”

¹ Currie v. M’Knight, (1896) 24 R. (H. L.) 1, [1897] A. C. 97, affirming the “Bold Buccleugh,” (1851) 7 Moore P. C. 267.

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legal process by which the injured party could establish his lien and make good his remedy against the ship. The only procedure known to the law of Scotland by which this right could be made good and followed to its logical conclusion was that of arrestment. In the present case arrestments had been used on the dependence of an action which combined a prayer for declarator of lien with one for payment of a sum of damages. It was admitted that the arrestments on the dependence could only be made good by a furthcoming in so far as the petitory conclusion of the action was concerned; as regarded the conclusion for declarator of lien there could be a special petition for sale, which would be the process equivalent to a furthcoming upon an arrestment on the dependence of an ordinary petitory action, and this procedure would be open to the appellants even if they were successful in the action only upon the prayer for declarator of the lien.¹

Argued for the respondents (the Clan Line Steamers, Limited);— Assuming that the appellants had a good maritime lien over the "Clan Ogilvy" in respect of the damage done, the arrestments which had been used in the present case were not an appropriate or competent form of diligence by which that lien could be made good. The arrestments had been used on the dependence of the action as originally raised, and their scope must be found in the initial writ in the form in which it stood at the date the arrestments were used, and before the amendments had been added. An arrestment on the dependence could not be changed into a real diligence by subsequently amending the initial writ.² The writ concluded for a sum of £1400 in name of damages, and, *separatim*, for declarator of lien. Now the arrestments used could only be made effective by furthcoming, and that furthcoming was only available to work out a personal decree in an action *in rem*, that is to say, in the present case, the claim of damages. The appellants asked for an arrestment to found a furthcoming in what was not an action *in rem*, but a bare declarator; for this there was no precedent. What the appellants in effect sought to do was to convert this action into the English Admiralty action *in rem*. That was clearly incompetent, if for no other reason than that the only parties here called were the owners of the "Clan Ogilvy." An action such as it was sought to pursue must be served upon, or notice thereof must be given to, all the parties interested in the vessel and her cargo, *i.e.*, the charterers, owners of cargo, &c. It was not for the respondents to suggest the form of process which the appellants should have adopted in order to make good this lien, it was enough for them to show that the form which had been adopted was an inappropriate one. There was no recognised procedure in Scotland in the matter, but the appellants might have applied to the Court for a special warrant to arrest the vessel similar to that issued in the English Admiralty action *in rem*.³

At advising on 12th June 1913,—

LORD PRESIDENT.—The owners of a steamer called the "Earl of Douglas"

¹ Counsel referred to the forms of writ and warrant in the English Admiralty action *in rem*, Annual Practice (Matthews, White, & Stringer), 1913, pp. 1309 and 1311.

² Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), First Schedule, Rule 80.

³ Marsden, Collisions at Sea, (6th ed.) p. 73.

brought an action in the Sheriff Court of Glasgow against the owners of a June 12, 1913. steamer called the "Clan Ogilvy" in respect of a collision which occurred by the "Clan Ogilvy," as they allege, having run into the "Earl of Douglas" while she was lying at anchor in the harbour of Newcastle, due, as was alleged, to the faulty navigation of those in charge of the "Clan Ogilvy."

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The initial writ, as served, made a claim against the defenders (the petitioners in the petition which is before us) and craved the Court to decern against the defenders for payment of the sum of £1400, and the initial writ went on with a crave "*separatim*, for declarator that the pursuers have a lien over the said s.s. 'Clan Ogilvy' for the damage so sustained," and the crave concluded with a prayer asking the Court to grant warrant to arrest on the dependence. In that state of the process, an arrestment on the dependence of the action was executed, in ordinary form, of the "Clan Ogilvy" as she lay in the graving dock of the harbour of Glasgow.

The owners of the "Clan Ogilvy" then raised the process which is now before us, against the owners of the "Earl of Douglas," in which they prayed for a recall of the arrestments. Concurrently with that, the pursuers in the original action moved for leave to amend, which leave to amend was granted; and the amendment which they made was that they added after the portion of the crave "for declarator that the pursuers have a lien over the said s.s. 'Clan Ogilvy' for the damage so sustained" the words "and for warrant to sell the said s.s. 'Clan Ogilvy' on said lien being declared, and to apply the proceeds in satisfaction of said lien towards the payment of said sum of £1400, being the loss and damage sustained by the pursuers."

The learned Sheriff-substitute, having considered the application for recall of the arrestment and the answers put in in the original action, pronounced this interlocutor in the process for recall: "On the petitioners finding caution . . . to the extent of £1500 sterling for the payment of such sums, principal, interest, and expenses, as may be decerned for in the action on the dependence of which the arrestment in question has been laid, recalls the said arrestment."

Now the owners of the "Earl of Douglas" have appealed that interlocutor to your Lordships, and they object to the form in which the Sheriff-substitute has recalled the arrestments, because they say—and they say truly—that what the Sheriff-substitute has done does not make the arrestments available for that part of the process which seeks to declare and make good a real lien against the ship. The respondents did not argue—and I think, in view of the authorities, it would have been useless to argue—that the arrestment upon the dependence was not quite a good arrestment in so far as it could be made available for the purposes of the pecuniary conclusion against the defenders for the £1400; but they said, and they said with success, to the learned Sheriff-substitute that that was all that the arrestment on dependence could be made good for. The appellants, on the other hand, argued before your Lordships that the arrestment was good to cover, so to speak, both branches of the prayer.

I am of opinion that the Sheriff-substitute has come to a right conclusion, and I think, upon grounds which are generally right, although there is one part of the note which he attaches to his judgment with which I cannot

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The arrestment on dependence, which is a matter of right in our law to anyone who raises an action, is a very familiar and well-known form of diligence, and its object is to arrest, that is to say to keep fixed, some asset of the debtor, the defender in the action, in order that that asset may be made good to satisfy the decree which the pursuer assumes he is going to get. Ordinarily speaking, arrestment could never be in the hands of the debtor himself but must be in the hands of someone else. But none the less, it is a process for keeping something which may be made a fund of payment for what the debtor will be found to owe when a decree has been obtained against him under a petitory conclusion; and I may add that it is trite law that the next proceeding, in order to make that sum available, is a furthcoming. Arrestment of a ship is rather different. Arrestment of a ship is a diligence which is not used in the hands of somebody else but which is used as a real diligence against the ship itself, and it is eventually made good, not by an action of furthcoming, but by a process of sale.

None the less, I think it is absolutely settled in our law that it is quite good to have an arrestment on dependence directed against a ship, and I would remind your Lordships of the case, which I do not think was quoted to us in the argument, of *Carlberg v. Borjesson*,¹ where all through the learned Judges' opinions no doubt is expressed that an arrestment of a ship on the dependence is a perfectly good form of diligence. Of course the point in *Carlberg v. Borjesson*¹ was quite different. In *Carlberg v. Borjesson*¹ the vessel had taken no notice of the arrestment which had been put upon it *ad fundandam jurisdictionem*, and had sailed down the Clyde; and the way of executing the arrestment upon the dependence had been to man a steamer, go after her, and bring her back. It was held that all that was quite illegal. But, none the less, their Lordships recognise that arrestment of a ship upon the dependence was perfectly good, and that it would have been perfectly good in this case if the ship had stayed in Glasgow and been found at anchor in the harbour. What I have just said is pointed out by Lord Shand in a passage in his opinion, at p. 195: "The arrestment of a vessel differs from an ordinary arrestment in being a real diligence directed against the vessel itself, and unlike a personal diligence of arrestment directed against a custodier or debtor in a sum of money. Its effect, as the term 'arrest' itself implies, is to fix the vessel in the place in which she is found, and if there is any danger of her being removed from that place, the power to dismantle may be exercised." But although arrestment as applied to a ship is, so to speak, peculiar, none the less the underlying idea of it is precisely the same as ordinary arrestment, namely, to fix in the territory something which shall be a fund of payment for the decree which is got under the petitory conclusion. And accordingly I think the parties were quite right in not objecting to the interlocutor in so far as it ordained caution.

But when we come to the second matter, that seems to me to be quite different. I think probably, as a mere technical point, that this case could

¹ (1877) 5 R. 188.

have been disposed of upon the ground that diligence must always be viewed strictly, and that therefore the effect of the diligence must be viewed as the crave originally stood, without the amendment. But I do not care to base my judgment upon that point. For my present purpose I will assume that the original crave of the initial writ in the original action had been in the form in which it eventually stood after the amendment.

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Now what is the second branch of the crave? It is to have a maritime lien declared. There is no question, after the House of Lords case of *Currie v. M'Knight*,¹ that this maritime lien exists for such claims in the law of Scotland. But the working out of the maritime lien must be by effectuating a sale of the ship as a real diligence against all and sundry and not merely against the person who is called in the petitory part of this action and asked to submit to a decree. If it is a good lien, the ship can be sold, and it does not matter to whom the ship belongs. Now if that is so, that seems to me to make an arrestment on the dependence an inappropriate form of diligence, because you are not there working out your payment out of the property of the debtor; you are not dealing with a debtor; you are dealing with the ship itself, which is supposed, so to speak, to be the living agent of the wrong that has been done to you. And therefore I do not think arrestment upon the dependence is an appropriate form of diligence.

I now come to the only part of the learned Sheriff-substitute's note with which I do not agree, namely, that in which it is said: "It is contended further that, apart from the arrestment altogether, the Court may detain the ship, the defenders stating that in England application may be made to the Courts for the attachment of a vessel in respect of an alleged claim for a maritime lien consequent upon a collision. This may or may not be the law of England, but I am not aware of any authority at all justifying such a course in Scotland, and I am not prepared to sustain this contention." I think that, if we could not keep the ship in order to make good the maritime lien, it would be very little use having a maritime lien in our law at all. And therefore I have not a doubt that there may be a good arrestment put upon the ship in order to prevent the ship going away and, so to speak, withdrawing herself from the process of sale which is directed against her in respect of the maritime lien, and therefore I do not agree with the learned Sheriff-substitute. But then I think that would have to be done by special application for arrestment, and there is ample authority for special application. In particular it is to be found in the case of *Lucovich*.² This special application could be made in the Bill Chamber. That has not been done here; this is a mere arrestment on the dependence.

Accordingly, for these reasons I am of opinion that the result to which the learned Sheriff-substitute has come is quite right.

LORD KINNAR.—I agree entirely with what your Lordship has said.

LORD JOHNSTON.—I am of the same opinion. Where there has been a collision between two vessels, there is a claim by the owners of the injured

¹ 24 R. (H. L.) 1, [1897] A. C. 97.

² (1885) 12 R. 1090.

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Since 1897, however, when the case of the "*Dunlossit*"¹ was decided in the House of Lords, it has been established that there may also be in Scotland as well as in England a remedy to the injured party through what is known as a maritime lien, but that does not involve an action *in personam*, but a process against the ship itself.

It is quite true that, as far as we know, since 1896 no case has occurred in which the doctrine there laid down as the law of Scotland has been applied. And everybody sympathises with the eminent firm who have initiated these proceedings in the difficulty they experienced in adopting an apposite form of procedure. But I think their mistake arose—and I am referring to the original petition, not as amended—in attempting to combine in the same procedure the action *in personam* and the effectuating of the remedy *in rem*. And for this reason—where you are proceeding with an action *in personam* and arrest on the dependence of that action, you are arresting only the interest of the owners whom you are pursuing. There may be other rights in the ship preferable to the owners', but those are not touched by your arrestment, and the protection of them is not necessary in the action. It is provided for in the forthcoming where opportunity is afforded to all interested, as for instance to mortgagees, to bring forward their preferable rights.

But where you are proceeding to enforce the right *in rem*, the position is not the same, and you cannot, as it seems to me, declare your maritime lien and proceed to sell, unless you have all parties together in the field. And it is there that, it seems to me, the attempt to combine these two proceedings has been a mistake, because the pursuers here seek *separatim* for a declarator which could not be properly granted in the presence merely of the owners, who are the sole defenders in the action, but could only be granted where all others interested have been called into Court, or, at any rate, have been given an opportunity of appearing. It seems to me, therefore, that the second part of this proceeding is inept, because it is impossible to proceed *in rem* except after calling a different set of defenders. And I think further that, even if all interested were convened, the combination of the two processes would be very inconvenient.

LORD MACKENZIE.—I agree with your Lordship in the chair.

LORD PRESIDENT.—I must not be taken as agreeing with a portion of what Lord Johnston has said. I only say this because the question will arise what is the proper procedure to be adopted in making good a maritime lien. Although I quite agree that the conclusion to make good the lien is quite different from the petitory conclusion against the one person who is called, and although certainly in any process which has for its object the making good of the real lien there would have to be at least edictal citation of everybody concerned, I do not see any absolute incompetency in combining these two conclusions in the same process if you like. I think it right to say that in this case.

¹ 24 R. (H. L.) 1, [1897] A. C. 97.

LORD KINNEAR.—I concur in what the Lord President has said.

June 12, 1913.

LORD MACKENZIE.—I also concur.

Clan Line
Steamers,
Limited, v.
Earl of
Douglas
Steamship
Co., Limited.

THE COURT dismissed the appeal, affirmed the interlocutor of the Sheriff-substitute dated 5th May 1913, and remitted the cause to him to proceed as accords.

WEBSTER, WILL, & Co., W.S.—J. & J. Ross, W.S.—Agents.

ALEXANDER M'LUCKIE, Pursuer (Appellant).—*A. M. Mackay.*

No. 134.

JOHN WATSON, LIMITED, Defenders (Respondents).—*Carmont.*

June 12, 1913.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—“Accident”—Deafness following upon chill—Chill due to voluntarily waiting in water accumulated in mine through breakdown of a pump.

M'Luckie v.
John Watson,
Limited.

A miner, about to ascend to the surface at the end of his shift, in order to be among the first to obtain a place in the cage, stood for upwards of thirty minutes in a pool of water which had accumulated in the pit bottom owing to a defect in the pump. Had he waited his turn upon dry ground, as he might have done, he could have reached the cage comparatively dry. Owing to the wetting he contracted a chill which produced deafness, causing incapacity.

Held that the incapacity was not due to injury by accident in the sense of the Workmen's Compensation Act, 1906.

Drylie v. Alloa Coal Co., Limited, supra, p. 549, distinguished.

In an arbitration under the Workmen's Compensation Act, 1906, in which Alexander M'Luckie, miner, claimed compensation from John Watson, Limited, the Sheriff-substitute at Hamilton (Shennan) refused compensation and, at the request of the workman, stated a case for appeal.

1st DIVISION.
Sheriff of
Lanarkshire.

The case set forth:—“(1) The appellant was a miner in the employment of the respondents in their Gilbertfield Colliery from 8th April 1912. . . . (2) The pump of the pit was frequently out of order, so that the pit bottom was often flooded, and the men were often drenched by water coming down the shaft while they were being raised to the surface. The miners repeatedly complained of this to the checkweighman. (3) On each of the 9th and 10th September 1912 the pumping gear went wrong, and in consequence thereof water accumulated in the pit bottom to a depth of about 18 inches at the cage, gradually shallowing back from the cage for about 30 feet to where the ground was dry. (4) On each of these days only one cage carrying eight men was available for raising the men to the surface at the close of the shift, and there were about two hundred men to be raised. As each was eager to get the first chance of ascending all of them waded into the water at the pit bottom and stood in it, some from thirty to forty-five minutes. There was no necessity for this. The traffic near the pit bottom had ceased at the time, and the men could with safety have waited on the dry ground till their turn came to ascend. They could then have crawled over hutches which were shoved towards the cage, and could thus have reached the cage comparatively dry. (5) On both the 9th and the 10th September the appellant was among those who were thus standing in the water at the pit bottom, and he stood thus waiting between thirty and forty-five minutes. He was sweating profusely when he came from his

June 12, 1913.

M'Luckie v.
John Watson,
Limited.

work to the pit bottom on 9th September. (6) On 9th and 10th September 1912 the appellant was also drenched by water in the shaft when he was ascending. (7) On 11th September 1912 the appellant was out at his work, but was suffering from chill. On the following day he was worse, but went out to work. On 13th September 1912 he was totally deaf, and was, and still is, unfit to work as a miner. (8) Before September 1912 the appellant suffered from chronic middle-ear disease, but this did not cause serious deafness, and did not interfere with his capacity for work. The total deafness from which he has suffered since 13th September 1912 is due to an affection of both the internal ears. This total deafness is not connected with the previous middle-ear disease, but has almost certainly been caused by chill arising from exposure. (9) The evidence did not establish definitely any time, place, and circumstance under which appellant contracted the chill. He may even have contracted it before 9th September, but in all probability its inciting cause was some or all of the wet conditions which prevailed in the pit on 9th and 10th September. The proof does not disclose a definite event as the cause of the chill.

"In those circumstances I held that the appellant had failed to prove that his incapacity was due to accident. I held, further, that if it could be held that standing voluntarily for thirty minutes in the pit bottom was an accident, it was one which did not arise out of the appellant's employment. Accordingly, I refused the appellant's claim for compensation."

The questions of law were :—“(1) Was the arbitrator wrong in holding that the appellant had failed to prove that his incapacity was due to accident arising out of and in the course of his employment with respondents? (2) On the facts found proved, was the arbitrator wrong in refusing compensation to appellant?”

The case was heard before the First Division on 12th June 1913.

Argued for the appellant ;—The present case was indistinguishable from the case of *Drylie v. Alloa Coal Company, Limited*,¹ because, as in that case, so in the present, the breaking down of the pump was an accident in the sense of the Act. The Sheriff-substitute's findings disclosed a complete chain of causation between that accident and the chill from which the appellant suffered; thus the case was distinguishable from that of *Brown v. John Watson, Limited*,² in which the case of *Drylie*¹ had been distinguished. The appellant could not have left the pit without getting drenched even if he had waited his turn upon dry ground, and accordingly it could not be said that his chill was due to his having exposed himself to a risk which was not one of the risks of his employment. *Esto* that he had been careless and had adopted a wrong method of leaving the pit which had increased the ordinary risk of contracting chill, his carelessness did not take him out of his employment.³

Counsel for the respondents was not called upon.

LORD PRESIDENT.—I do not think there is the slightest doubt that the learned Sheriff-substitute has come to quite the right conclusion. I think it is very probable that, if he had had an opportunity of reading the case

¹ *Supra*, p. 549.

² *Supra*, p. 593.

³ *Conway v. Pumpherston Oil Co., Limited*, 1911 S. C. 660; *Gane v. Norton Hill Colliery Co.*, [1909] 2 K. B. 539.

of *Drylie v. Alloa Coal Company*¹—which he had not, because his judgment was given before that case was decided—he might very likely have expressed himself differently, because I think the way he has expressed himself is really an echo of what was said in the case of *Eke v. Hart-Dyke*.² But none the less I think that the result he has come to is obviously right, and I think we should be really casting the law completely adrift from the ratio of the *Alloa Coal Company* case¹ if we came to any other conclusion.

In the *Alloa Coal Company* case¹ the pit was flooded through an accident, and was flooded to such an extent that the men thought they were in danger of their lives, and rushed to the pit bottom in order to get up to the surface—not at the ordinary time and in the ordinary course of their business, but, as they thought, in order to escape from drowning. While there, they were subjected to a severe wetting, and the learned Sheriff-substitute, who acted as arbitrator in the case, came to the conclusion that the disease of which the man died was contracted through the exposure to which he was then subjected. In that case it was held that there had been an accident, and that it occurred out of and in the course of the employment.

But what do we have here? We have, I agree, an accident in this way, that the pump broke down and there was water at the pit bottom; but there is no suggestion that there was the slightest danger to anybody owing to the amount of water at the bottom of the pit. The men were going up to the surface when their work was done, in the ordinary way, and if each man had waited his turn he would only have got his feet wet in getting to the cage—or, as the learned Sheriff-substitute says, if they had been anxious not to get their feet wet, they could have avoided even that to a large extent by crawling over some hutches which were pushed towards the cage. Instead of waiting their turn the workmen were all anxious to get to the cage at once, and this man walked into the water and stood there for at least thirty minutes, and in consequence of that the Sheriff-substitute thinks it is probable that he got the chill which caused the infirmity from which he suffered.

It seems to me impossible to say that that was an accident which arose out of and in the course of the employment, and it is futile to say—as was pleaded by counsel—that the workman might have been just as ill if he had had an ordinary wetting of his feet instead of voluntarily staying in the water for thirty minutes. I think that the case is an exceedingly clear one, and that the questions should be answered in the negative.

LORD KINNEAR.—I entirely concur. I only add, because I was not a party to the judgment in the case of *Drylie v. The Alloa Coal Company*,¹ that I assent to all that was said by your Lordship and by Lord Mackenzie in that case. But I think the present case is to be distinguished for the reasons given by your Lordship.

LORD JOHNSTON and LORD MACKENZIE concurred.

THE COURT answered the questions in the negative, and dismissed the appeal.

J. FERGOUSON REEKIE, S.S.C.—W. & J. BURNES, W.S.—Agents.

¹ *Supra*, p. 549.

² [1910] 2 K. B. 677.

No. 135.

JAMES TAYLOR, Appellant.—*Guild.*MRS MARY RAMSAY STEEL-MAITLAND, Respondent.—*W. Mitchell.*

June 17, 1913.

Taylor v.
Steel-
Maitland.*Expenses—Sheriff—Taxation—Fees to counsel in Sheriff Court—Interlocutor of Sheriff incidentally allowing fees recalled on appeal to Court of Session and expenses awarded—Right of Auditor to allow fees.*1st DIVISION. (REPORTED *supra*, p. 562.)Sheriff of the
Lothians and
Peebles.

In an appeal by stated case to the Sheriff in an arbitration under the Agricultural Holdings Act, 1908, the Sheriff, in his interlocutor answering the questions of law, found the appellant (the tenant) liable in expenses, and allowed fees to counsel.

In an appeal to the Court of Session the Court recalled the Sheriff's interlocutor, but found the respondent (the landlord) entitled to the expenses of the stated case.

Held that the Auditor, in taxing the account of these expenses, had warrant for the allowance of counsel's fees in the Sheriff Court although the Sheriff's interlocutor, in which fees were allowed, had been recalled.

GUILD & GUILD, W.S.—JOHN C. BRODIE & SONS, W.S.—Agents.

No. 136.

CATHERINE ELEANOR FLORENCE, Pursuer (Appellant).—*A. A. Fraser*
—*Paton.*

June 18, 1913.

GEORGE SMITH, Defender (Respondent).—*Lippe.*Florence v.
Smith.*Parent and Child—Illegitimate child—Filiation—Corroboration of pursuer's evidence—Act of connection subsequent to conception of child—False denial by defender.*

In support of the pursuer's evidence in an action of filiation, it was proved, *inter alia*, that the parties were on terms of intimacy and that at a date corresponding to the time of conception they were in the same neighbourhood, though there was no proof of an actual meeting. It was further proved, though denied by the defender, that the parties had connection at a subsequent date on which they admittedly met.

Circumstances in which *held*, having regard in particular to the defender's false denial of the later act of connection and of the facts establishing it, that there was sufficient corroboration of the pursuer's testimony, and decree *granted*.

2d DIVISION. (REPORTED *supra*, p. 393.)Sheriff of
Forfarshire.

In March 1912 Catherine Eleanor Florence, Knowley, Warthill, Aberdeenshire, brought an action in the Sheriff Court at Dundee against George Smith, Dundee, concluding for declarator that the defender was the father of an illegitimate child of which the pursuer was delivered on 5th November 1911, and for payment of inlying expenses and of aliment for the child.

The defender denied that he was the father of the child.

Proof was allowed and led. The import of the evidence is fully given in the note of the Sheriff-substitute (Neish).

On 26th July 1912 the Sheriff-substitute assolizied the defender.*

* "NOTE.—The parties to this case resided on neighbouring farms in Aberdeenshire, their fathers were related, they were at school together, and have known each other from childhood. The pursuer has always resided

The pursuer appealed to the Court of Session, and the case was heard before the Second Division (without Lord Guthrie) on 17th and 18th June 1913.

June 18, 1913.
Florence v.
Smith.

Argued for appellant;—The Sheriff had found, and it was clearly proved, that an act of connection had taken place on 18th March. This fact coupled with the proof that the parties were on intimate terms, and that they had opportunities of meeting about the date of conception, corroborated the pursuer's testimony and raised a presumption of paternity against the defender.¹ The pursuer was in a much stronger position than if the defender had admitted the connection on 18th March. By his denial of such a material fact the credibility of his whole evidence was destroyed, and the pursuer was left uncontradicted.²

Argued for the respondent;—The verdict of the Judge who had seen the witnesses should not be disturbed. The pursuer's case rested

with her father at Knowley, except for a period from January 1909 to May 1909, when she was in Aberdeen attending cooking classes.

"The defender, on leaving school in January 1906, went to a bank in Inverurie. In May 1908 he was transferred to Durno. He remained there till January 1910, and during this period resided at home. From Durno he was transferred to Huntly, and remained there till September 1911, when he was transferred to Loches. While at Huntly he came home at times for the week-end.

"The pursuer says she was sweethearting with the defender, and this is the view taken of their relations by her father, her sister, her brother, Adam Addison, and John Addison. On the other hand, the defender's mother will not admit that her son was more friendly with the pursuer than with any other girl, although she admits that she knew that 'Eleanor was fond of George.' The defender's brother Robert did not look upon them as sweethearts. The defender admits that he was 'on pretty friendly terms' with the pursuer, and walked her home pretty often from church and choir practice. He has taken her arm and put his arm round her waist, but he has not kissed her, except when they were children. He was not courting the pursuer. 'I liked her, that was all. I had nothing against her.'

"There are two incidents to which I must refer in connection with the degree of intimacy between the parties.

"The first took place about the end of 1909 after choir practice. The defender drove his sister home to Tocher, then got on his bicycle and met the pursuer and her sister at the end of Tocher Road. He saw the girls home to Knowley, and at the gate he left his bicycle with the pursuer's sister Alice, and went with the pursuer to the back of the house. The pursuer then says the defender tried to have connection with her, but that she resisted him. The defender denies that he attempted connection, and says his going away with the pursuer was by way of a joke to tease the younger sister. He says he expected Alice to lay down the bicycle and come and look for the truants. That part of the joke certainly did not come off. The idea of a joke never occurred to Alice, who says she was asked to hold the bicycle and light the lamp. Nor did it occur to the pursuer's father that it was a joke against Alice. He, finding Alice with the bicycle, took it inside the house, locked the door, and did not give the bicycle back to

¹ M'Donald v. Glass, (1883) 11 R. 57; Ross v. Fraser, (1863) 1 Macph. 783; Costley v. Little, (1892) 30 S. L. R. 87; Buchanan v. Finlayson, (1900) 3 F. 245.

² Macpherson v. Lague, (1896) 23 R. 785; Harper v. Paterson, (1896) 33 S. L. R. 657. Lord Dundas referred to Dawson v. M'Kenzie, 1908 S. C. 648, and M'Whirter v. Lynch, 1909 S. C. 112.

June 18, 1913. on her uncorroborated evidence. There was no proof of a meeting between the parties at the critical date, and therefore no proof of "opportunity," such as there was in the cases of *Ross v. Fraser*¹ and *McDonald v. Glass*.² Proof of connection subsequent to conception was much less cogent than proof of prior connection, and *per se* was insufficient corroboration.³ The authorities cited on the question of the defender's false denial had no application. In those cases there was direct proof of the fact which was denied. In this case what was denied, namely, that connection took place on 18th March, was only an inference from proved facts, and these facts, in all material details, were admitted.

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LORD JUSTICE-CLERK.—In this case I have come to the conclusion that, while the Sheriff-substitute's summary of the facts is well stated and con-

the defender till he had chaffed him, he does not say on what subject, but certainly not I fancy on playing hide-and-seek with Alice. The impression left on my mind is that the idea of a joke upon Alice is an afterthought, and that the defender desired to be alone with the pursuer. Again I doubt the defender when he says that he merely went out to take a run on his bicycle. I believe he came just to meet the girls on their way back from choir practice. I also doubt his tale about the soft tyre; at any rate this incident is not put to the girls. In my opinion, whether or not the defender attempted connection on this occasion, he left Alice and went round to the back of the house for the purpose of being alone with the pursuer, and not as he says to play a game of hide-and-seek with Alice.

"The next incident took place in the loft or barn at Knowley, about six weeks before the Premnay expedition, which took place in September 1910.

"The description of this building is very confused in the evidence, but it seems to have had a door and a trap-door down to the cart shed. It is admitted that the parties were in the loft together. The pursuer says the defender locked the door, and again attempted connection, but without success. The defender denies both these statements. The pursuer's brother Douglas came to look for them, the defender jumped through the trap-door, and the pursuer came out at the door. Again the defender says he jumped through the trap-door for a joke.

"I do not say that the evidence with regard to these incidents necessarily leads to the conclusion that the defender did attempt connection on these occasions. After all, the parties had known each other since childhood, they were near neighbours, their families were on terms of intimacy, and their fathers were related. I should have thought these incidents trivial, had it not been for the impression left on my mind that the defender is unduly anxious to avoid any imputation of intimacy with the pursuer. Whether or not they were sweethearts, I think it is not easy to read the evidence in the case without coming to the conclusion that they mutually evinced a decided preference for each other's company and, when the occasion served, preferred that they should not be troubled with the presence of a third party.

"I ought to say a word about the postcards which the pursuer has produced. Again, looking to the childhood friendship of the parties, I do not know that they are unduly affectionate in their terms. The pursuer says she destroyed letters which she had at the defender's request. The defender denies that he made any such request. If she did so, it is a little difficult

¹ 1 Macph. 783.

² 11 R. 57.

³ Buchanan v. Finlayson, 3 F. 245, *per* Lord Justice-Clerk Kingsburgh, at p. 249; Havery v. Brownlee, 1908 S. C. 424; Muir v. Tweedie, (1883) 21 S. L. R. 241.

sistent with the evidence, he has erred in the conclusions in law which he June 18, 1913.
 has drawn from the facts. There is no doubt that the pursuer and the Florence v.
 defender were on terms of familiarity and that they had frequent oppor-Smith.
 tunities of meeting. The pursuer alleged, but was unable to bring direct Lord Justice-
 corroboration of the fact, that the defender had connection with her about Clerk.
 the time when her child must have been conceived. If she could produce
 no further evidence in corroboration of her story her case would certainly
 fail, but the case does not stand there. There is a further allegation that
 the parties had connection at a date some six weeks subsequent to the date
 of conception. Now as regards that incident, I think it throws a strong
 light on the case. The pursuer said that she and the defender, having
 parted from their two companions on a Saturday evening, lay down on a
 bank by the side of the road, and there had connection. The defender
 denies that, but he does not deny that he was there, and he admits certain

to understand why she did not burn the postcards also. She says herself
 that she did not burn the postcards because she had the postcards at Know-
 ley and the letters in Aberdeen, but if, as the pursuer says, the bonfire
 took place in Aberdeen she has preserved three of the postcards which she
 received in Aberdeen, and presumably she had them there.

"*Premnay, September 1910.*—This is the first occasion upon which the
 pursuer speaks to connection. The defender and his brother were bicycling
 to Premnay. They were overtaken by the pursuer and her brother. The
 four visited a mutual friend in Premnay. On the way back the party
 divided at Old Rayne. The pursuer and defender took the long road, the
 other pair took the short road, and the four met again at Rayne School.
 The pursuer says connection took place on this occasion. Defender denies
 it. There is controversy as to how long James Smith and Douglas
 Florence had to wait at the school. Douglas says twenty minutes or half-
 an-hour. James says five minutes. The defender says he suggested a race ;
 his brother corroborates him. I see no reason to doubt that a race was
 suggested, but I also suspect that the defender wanted to get away with the
 pursuer alone. Whether or not connection took place on this occasion is a
 very difficult question. I do not think it can be said that this public road
 during the daytime was a suspicious or secret place, and no one saw any
 familiarity between the parties on this ride, and although I do think the
 parties may be fairly described as sweethearts by this time, I do not think
 I am prepared to say the connection on this occasion is proved.

"*September 1910-January 1911.*—The pursuer says she had connection
 with the defender several times between these dates. She gives neither day
 nor place, and there is no evidence as to the parties even having been seen
 together during this period.

"*The end of January or beginning of February 1911.*—The pursuer
 speaks to connection at this time. This is the crucial date for the pursuer,
 because it corresponds with the ordinary date of conception. The child was
 born on 5th November 1911. The pursuer fixes the date because it was
 about the time the choir practices were resumed. According to Isobel Smith
 the first choir practice for the session was on 14th February. The defender
 according to his own account was at home on Sundays 15th and 22nd
 January and 5th and 12th February. The pursuer says,—'He had connec-
 tion with me on a Saturday or Sunday. I saw him at church on the
 Sunday, and he walked home with me. He said he would be passing in
 the evening, and to look out for him between seven and eight. I did so,
 and he came. I went out with him and we went down the road between
 Tocher Farm and our own farm. He had connection with me on the
 roadside. I was with him about a quarter of an hour. My father sus-

June 18, 1913. facts which tend very much against his defence. The pursuer is corroborated in her account of this incident by a witness, Adam Addison, whose evidence the Sheriff-substitute found no reason to doubt, and who speaks to having seen, on that occasion, what was certainly an act of gross familiarity between the parties. The defender had a pony with him, and the evidence of this witness is that the pony was left on the road, that the pursuer and the defender were lying at the roadside, that he had both his arms round her, and that she was heard laughing. If there is no reason for doubting this evidence it is of the greatest possible importance comparing it with the evidence of the defender. He knew that this evidence had been led, and he probably knew that an absolute denial would be fatal to his case, if the pursuer and Addison were believed. What he did was to deny that intercourse had taken place and to try ingeniously to fritter away what was observed by Addison. He denies that he had both arms round

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pected we were out.' Now, the father is not asked about this incident; no one saw the parties together at this time, no one saw them walk home from the church. The meeting rests upon the pursuer's evidence alone. The defender says he was never at Knowley during this time between 1st January and 18th March, and he denies connection.

"11th or 12th March.—This is the next occasion to which the pursuer speaks. She is somewhat confused as to whether it was a Saturday or a Sunday (11th or 12th March). The defender says he was not at home that week-end, and he is corroborated by his mother, his sister, and his brother. His sister remembers that Sunday, because one of the candidates for the post of organist did not come forward and she had to play. Mr Ross for the pursuer objected to evidence being led as to the defender not having been home for this week-end, on the ground that it was an attempt to prove an alibi, of which no notice had been given on record. I did not think the evidence did amount to an attempt to prove an alibi in the strict sense of the word. Such an attempt would have been made had the defender adduced evidence to prove that he was in Huntly, but he led no such evidence. All he tries to prove is that he was not at home. Possibly he should have said so on record, but I don't think the question of whether or not the evidence should have been allowed is of much importance. I certainly did not think it right to compel the defender to amend with the penalty of paying expenses, but I expressly reserved the pursuer's right to lead her conjunct probation, and she did not avail herself of this reservation; I suppose because she could not produce any witness who did see the defender at home this week-end. If the evidence is bad, then again the alleged meeting rests solely on the pursuer's evidence. If the evidence is good, as in my opinion it is, I think it is quite clearly proved that the pursuer is mistaken as to this date.

"18th March.—It is admitted that on this date the parties walked home from choir practice, the defender leading his pony, and that they sat down on the brae. Adam Addison says he saw the couple lying at the roadside, and that the defender had both his arms round the pursuer. The defender admits 'his arm was through hers.' 'Both my arms were not round her.' The pursuer says connection took place on this occasion, the defender denies connection.

"2nd April.—On this occasion, the pursuer, defender, Mary Durno, and Watt walked home together from church in the evening. Pursuer and defender started in front, but afterwards allowed Mary Durno and Watt to pass them. Mary Durno says they had to wait for the other couple a quarter of an hour, and that defender had his arm round pursuer's waist. Watt thinks they waited ten minutes. This is the last occasion on which pursuer says connection took place. The defender again denies connection.

her, and says that one arm was through hers; he denies that the pony was June 18, 1913. left loose on the road, and maintains that the rein was never out of his hand. If his story is untrue, and the Sheriff-substitute holds so, that is a strong element in considering whether the pursuer has sufficient corroboration of her statement that connection took place a few weeks earlier. The case of *Macpherson v. Largue*¹ and several other cases bear out that such facts may be taken into account in considering whether the pursuer has proved her case. I think that, taking the facts to which I have adverted into consideration, there is in the evidence before us sufficient corroboration of the pursuer's otherwise unsupported statement that the defender had connection with her about the time of conception of the child. I am therefore for recalling the interlocutor of the Sheriff-substitute and finding for the pursuer.

The pursuer has consistently maintained from the first that the defender is the father of her child, and the defender has, as consistently, denied the imputation.

"I think the most serious part of the evidence for the defender as regards connection, is the meeting on 18th March. If Adam Addison is to be believed, the defender's position was very compromising. The hour was late, about ten o'clock. Choir practice began that night at 7.30, and usually lasted an hour, so that the parties had taken some little time on their way home. Addison watched them for ten minutes, but it is fair to presume that he saw no further impropriety than both the defender's arms round the pursuer. I frankly confess, however, that in my opinion, looking to the intimacy between the parties as evidenced by other incidents in the case, there is enough evidence to corroborate the pursuer's story of connection on this occasion. But then I do not think connection, even if proved on this occasion, is sufficient to father the child upon the defender.

"The pursuer is quite indefinite in her condescendence as to the particular act of connection to which she attributes the conception of her child. She is equally indefinite in her evidence, indeed she is not examined on this point. Now, the child was born on 5th November, and if conceived on 18th March, the period of gestation would be 232 days in place of the usual 274 to 280. I do not, of course, suggest that 232 days is an impossible period of gestation, but it is an unusual period. There is no hint or suggestion, on the whole case or in the pursuer's evidence, that her baby was not a full time child, and I think that, if the pursuer intended to rely upon this date as the occasion when her child was conceived, some such evidence as I have indicated should have been forthcoming. In fact, of course, she maintains connection at the end of January or beginning of February, a date which would coincide with the ordinary period of gestation.

"It is right that I should say that I am not prepared to hold that the pursuer has proved connection either on the road from Premnay or on 2nd April. Granted that on these occasions the defender showed a greater desire to be alone with the pursuer than he is ready to admit, I do not think the surrounding circumstances of these incidents necessarily or actually lead to the conclusion that connection took place on these occasions, but again neither occasion coincides with the usual period of gestation.

"The question remains whether, granted that connection is proved on 18th March, that, taken along with the other incidents in the case, such as the parties' partiality for each other's company and such familiarities as are spoken to, is sufficient to corroborate the pursuer and to prove that a meeting and connection took place at the end of January or beginning of February. I do not know what might have been the result if there had been

¹ 23 R. 785.

June 18, 1913. **LORD DUNDAS.**—I think this case, like many of its kind, is rather a narrow one. I need not say I should be slow to differ from the careful judgment of an experienced Sheriff-substitute in a case like this upon any mere question of fact; and, so far as his digest of the facts is concerned, I am prepared to agree with the Sheriff-substitute entirely. But I differ from his conclusion, because I think he has failed to deduce the right legal inferences from the facts, and especially from one salient incident to which I shall presently refer. That being so, I need not deal with the facts in any detail, except with regard to that one incident. The general setting of the picture, so to speak, discloses that these two young people—the pursuer, at the date of the proof, was only twenty, and the defender twenty-two—were born and brought up in close intimacy with one another. Their fathers are relatives, and of similar stations in life—small farmers, living on farms close to each other; the children grew up together, and as they reached years of maturity were on terms of great intimacy, with an element of what may fairly be described as “sweethearting.” All that, of course, is quite consistent with innocent intimacy and innocent affection. But a child was born to the pursuer on the 5th November 1911, and no other man than the defender can, upon the evidence, be pointed to as, in the least degree, a probable father of the child. Still it is for the pursuer to prove her case; and but for the one incident, which I now come to consider, I should have held, with the Sheriff-substitute, that she had failed to prove it. As to that incident, the pursuer depones that late on the evening of the 18th of March 1911 she and the defender were alone together on the roadside, between the smithy and the smith's house, and that connection took place on that occasion. In this she is materially corroborated by Adam Addison, an independent witness, against whose credibility nothing has been suggested. He

some independent proof of the parties having met at this time, although I do not know that connection in January or February is to be presumed because it took place in March, but there is absolutely no direct evidence of their meeting except the pursuer's own statement. Opportunity for meeting there was in the sense that the defender was at his own home for the week-ends of 22nd January and 5th February, but there is no direct corroboration of the pursuer's statement that they did meet; of opportunity for connection in the proper sense there is no evidence beyond that of the pursuer. No one indeed speaks to having seen the parties together between the Premnay incident in 1910 and 18th March 1911. Suspicion there may be that the pursuer is fathering her child upon the proper person, but I do not think the issue in this case can be decided upon suspicion. In my opinion the pursuer cannot succeed unless her own evidence is supported by such corroboration as is reasonable to prove the issue of paternity which she maintains, and that issue is to my mind dependent upon her proving connection at the end of January or beginning of February. It is not to be left out of account that, in my opinion, the pursuer is mistaken as to the meeting on 11th or 12th March, and, giving all weight to her own evidence, she may be mistaken as to the crucial meeting.

“Cases of this kind are always difficult. I think there is perhaps more than the usual difficulty in this case, but I have found myself unable to hold that there is sufficient corroboration of the pursuer's evidence with regard to the alleged meeting at the end of January or beginning of February to enable me to give a verdict in her favour.

“I therefore assoilzie the defender.”

says he saw the two lying together on the roadside, and that both the June 18, 1913.
 defender's arms were round the pursuer, who was laughing. The defender ^{Florence v.}
 does not deny that he was with the pursuer at the time and place spoken ^{Smith.}
 to, but he says that they were not lying down but only sitting or leaning ^{Lord Dundas.}
 back on the bank; he denies that his arms were round her, though one of
 his arms was through her arm, and he denies that he had connection with
 her. Now, there is a series of recent decisions to the effect that where a
 defender falsely denies some fact bearing materially upon the crucial issue
 in dispute, that denial may turn the scale against him, in an otherwise
 doubtful case, by giving a complexion to the case different from that which
 the Court might, but for such denial, have put upon it. I do not know
 whether the Sheriff-substitute had his attention called to these cases. I am
 inclined to believe that they were not cited in the discussion before him,
 because otherwise, I think, he would probably have referred to them in the
 course of his carefully expressed opinion. If the cases were not cited, that
 would readily account for the Sheriff-substitute having fallen into error, as
 I think he has fallen, in regard to the legal aspect of the matter. However
 that may be, it is sufficient to remind your Lordships of the case of *Macpher-*
son v. Largue,¹ since followed and approved at least twice by the First
 Division during the presidency of Lord Dunedin, in *Dawson v. M'Kenzie*,²
 and *M'Whirter v. Lynch*.³ In the last case the Lord President said: "I
 have nothing more to add to what I said in *Dawson v. M'Kenzie* as to the
 scope of this doctrine of corroboration by contradiction, but, as I do not
 wish to quote myself, I will quote a sentence of Lord M'Laren's opinion in
 that case: 'There must be corroboration of the pursuer's evidence; yet
 when the effect of the defender's false evidence, i.e., his denial of circum-
 stances which are otherwise proved, is to show that there is something of
 which he is ashamed, or something the admission of which he conceived
 would throw suspicion on himself, this will put a different complexion on
 what the Court might otherwise be disposed to regard as innocent intimacy
 between the parties.'" I think that is very apposite to the present case.
 It is true that, assuming that connection took place on the 18th of March,
 that would probably not account for the conception of the child, because
 there is nothing in the evidence to show that the child was born before the
 expiry of the usual and normal period of gestation. But that does not affect
 the material bearing on the case of the evidence to which I have alluded.
 It seems to me that Addison's evidence, and the defender's denial of the
 material parts of it, go far to corroborate the general truth of the pursuer's
 story, though there is no specific proof of any connection at an earlier date
 corresponding to the period of conception. The parties were not far off
 from one another at and about that period. That being so, I think that
 there is sufficient ground for altering the judgment of the Sheriff-substitute.
 We have nothing to do with the question which would have arisen if the
 defender had frankly admitted connection on the 18th of March, while
 maintaining his defence in all other respects. But it seems to me there is
 the greatest possible difference between an admission by a defender of con-
 nection at a date subsequent to that of conception of the child, and a denial

¹ 23 R. 785.² 1908 S. C. 648.³ 1909 S. C. 112.

June 18, 1913. by him of such connection, proved to be false. And as cases on that point have been referred to, I should like to add that, as at present advised, I respectfully differ from some of the views which have been expressed in previous cases. I think there is a great difference between an admission of intercourse prior, and an admission of intercourse subsequent, to the date when the child must have been conceived. I respectfully differ from the observations on this matter by Lord Young in *M'Donald v. Glass*,¹ and prefer such opinions as that of Lord Neaves in *Ross v. Fraser*,² and those of the Lord Justice-Clerk and Lord Trayner in *Buchanan v. Finlayson*.³ But in the circumstances of this case it is unnecessary, and would indeed be inappropriate, to consider what might have been the position if the defender had admitted intercourse with the pursuer on the 18th of March. I agree with your Lordship in thinking that we ought to sustain this appeal, recall the interlocutor appealed against, and find that the pursuer has proved her case against the defender.

LORD SALVESEN.—I entirely agree with the result at which your Lordships have arrived. For my part I do not think it is a difficult case and I should have had no hesitation in reaching an opposite conclusion from the Sheriff-substitute upon the facts as he has stated them. The parties were of the same social rank, had been intimate for years, and had corresponded on friendly and even affectionate terms. In the letters from the pursuer there are hints of clandestine meetings, and in the defender's postcards there are expressions only consistent with affectionate regard. They sought each other's company and took many occasions to be alone together. There are two incidents, prior to the crucial date of 18th March, namely, the bicycle incident and the incident in the loft, to which I think the Sheriff-substitute has not attached sufficient importance. On both these occasions the defender attempted to explain his behaviour as a "joke." I must say that I do not appreciate the joke in his locking himself into a hayloft with the girl whom he was courting, and then when disturbed leaving the premises by a trap-door while she went out by the door by which they had entered. It is very easy to explain the defender's conduct on the footing that he felt himself in a compromising position and took what he thought was a way of avoiding detection, and very difficult to explain it as a joke. As to the bicycle incident it was a very extraordinary joke that the little girl should be left to hold the bicycle while the pursuer and defender went behind the house in the dark for 10 or 15 minutes. It appears to me to be easily explained by the desire of the parties to be alone. The pursuer does not say that connection took place on these occasions, though she says it was attempted. But they are significant as leading up to subsequent events, and are made the more significant by the way in which the defender tries to explain them.

As to the actual date of conception there is no direct evidence of connection except that of the pursuer herself. But it is proved that about that time the defender was visiting his own home about 10 minutes distance from the pursuer's house, and that they were in the habit of frequently

¹ 11 R. 57.² 1 Macph. 783.³ 3 F. 245.

walking out together. The pursuer says there was connection at a date June 18, 1913 which corresponds with one or more of the visits made by the defender to ^{Florence v.} his parents. I think therefore that there was ample opportunity for meet- ^{Smith.} ing in the way the pursuer says that they did, and I do not understand ^{Lord Salvesen.} what the Sheriff means when he says there was no proof of "opportunity for connection in the proper sense."

At the same time, if the case had stopped here, I agree that the pursuer would not have proved her case, although there might have been little moral doubt that the defender was the father of the child. But the subsequent incident on 18th March leaves no doubt in my mind that the pursuer's story is sufficiently corroborated to warrant our proceeding upon it. In many cases mere proof of gross familiarity denied by the defender is sufficient to corroborate a pursuer who is otherwise a credible witness. And there can be no grosser act of familiarity than an act of connection. If, as the Sheriff holds, connection took place within six weeks of the date of conception, and there is nothing to suggest that it took place then for the first time, it would be extraordinary not to hold that sufficient corroboration. Of course cases can be figured in which it might not be sufficient, but, in the special circumstances of this case, I think that an admission of connection on 18th March would have been sufficient corroboration of the pursuer. But the case is made much stronger when we find that the defender denies the fact which the Sheriff finds proved. That gives a different complexion to the whole case, for it deprives the defender's evidence of credibility, and we are left in the position of having the pursuer's evidence amply corroborated, while no regard falls to be paid to the counter evidence of the defender.

I have therefore no doubt that the pursuer has proved her case, and, indeed, there are few occasions in which I have felt more confidence that the legal result at which we have arrived corresponds with the truth and justice of the case.

THE COURT sustained the appeal, recalled the interlocutor of the Sheriff-substitute, and decerned against the defender in terms of the conclusions of the initial writ, with expenses.

CLARK & MACDONALD, S.S.C.—DOUGLAS & MILLER, W.S.—Agents.

GEORGE DUKE M'NICOLL AND OTHERS (Mrs Eliza Lennox Henderson's Trustees), Appellants.—*Clyde, K.C.—Macquisten.*

THE COMMISSIONERS OF INLAND REVENUE, Respondents.—

Sol.-Gen. Anderson—J. A. T. Robertson.

Revenue—Stamp-duty—"Deed"—Writ—Stamp Act, 1891 (54 and 55 Vict. cap. 39), First Schedule.

The First Schedule to the Stamp Act, 1891, includes, among stamp-duties payable on instruments, a duty of 10s. on "Deed of any kind whatsoever not described in this Schedule."

Held that a minute of acceptance of office by trustees, engrossed upon a trust-disposition and settlement and signed by the trustees before two subscribing witnesses, was not a "deed" within the meaning of the Schedule, and was not chargeable with a stamp-duty of 10s., or with any stamp-duty.

No. 137.

June 19, 1913.

Henderson's
Trustees v.
Commissioners of
Inland
Revenue.

June 19, 1913. **Henderson's Trustees v. Commissioners of Inland Revenue.** AT the end of a trust-disposition and settlement, executed by Mrs Eliza Lennox Henderson, there was engrossed a minute of acceptance of office by the trustees appointed thereunder in the following terms:—
 “We, George Duke M’Nicol, solicitor, Kirriemuir, James Russell, coal exporter, Glasgow, Hector Murray Macneal, shipowner, residing at thirty-nine Lilybank Gardens, Hillhead, Glasgow, and David Baird Smith, writer, Glasgow, do hereby accept the offices of trustee and executor conferred upon us by the foregoing trust-disposition and settlement.—In witness whereof, this minute written by William Nicol, clerk to Baird Smiths, Muirhead, & Guthrie Smith, writers in Glasgow, is subscribed by us all at Glasgow, on the fourth day of August Nineteen hundred and ten, before these witnesses, the said William Nicol and William John Wilson, commissionaire to the said Baird Smiths, Muirhead, & Guthrie Smith. (Signed) GEORGE D. M’NICOLL, JAMES RUSSELL, HECTOR M. MACNEAL, DAVID BAIRD SMITH. William Nicol, *witness*; W. J. Wilson, *witness*.”

1ST DIVISION.

The Commissioners of Inland Revenue were of opinion that this minute of acceptance was chargeable in terms of the First Schedule to the Stamp Act, 1891,* with a stamp-duty of 10s., and it was stamped accordingly.

Mrs Henderson's trustees required the Commissioners to state a case for the opinion of the Court of Session.

The question of law for the opinion of the Court was:—“Whether the said instrument is liable to be assessed and charged with the said duty of 10s.; or, if not liable to be assessed with that duty, with what other stamp-duty, if any, it is liable to be assessed and charged.”

The case was heard before the First Division (without Lord Johnston) on 17th June 1913.

Argued for the appellants;—The writing in question was not a “deed” within the meaning of the First Schedule to the Stamp Act, 1891. The word “deed” was used throughout that Act as a term of art and in the technical sense known to English law, and the present writing lacked the requirements necessarily incident to a deed in that technical sense.¹ It was in that sense that the words must be construed here, because in a taxing Act applicable to the United Kingdom one meaning only was to be attributed to a word unless the Act expressly provided for several meanings, each applicable to a different part of the United Kingdom. The writing, however, was not even a deed in the sense known to the law of Scotland, where the word bore a wider and less restricted meaning. In Scotland a “deed” might be described as an operative document which conferred or transferred a right, or, to use the words of Professor Bell,² “in the Stamp Acts the term ‘deed’ is applicable to any writing by which it is intended that, upon its execution, and at once, an obligation or right shall be constituted in favour of the grantee.” By an acceptance of office as a trustee no right was constituted or conferred or transferred in favour of anyone, and the wholly unnecessary formalities observed in signifying the acceptance could not make the document anything more than it in fact was, viz., a simple statement of the fact of acceptance.³ Stamp-

* 54 and 55 Vict. cap. 39. The apposite words of the First Schedule are quoted in the rubric.

¹ Stroud's Judicial Dictionary, vol. i. *voce* “Deed.”

² Bell's Lectures on Conveyancing, (3rd ed.) i. 205.

³ Fleming v. Robertson, (1859) 21 D. 982, Lord Wood, at p. 987.

duty could never be held to be imposed where no transfer or nexus was operated, unless the language which imposed it was clear and distinct in its terms.¹

Argued for the respondents;—Any writing which created a legal relationship was a "deed," and the acceptance in question created a new legal relationship, or at least completed one partly established by the trust-disposition and settlement. The respondents did not rely upon the particular form in which the acceptance was drawn. A holograph writing intimating acceptance of office would have been as much a deed as the writing in question.² It was in accordance with practice to require such acceptances to be stamped if they were brought to the notice of the Revenue officials.

June 19, 1913.
Henderson's
Trustees v.
Commissioners of
Inland
Revenue.

At advising on 19th June 1913,—

LORD PRESIDENT.—This is an appeal as to an assessment of stamp-duty of 10s. which was made in respect that upon a trust-disposition and settlement there was engrossed an acceptance of trust by the trustees who had been named in the trust-disposition and settlement, which acceptance was signed and tested. The Inland Revenue attempt to justify the assessment by reference to the part of the First Schedule to the Stamp Act, which says:—"Deed of any kind whatsoever, not described in this schedule, 10s."

Now the Stamp Act does not define what a deed is, and I think it unnecessary to consider whether the word "deed" is there used as a term of art, because in any case it is only in England that it is so used. I am quite content to take "deed" as being used in the popular sense. The statute has not defined what a deed is, nor am I tempted to give a definition, but I am certainly clearly of opinion that, whatever is a deed, this acceptance of trust is not, and I do not suppose that anyone could be found in the legal profession who would ever dream of calling it any such thing.

An acceptance by trustees, in usual practice, is made by the first minute in the trust sederunt-book. Here it was thought that it would be a good thing to write the acceptance on the trust-settlement, and in order, I suppose, to save the trustees the trouble of writing it holograph, it was signed and tested. To engross it in the manner I have described upon the trust-disposition was quite unnecessary, but quite innocuous; and to suppose that that constituted the acceptance a deed is contrary to ordinary common sense and common parlance.

The learned counsel arguing for the assessment said that this was a deed because it was something which constituted a new legal relation. Well, it did constitute a legal relation. But that attempted definition will never do. According to that definition you could not endorse an ordinary bill of exchange without a 10s. stamp, because you undoubtedly constitute a new legal relation when you endorse a bill of exchange; and many other examples might be suggested.

¹ The Queen v. Morton, (1873) 2 Crown Cas. Res. 22; Smyth v. Latham, (1833) 9 Bing. 692, Tindal, C.J., at p. 709; Routledge v. Thornton, (1812) 4 Taunt. 704; Commissioners of Inland Revenue v. Angus, (1889) 23 Q. B. D. 579, Lord Esher, at p. 589.

² Bell's Lectures on Conveyancing, (3rd ed.) i. 23.

June 19, 1913. I am of opinion that the assessment is wrong, and that the appeal should be allowed.

Henderson's
Trustees v.
Commissioners of
Inland
Revenue.

LORD KINNEAR.—I am entirely of the same opinion, and I agree with your Lordship that for the purpose of this case the word "deed" is a word of ordinary language, because it is not in our system a term of art. I agree also that it is unnecessary to attempt any exact definition of what the word "deed" means; but I take the definition which was suggested in the ingenious argument for the Inland Revenue, in which it was said that a deed was any formal instrument which creates a legal relation. Now this writing is certainly formal; indeed it is unnecessarily formal and cumbrous for the purpose for which it is made; but it does not, by itself, create any legal relation whatever. Taken by itself it is nothing, and it has no effect or meaning. Its whole force depends upon its reference to the foregoing trust-disposition and settlement, which is undoubtedly a deed in the ordinary sense in which we use the word. It is an acceptance of the office conferred by the trust-disposition and settlement. It is a mere note of acceptance which might have been made in any form, or which might have been dispensed with altogether, if the persons named as trustees were willing to act, because their attendance at meetings and a note to the effect that they had been present was quite enough.

It is true, of course, that the trust-disposition does not, in itself, constitute the particular persons as trustees until they do accept; but so far as anything like a deed is concerned, it is that instrument and that instrument alone which creates the trust. The fact of acceptance may be proved by writing or by parole, and, if by writing, by any informal note under the hand of a trustee or by any note made by the agent of the trust at a meeting of the trustees.

I therefore agree with your Lordship that the assessment here was wrong, and that the appeal should be allowed.

LORD MACKENZIE concurred.

THE COURT sustained the appeal, found that the instrument in question was not chargeable with any stamp-duty, and ordered the Commissioners to repay to the appellants the sum of 10s.

MORTON, SMART, MACDONALD, & PROSSER, W.S.—SIR PHILIP J. HAMILTON
GRIERSON, Solicitor of Inland Revenue—Agents.

ARTHUR M'GOWAN, Pursuer (Appellant).—*Graham Stewart, K.C.*—*W. J. Robertson.* No. 138.

THE CITY OF GLASGOW FRIENDLY SOCIETY AND OTHERS, Defenders (Respondents).—*Moncrieff, K.C.*—*Lippe.* June 19, 1913.

ALEXANDER BOAG, Defender (Respondent).—*Gilchrist.*

M'Gowan v.
City of
Glasgow
Friendly
Society.

Friendly Society—Jurisdiction—Exclusion of jurisdiction—Rule of friendly society for settlement by arbitration of disputes between society and members—Election of member to board of management contrary to rule—Declarator that election void—Competence of action—Whether rule permissive in form is in effect imperative—Friendly Societies Act, 1896 (59 and 60 Vict. cap. 25), secs. 9 (3), 68 (1), First Schedule (8).

In an action by a member of a friendly society against the society for declarator that the appointment of another member to the board of management was void in respect that under the rules of the society he was ineligible for election, it was in defence denied that he was ineligible, and it was also pleaded that the action was excluded by a rule of the society that "all disputes between the society and any member as such . . . may be determined by arbitration." The rule was passed under the Friendly Societies Act, 1896, which provides that every dispute between a member and the society shall be decided in manner directed by the rules of the society "without appeal, and shall not be removable into any Court of law. . . ."

Held that the action was competent in respect that the jurisdiction of the Court was not excluded in a case where the averment was that the society had acted in violation of its rules and constitution.

Opinion reserved, per Lord Salvesen, on the question whether the rule of the society as to the settlement of disputes was in effect imperative though in form merely permissive.

Process—Reduction—Necessity for reduction—Friendly Society—Election of member to board of management—Declarator that election void—Necessity for reduction of minutes of meeting at which election made.

The rules of a friendly society provided that members should be represented by delegates elected by themselves, and that minutes of the district meetings at which the election took place should be kept and transmitted to the secretary of the society. It was further provided that the delegates should elect from among themselves a board of management.

Held that an action for declarator that the election of a member to the board of management was void, in respect that he was ineligible to act as a delegate, could competently be brought without reduction of the minutes of the meeting at which he was appointed a delegate, or of those of the meeting at which he was elected to the board.

ON 4th March 1912 Arthur M'Gowan, Kilmarnock, brought an action in the Sheriff Court of Lanarkshire at Glasgow against (1) the City of Glasgow Friendly Society, registered under the Friendly Societies Acts, (2) Robert Pirie, M.D., and others, the trustees of the Society, and (3) Alexander Boag, Uddington. 2D DIVISION.
Sheriff of
Lanarkshire.

The claim of the pursuer was:—"(1) For declarator (a) that the pretended election of the defender Alexander Boag as a member of the board of management of the City of Glasgow Friendly Society at the annual general meeting of delegates of said Society, held on adjournment on 13th December 1911, was null and void, in respect

June 19, 1913. that under the rules of the Society he was ineligible as a delegate thereof, and therefore as a member of the said board of management, by reason of his being more than ten weeks in arrears with his subscriptions as a member of the said Society, both at the time of his pretended election as a delegate and also at the time of his pretended election as a member of the board of management of the said Society; and (b) that the pursuer was duly and legally elected a member of the said board of management at the said annual general meeting, in respect that he, as a candidate for election as a member of the said board of management, received the largest number of votes at said annual general meeting after the defender the said Alexander Boag, who was ineligible as a delegate and member of the said board of management as aforesaid; and (2) for interdict against the said The City of Glasgow Friendly Society and the said trustees thereof summoning the said Alexander Boag to meetings of the said board of management as a member thereof, and paying him any remuneration as a member thereof, and also against the said Alexander Boag acting as a member of said board of management."

The pursuer, after averring that he was a member of the Society, continued:—(Cond. 4) "At the meeting for the election of delegates,* held in the Motherwell district in March/April 1909, the

* The rules of the Society provided:—"IV. (1) To enable members to arrange for the management of the Society they shall be represented by delegates, and annual general meetings and special meetings of the Society for that purpose shall consist of meetings of delegates elected as hereinafter provided. . . . (a) Each district shall be represented by one delegate for every thousand members. . . . No person . . . who is over ten weeks in arrears . . . shall be eligible to act as a delegate. . . . (c) Each [district meeting for the election of delegates] shall elect a chairman and a secretary who shall immediately after the close of the meeting transmit to the secretary of the Society a minute of the proceedings signed at the meeting by the chairman. . . . No person who is over fourteen weeks in arrears shall gain admission to the meeting. (2) The delegates shall elect from among themselves a board of management consisting of nine members. (6) [The secretary] shall call and attend all meetings of the Society, of the board of management, and of the committees, and engross minutes of the proceedings in the minute-books. Each minute shall be signed either by the chairman who presided at the meeting or by the chairman of the meeting at which it has been passed as correct." "VI. (6) All disputes between the Society and any member as such, or any person claiming through a member as such, which cannot be settled in the Small-Debt Court, may be determined by arbitration, and the following regulations shall apply to all arbitrations under the rules of the Society:—(1) The arbiter shall be appointed by the Sheriff or Sheriff-substitute where the applicant for arbitration resides, after he has consigned at the head office of the Society as security for the arbiter's fee the sum of £1, 1s., where the amount in dispute does not exceed £20, or £3, 3s. in all other cases." The rules also provided for the remuneration of the members of the board of management.

The Friendly Societies Act, 1896 (59 and 60 Vict. cap. 25), enacts:—

Sec. 9. "(3) The rules of the society . . . shall . . . contain provisions in respect of the several matters mentioned in the First Schedule to this Act.

Sec. 68. "(1) Every dispute between—

"(a) A member or person claiming through a member or under the rules of a registered society or branch, and the society or branch

defender the said Alexander Boag was present and was a candidate for the office of delegate, and after a vote was declared elected a delegate." (Cond. 5) "At the date of said meeting and of his pretended election as a delegate the said Alexander Boag was over fourteen weeks in arrears with his subscriptions, and was therefore not entitled to be present at the meeting, and was not eligible to act as a delegate. This was apparent from the books of the Society, and was known, or should have been known, to the said Society. . . . The said Alexander Boag's pretended election as a delegate was therefore null and void. . . ." (Cond. 6) "At the annual general meeting of the Society which was called for June 1911, and held, after adjournment, on 13th December 1911, the defender the said Alexander Boag and the pursuer were candidates for election as members of the board of management, and the said Alexander Boag was declared elected. The pursuer was declared not elected. The said pretended election of the said Alexander Boag as a member of the said board of management was in breach of the rules, incompetent, and null and void in respect that he was not then eligible to act as a delegate, and was therefore not a competent candidate for election as a member of the said board of management by reason of his being more than ten weeks in arrears with his subscriptions as a member of the said Society at the date of his pretended election as a delegate. He was also more than ten weeks in arrears at the date of his pretended election as a member of the said board of management. . . ." (Cond. 7) "At the said adjourned annual meeting of the Society, held on 13th December 1911 . . . the pursuer received the largest number of votes as a candidate for election as a member of said board of management to fill said vacancy therein immediately after the defender the said Alexander Boag, and was eligible for election as a member thereof. He was accordingly then duly and legally elected to the exclusion of the said Alexander Boag. . . ."

Defences were lodged for the Society and for Alexander Boag, in which it was denied that the latter was in arrears with his subscriptions either at the date when he was appointed delegate or at the date when he was elected to the board of management. They also averred that Boag had been re-elected as a delegate at a meeting held on 25th April 1912.

The pursuer pleaded, *inter alia* ;—(2) The defender the said Alexander Boag not being eligible to act as a delegate of the said Society, in respect that at the date of his pretended election as a delegate he was more than ten weeks in arrear with his subscriptions as a member of the said Society, his pretended election as a member of the board of management of said Society, as condescended on, was null and void, and decree of declarator and interdict should be granted as craved with expenses.

or an officer thereof . . . shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law or restrainable by injunction ; and application for the enforcement thereof may be made to the [Sheriff]. . . ."

First Schedule : "Matters to be provided for by the rules of societies registered under this Act. . . ."

"8. The manner in which disputes shall be settled."

June 19, 1913. The defenders pleaded, *inter alia*;—(1) No jurisdiction. (2) No title. (3) No interest. (4) The action is incompetent. (5) The action is irrelevant.

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On 13th June 1912 the Sheriff-substitute (Boyd) repelled the first five pleas for the defenders, and allowed a proof.

The defenders appealed to the Sheriff (Millar) who, on 20th July 1912, recalled the interlocutor appealed against, sustained the fourth plea in law for the defenders, and dismissed the action.

The pursuer appealed to the Court of Session, and the case was heard before the Second Division (without Lord Guthrie) on 18th and 19th June 1913.

Argued for the appellant;—The action was competent, and the pursuer was entitled to a proof of his averments. The pursuer did not now insist on the conclusion for declarator that he had been elected to the board of management. There was, therefore, no operative conclusion directed against the Society, and accordingly the rule in the case of *Gall*¹ had no application. The action was not excluded by the rule that disputes between the Society and a member "may" be determined by arbitration. In the first place the rule was permissive, and not imperative as in *Melrose v. Trustees for Edinburgh Savings Bank*.² "May" was only interpreted as "must" in Acts of Parliament where powers were conferred on public authorities to be exercised for the public benefit, as in the case of *Gray v. St Andrews and Cupar District Committees of Fifeshire County Council*.³ In the second place the rule did not apply to this case. It applied only to disputes about money matters, as appeared from the references to "the Small-Debt Court" and "the amount in dispute." Nor was this a dispute between the Society and a member "as such"; because the pursuer was not acting merely in his individual interest, but was vindicating the rules in the interest of all the members. But even if the rule was imperative and applicable to all disputes between the Society and a member, it could not oust the jurisdiction of the Court where the dispute arose with reference to an alleged infringement of the constitution committed by the Society.⁴ If the Society was in breach of the rules, it could not appeal to the rules to determine the manner in which the dispute should be settled. Unless the pursuer could come to the Court, he had no remedy, for the arbitrator could not make his award effective by interdict. It was not necessary to conclude for reduction of the minutes of the meetings at which Boag was appointed a delegate and a manager. It was Boag's election as a manager at a meeting of delegates which the pursuer sought to have declared void; he had no concern with what passed at the meeting of members at which he was elected a delegate, and there was no provision in the rules regarding the minutes of delegates' meetings as there was in the case of members' meetings. In any event the minutes were merely records of what passed at the meetings, and had nothing to do with the question of eligibility, which was the real question in dispute. The constitution of this Society had already been under the consideration of the Court

¹ *Gall v. Loyal Glenbogie Lodge of the Oddfellows Friendly Society*, (1900) 2 F. 1187.

² (1897) 24 R. 483.

³ 1911 S. C. 266.

⁴ *Symington's Executor v. Galashiels Co-operative Store Co., Limited*, (1894) 21 R. 371.

in *Wilkinson v. City of Glasgow Friendly Society*.¹ The circumstance that since the action was brought Boag had, as was alleged, been duly re-elected as a delegate was irrelevant. The case must be decided on the state of the facts at the time when the action was brought.

Argued for the respondents;—The jurisdiction of the Court was excluded by the rule providing for the settlement of disputes between the Society and its members. This rule was passed under the provisions of the Friendly Societies Act, 1896.² Under these provisions the mode of settlement provided by the rules of any society was made applicable to all disputes without distinction, and all other modes of settlement were excluded. This disposed of the pursuer's objections both to the form and to the scope of the rule in question. In the circumstances the rule though permissive in form was imperative in effect.³ No doubt there were cases in which the actings of the Society could be brought under the review of the Court, as when it was admittedly acting in an unconstitutional manner.⁴ But, in the present case, this was denied, and the only question at issue was a simple question of fact, eminently suitable for arbitration, namely, whether or not Boag was in arrear with his subscriptions. The arbitrator's award could be made effective by the Sheriff in manner provided by the Friendly Societies Act, 1896, section 68 (1). Further the pursuer had mistaken his remedy. It was Boag's appointment as a delegate which he should have attacked, and to do so he required to reduce the minute of the meeting at which he was elected, for that minute was, under the rules, Boag's warrant to act as a delegate. Reduction of the minute of the delegates' meeting at which the board of management was elected was also necessary. Reduction was not competent in the Sheriff Court, and this was an additional argument against the competence of the action as laid. In any event, now that Boag had been duly re-elected, the action was one which no one had any interest to pursue, least of all the pursuer, who had abandoned his contention that he was entitled to be on the board of management in place of Boag.

LORD SALVESSEN.—In this case the pursuer seeks to have it declared that the pretended election of the defender Alexander Boag as a member of the board of management of the City of Glasgow Friendly Society was null and void *ab initio*, and he also seeks to interdict the Society and the trustees from summoning Mr Boag to meetings of the board of management. The ground of the application is that Mr Boag, at the date when he was elected a delegate to the Society, and also at the date when he was elected to the board of management, was not qualified according to the rules of the Society to act either as a delegate or as a member of the board of management. The particular disqualification averred is that Mr Boag was more than ten weeks in arrear with his subscriptions.

The Sheriff-substitute allowed a proof, but the Sheriff recalled his interlocutor and found that the case for the pursuer was incompetent as stated.

¹ 1911 S. C. 476.

² Secs. 9 (3), 68 (1), First Schedule (8).

³ *Gray v. St Andrews and Cupar District Committees of Fifeshire County Council*, 1911 S. C. 266; *Eyre v. Corporation of Leicester*, [1892] 1 Q. B. 136.

⁴ *Andrews and Others v. Mitchell*, [1905] A. C. 78, *per* Lord Robertson, at p. 83.

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June 19, 1913. I am unable to agree with the learned Sheriff in the view which he has taken or in the reasons by which he supports that view. The learned Sheriff seems to think that this is a domestic matter and that, as the Society has rules for settling disputes which rules have the sanction of the statute under which they are framed, an appeal to the Law Courts is incompetent. If this were a mere pecuniary claim by a member of this Society under his policy against the Society for payment of an amount which he alleged to be due, I have no doubt that these rules, at all events so far as concerns amounts below £12, would have been operative. Whether, if the sum were beyond £12, which was the statutory limit of the Small-Debt Court jurisdiction at the date when these rules were passed, there would be an obligation on the member to submit his pecuniary claim to the arbiter is a matter which we do not require, in the view I take of the case, to decide.

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I think there is a great deal of force in the argument presented by Mr Moncrieff, that the rules are intended by statute to be exhaustive, and that when the statute says that every dispute is to be decided in the manner directed by the rules of the Society, the direction may be imperative although the rule is expressed in a permissive form. It is, however, I think quite unnecessary to deal with that matter, because we are not here concerned with a question which has arisen under these rules at all.

The question which the pursuer seeks to raise is a constitutional question. In the case of *Andrews and Others v. Mitchell*¹ it was held by the House of Lords that a member of a friendly society may competently raise such a question in the Law Courts, and indeed that the Law Courts form the only tribunal in which such questions can competently be raised. The point there was as to whether a friendly society had acted in accordance with its rules in expelling a member. If it had so acted, the Courts had no jurisdiction at all in the matter. If it had not so acted, it had acted unconstitutionally, and the decision was that the Courts were not merely not incompetent to entertain the complaint but were alone competent to do so. The matter was very tersely and clearly put by Lord Robertson² in the two sentences to which I drew attention during the argument. "The Act of 1896," he says, "has not given *carte blanche* to the tribunals of these societies to pronounce decisions which shall be exempt from examination in Courts of law. The decisions protected from review are constitutional decisions—decisions pronounced according to the rules, which, as we know, are registered under the Friendly Societies Acts." But the substance of the pursuer's complaint is that this Friendly Society has acted against its rules in that it has elected to its board of management a person who was not qualified to act. Accordingly in the case here the question is not one of those which are protected from review within the meaning of Lord Robertson's dictum; and I think the Law Courts are the only competent Courts in which the question can be tried.

I pause to say that it is very much in the interests of friendly societies that there should be this control by the Law Courts over any unconstitutional actings; otherwise I do not see how the members of these societies

¹ [1905] A. C. 78.

² *Andrews and Others v. Mitchell*, [1905] A. C. 78, at p. 83.

could be protected against boards of management, which, being once in the June 19, 1913. saddle, violated the rules under which they had been appointed to act. I can figure a case in which each and all of the members of a board of management had, since their election, become disqualified on one ground or another, and yet professed to manage the affairs of the society. Is that a matter to be determined by arbitration, or is it not rather to be determined by the Courts of the country, which exercise jurisdiction over all voluntary societies—a jurisdiction to the effect of seeing that they conform to the rules of their own constitution? So long as they act within the rules which they have laid down for themselves, and which form the contract between the society and its members, the jurisdiction of the Courts is excluded. When they violate these rules then the jurisdiction of the Courts may be invoked by any member of the society.

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Accordingly, I think the present case does not fall under the special rule for settling disputes to which reference is made, and according to which either the Small-Debt Court, or, in special circumstances, a Court of arbitration, is, on the defenders' reading of the rule, the only competent tribunal for the decision of the question in dispute.

The only other point raised is as to whether as matter of form it was essential that the minute appointing Mr Boag as a delegate or the minute appointing him as a member of the board of management should be reduced. The Sheriff inclines to the view that reduction was necessary, and that as an action of reduction is not competent in the Sheriff Court the action should be dismissed. That is an extremely technical objection; but apart from its technicality, it appears to me to be unsound.

The minutes founded on by the defenders are not produced, and we do not know their terms, but according to the statement of them they are merely records of what took place at certain meetings. The first is a record of the election at the branch meeting of Mr Boag as the delegate for the branch. According to the rules evidence of such election is to be transmitted to the Society, and provision is made for the chairman of the meeting transmitting a minute stating who has been elected. As regards election to the board of management, there does not seem to be any provision that the proceedings fall to be recorded in a formal minute, and I suppose the election would have been quite good although no written record of it had been kept. In a properly managed society, of course, one would imagine that such a record would exist, from which it might be seen that those who were acting on the board of management had been duly elected after the proper procedure; but, again, that would be a mere record of what had taken place. It is not alleged that it is a certificate that each of the members so elected was qualified to act. But even if it had been so, I do not think it would have been in the least necessary that an action of reduction should be raised. As it was put in argument, the disqualification may have attached after the election was made whether as a delegate or as a member of the board of management.

Are the members as a whole, then, to have no remedy against unqualified persons acting on the board of management? If the argument of the defenders is worth anything it comes to this, that once duly elected, a delegate or a member of the board of management may disregard the rules of the

June 19, 1913. Society and subject himself to various disqualifications, without any person having the right to call attention to the irregularity and to have the administration put upon a proper footing. The effective remedy which the pursuer seeks, and which he can obtain only from a Court of law and not from an arbiter, is an interdict against the person, who by the rules of the Society is disqualified from acting, continuing to act; and assuming that the pursuer establishes the disqualification as having attached to Mr Boag at the time that this action was brought, I see no reason why he should not get that remedy. We cannot consider what has taken place since. It may be that Mr Boag is now duly qualified; but the pursuer is entitled to have the judgment of the Court on the question whether his application was properly brought. It may be the best justification of the application that the Society has in consequence put its affairs upon a proper footing. It may no doubt affect the terms of the interdict, if any, which the Sheriff-substitute will pronounce; but it cannot affect the right of a party complaining of a departure from the rules by those who have the administration of the Society to have their conduct inquired into.

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There may also be a question whether, assuming Mr Boag was not duly elected, the pursuer was not entitled to the position and the remuneration which Mr Boag has enjoyed. It is always open to a member of a voluntary society to claim damages against the society which has deprived him of patrimonial benefits by acting in violation of its own rules. The case of *Andrews*¹ is an illustration of that, because the pursuer there was suing for damages in respect of his expulsion from the society, on the ground that the expulsion had proceeded without his having received the written notice for which the rules provided.

On these grounds I am clearly of opinion that the Sheriff here has erred in dismissing the action, and that we should revert to the judgment of the Sheriff-substitute.

The LORD JUSTICE-CLERK and LORD DUNDAS concurred.

THE COURT sustained the appeal, recalled the interlocutor appealed against, affirmed the interlocutor of the Sheriff-substitute dated 13th June 1912, remitted to him to proceed as accords, and found the pursuer entitled to expenses.

WATT & WILLIAMSON, S.S.C.—SIMPSON & MARWICK, W.S.—
LAING & MOTHERWELL, W.S.—Agents.

¹ [1905] A. C. 78.

THE DIRECTORS OF THE CITY OF GLASGOW LIFE ASSURANCE COMPANY No. 139.
AND THE DIRECTORS OF THE SCOTTISH UNION AND NATIONAL
INSURANCE COMPANY, Petitioners.—*Black.* June 25, 1913.

Insurance—Insurance Company—Transfer of business—Petition to sanction proposed transfer—Intimation—Dispensing with transmission to policy-holders of documents relating to transfer—Assurance Companies Act, 1909 City of Glasgow Life Assurance Co.
(9 Edw. VII. cap. 49), sec. 13 (3) (b).

In a petition under the Assurance Companies Act, 1909, for sanction of the transfer of the business of a life insurance company to another insurance company, the petitioners craved the Court to dispense with the transmission of the documents specified in sec. 13 of the Act to the policy-holders of the transferee company, who numbered 30,000, in respect that the life insurance funds of the transferee company would not, under the transfer, become liable for the sums due under the policies of the transferring company, and that the transmission would cause considerable trouble and expense.

The Court dispensed with the transmission of the documents.

ON 24th June 1913 the directors of the City of Glasgow Life Assurance Company and the directors of the Scottish Union and National Insurance Company presented a petition under the Assurance Companies Act, 1909, and particularly section 13 thereof,* craving the Court to sanction the transfer of the whole business of the first of these Companies to the second, in terms of an agreement between them. 2D DIVISION.

The City of Glasgow Life Assurance Company (hereinafter referred to as the first Company) had carried on business since 1839, and was in 1913 registered as an unlimited Company under the Companies (Consolidation) Act, 1908. The capital stock of the Company was £600,000, divided into 24,000 shares of £5 each, on each of which £2, 10s. was paid up. The object and business of the Company were "the making and effecting of assurances on lives and survivorships, and making or effecting of all other kinds of assurance connected with life, the granting and selling of annuities either for lives or otherwise, and on survivorships, and the purchasing of annuities for lives or otherwise, the granting of endowments for children and other persons, the receiving of investments of money for accumulation, and the purchasing of contingent rights, whether of reversion, remainder, annuities, life policies, or otherwise."

* The Assurance Companies Act, 1909 (9 Edw. VII. cap. 49), enacts:—
Sec. 13. "(1) Where it is intended . . . to transfer the assurance business of any class from one assurance company to another company, the directors of any one or more of such companies may apply to the Court, by petition, to sanction the proposed arrangement. . . . (3) Before any such application is made to the Court . . . (b) a statement of the nature of the . . . transfer, . . . together with an abstract containing the material facts embodied in the agreement or deed under which the . . . transfer is proposed to be effected, and copies of the actuarial or other reports upon which the agreement or deed is founded, including a report by an independent actuary, shall, unless the Court otherwise directs, be transmitted to each policy-holder of each company in manner provided by section 136 of the Companies Clauses Consolidation Act, 1845, for the transmission to shareholders of notices not requiring to be served personally. . . ."

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The business and objects of the Scottish Union and National Insurance Company (hereinafter referred to as the second Company) were "to carry on the business of life, fire, marine, and accident assurance; to grant and sell annuities of all kinds, and to grant and effect other assurances and contracts of guarantee or indemnity against any other description of loss or damage to property or person occasioned in any manner whatsoever." Its capital at the date of the petition was £5,103,000, divided into 248,250 "A" shares of £20 each, on which £1 per share had been paid up, and 13,800 "B" shares of £10 each, on which £3, 15s. per share had been paid up. By one of its private Acts this Company had power to take over the business of similar companies.

The petition further set forth:—"That in addition to its other insurance business the second Company carries on all the branches of business carried on by the first Company, and that by the proposed transfer of the whole of the business of the first Company to the second Company additional security will be afforded to the policyholders and annuitants of the first Company by the increased share capital and reserve funds. Further, the second Company will acquire a live organisation and connection which it can make use of in adding materially to its own life business to the advantage of its policyholders. Also the placing of the administration of the two Companies under one management will result in considerable economy. That as the result of negotiations between the boards of directors of the two Companies a provisional agreement was entered into between them, dated 5th and 6th March 1913, with an addendum thereto, dated 9th May 1913, by which the first Company agrees to sell and the second Company agrees to purchase on the terms therein mentioned the entire undertaking, business, goodwill, name, rights, and all other assets of the first Company, and that as at and from the 1st day of January 1913. A copy of said provisional agreement and addendum is produced herewith. That by the said provisional agreement it is provided that the contract between the said Companies should be conditional on (a) the value of the assets of the first Company being at the date thereof substantially as stated in the report to the first Company's shareholders issued in respect of the year ending 31st December 1912; (b) the liabilities of the first Company under its contracts of assurance and annuity as stated in the said report being confirmed by the report of the independent actuary required under section 13 (3) (b) of the Assurance Companies Act, 1909; (c) the shareholders of the first Company confirming said provisional agreement by a majority of not less than 75 per cent of the capital of the first Company not later than the 30th day of April 1913; (d) the transfer being approved by the shareholders of the second Company and confirmed by the Court, as required under section 13 (2) of the Assurance Companies Act, 1909, on or before the 30th November 1913." After stating that all these conditions, except the provision as to confirmation by the Court, had been satisfied the petition continued as follows:—"A statement of the nature of the transfer, together with an abstract containing the material facts embodied in the said provisional agreement and addendum, copy of the report of the first Company for the year ending 31st December 1912, upon which the said provisional agreement with its addendum is founded, copy of the actuarial report, dated 16th April 1913, on the proposed transfer by Mr Gordon Douglas as the independent actuary

required by section 13 (3) (b) of the Assurance Companies Act, 1909, June 25, 1913. and a copy of the report of the second Company for the year ending 31st December 1912, have been transmitted to each policy-holder of the first Company, as well as to persons claiming to be interested in any policy who have given to the first Company notice in writing of such interest, all in terms of said section 13 (3) (b) of said Act. Lists of said policy-holders and persons, with affidavits as to the posting of the said documents and copies of the said documents are produced herewith.

"Notice of the intention to make this application was published in the *Edinburgh, London, and Dublin Gazettes* on 6th June 1913, and the said provisional agreement with its addendum remained open for the inspection of the policy-holders and shareholders of both Companies at their head offices in Edinburgh and Glasgow respectively for a period of fifteen days after the publication of the said gazette notice, in terms of section 13 (3) (c) of said Assurance Companies Act, 1909. A copy of each of said gazettes containing such notice is produced herewith.

"The present application for sanction is presented under and by virtue of the Assurance Companies Act, 1909, and particularly section 13 thereof. By virtue of subsection (3) (b) of the said section a statement of the nature of the proposed transfer, together with an abstract containing the material facts embodied in the said provisional agreement and addendum, and copies of the said report of the first Company for the year ending 31st December 1912, and of the actuarial report, dated 16th April 1913, on the proposed transfer by Mr Gordon Douglas as independent actuary as aforesaid, all as hereinbefore referred to, fall to be transmitted to the policy-holders of the second Company unless the Court otherwise directs. As it is provided by said provisional agreement that the life assurance and annuity fund of the first Company shall be kept separate and distinct, and as the life assurance and annuity funds of the second Company cannot in any way become liable for nor be affected by the sums due or to become due under the policies of the first Company, and as the transmission of the foresaid documents to the policy-holders of the second Company, about 30,000 in number, would cause considerable trouble and expense, it is humbly submitted that your Lordships should direct that the said transmission may be dispensed with. . . . It is the intention of the first Company to proceed by way of voluntary liquidation and a sale under the Companies (Consolidation) Act, 1908."

The petition, after craving intimation on the walls and in the minute-book, craved the Court "to direct that any transmission to the policy-holders of the Scottish Union and National Insurance Company foresaid of a statement of the nature of the transfer, together with an abstract containing the material facts embodied in the said provisional agreement and addendum thereto, and copies of said reports, may be dispensed with; and to allow all persons having interest to lodge answers hereto within eight days after such intimation and advertisement, if so advised; and on resuming consideration hereof, with or without answers, to sanction the transfer of the whole business of the said City of Glasgow Life Assurance Company to the second Company in terms of the said provisional agreement. . . ."

On the petition appearing in the Single Bills of the Second Division on 25th June 1913 counsel moved the Court to dispense with the

June 25, 1913. transmission of the documents as craved in the petition, and referred to *Empire Guarantee and Insurance Corporation, Limited*.¹

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THE COURT (consisting of Lord Dundas, Lord Salvesen, and Lord Guthrie), without delivering opinions, pronounced the following interlocutor:—"Appoint the petition to be intimated on the walls and in the minute-book in common form, and to be advertised twice in each of the *Scotsman* and *Glasgow Herald* newspapers: Dispense with the transmission to the policy-holders of the Scottish Union and National Insurance Company of a statement of the nature of the transfer, together with an abstract containing the material facts embodied in the provisional agreement and addendum thereto and copies of the reports, all referred to in the petition; and allow all persons having interest, if so advised, to lodge answers within eight days after said intimation and advertisements."

JOHN COWAN, W.S., Agent.

No. 140. PETER REID, Pursuer (Respondent).—*Constable, K.C.—Gilchrist*.
JAMES NIMMO & COMPANY, LIMITED, Defenders (Appellants).—
June 27, 1913. *Morison, K.C.—Carmont*.

Reid v. James
Nimmo & Co.,
Limited. *Expenses—Jury trial in Sheriff Court—Appeal—New trial—Expenses of appeal.*

Where a verdict for the pursuer in a jury trial in the Sheriff Court was set aside on appeal to the Court of Session, and a new trial granted, on the grounds that the verdict had been erroneously applied and was contrary to the evidence, the Court found the pursuer liable in the expenses of the appeal.

2D DIVISION. PETER REID, pit bottomer, Standburn, Avonbridge, brought an action in the Sheriff Court at Falkirk against James Nimmo & Company, Limited, coalmasters, Glasgow, for £260 as damages, under the Employers Liability Act, 1880, in respect of injuries sustained by him while working in their employment.

The case was tried before the Sheriff-substitute (Moffatt) and a jury on 26th February 1913. The jury returned a verdict containing findings in answer to the questions submitted to them, and assessing the damages due to the pursuer at £246, 7s.

On 28th February 1913 the Sheriff-substitute pronounced an interlocutor applying the verdict, and decerning against the defenders for the sum of £246, 7s.

The defenders appealed to the Court of Session, and moved for a new trial on the grounds (1) that the verdict had been erroneously applied, in respect that the findings of the jury did not warrant a verdict in favour of the pursuer; and (2) that the verdict was contrary to the evidence.

The case was heard before the Second Division (without the Lord Justice-Clerk) on 27th June 1913.

The Court having intimated that they would set aside the verdict and grant a new trial on the grounds stated for the appellants, counsel

¹ 1911 S. C. 1296.

for the appellants moved the Court to allow them the expenses of the June 27, 1913. appeal. They cited *Bond v. Dalmeny Oil Company, Limited*.¹

Counsel for the respondent argued that the question of expenses should be reserved, and cited *Macdonald v. Wyllie & Son*² and *Canavan v. John Green & Company*.³

Reid v. James
Nimmo & Co.,
Limited.

THE COURT (without delivering opinions on the question of expenses) pronounced the following interlocutor:—" . . . Sustain the appeal; recall the said interlocutor; set aside the verdict, and remit the cause to the Sheriff to allow the parties a new trial, and to proceed as accords: Find the pursuer liable in expenses in this Court, and remit the same to the Auditor to tax and to report to the Sheriff, to whom grant power to decern for the taxed amount thereof, and the expenses of the first trial to be expenses in the cause, and to be disposed of by the Sheriff."

D. C. OLIVER, Solicitor—W. & J. BURNES, W.S.—Agents.

JAMES NELSON, Pursuer (Appellant).—*G. Watt, K.C.*—*T. D. K. Murray.*

No. 141.

ALLAN BROTHERS & COMPANY (UNITED KINGDOM), LIMITED, Defenders (Respondents).—*Horne, K.C.*—*Carment.*

June 28, 1913.

Nelson v.
Allan
Brothers & Co.
(United
Kingdom),
Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Schedule, (17) (b)—A. S. 26th June 1907, sec. 17 (h)—Application for order on arbitrator to state case—Arbitrator's refusal to state question whether his findings in fact supported by the evidence led—Whether question one of law or fact.

A workman, dissatisfied with the arbitrator's statement of a case on appeal under the Workmen's Compensation Act, presented a note for an order upon the arbitrator to state a case, averring that certain facts, other than those stated by the arbitrator, had been proved, and that certain of the arbitrator's findings were contrary to the evidence, and proposing as one of the questions of law the question "Whether there was evidence led before the Sheriff-substitute which could competently support his findings of fact?" He did not aver that there was no evidence before the arbitrator upon which he could proceed to a decision of the case.

The Court *refused* the note, *holding* that it was in effect a request for the allowance of appeal upon a pure question of fact, upon which, under the Act, the arbitrator was final.

In an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court of Lanarkshire at Glasgow, in which James Nelson, a seaman, claimed compensation from Allan Brothers & Company (United Kingdom), Limited, the Sheriff-substitute (Glegg) refused compensation, and, at the request of the workman, stated a case for appeal.

1st DIVISION.
Sheriff of
Lanarkshire.

The case set forth:—

"The case was heard before me and proof led when the following facts were established:—

¹ (1909) 46 S. L. R. 920.

² (1898) 1 F. 339.

³ (1905) 8 F. 275.

June 28, 1913.

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Allan
Brothers & Co.
(United
Kingdom),
Limited.

"(1) Appellant was in the employment of Allan Brothers & Company, Limited, on the s.s. 'Scandinavian' at a wage of 34s. 6d. per week. (2) On 2nd April 1912 while the ship was at Halifax appellant injured his left hand by falling on the deck. (3) In consequence thereof he was incapacitated for full work, and did light work until 11th April. (4) On 11th April, while the ship was at Boston, appellant went ashore, returned under the influence of drink, and engaged in a fight with quartermaster Miller. (5) At that time his hand was recovering from the injury, and if no further injury had been received it would have been completely recovered by 22nd April 1912. (6) Appellant's hand received further injuries in the course of the fight, and next day it was swollen and stiff and incapacitated him from work. (7) Appellant was kept on and paid wages until the end of the voyage on 22nd April 1912. (8) On 12th July 1912 appellant returned to and earned full wages at his previous employment. (9) Appellant's incapacity subsequent to 22nd April 1912 was not due to the original injury sustained on the 2nd but was due to the injury sustained in the fight on the 11th.

"I found in law that appellant's incapacity subsequent to 22nd April was not due to accident arising out of and in the course of his employment.

"I therefore assailed the respondents and found them entitled to expenses.

"The question of law for the opinion of the Court is:—Whether upon the facts stated it could competently be found that the appellant's incapacity subsequent to 22nd April 1912 was not due to accident arising out of and in the course of his employment."

The Sheriff-substitute appended to the case a certificate in these terms:—"I certify that I have refused to include in the foregoing stated case the following question which the appellant proposed I should submit in addition to the question of law therein stated, viz.:—'Whether there was evidence led before the Sheriff-substitute which could competently support his findings of fact?' The reason for my refusal was that this question was not raised by the facts proved."

Thereafter the appellant lodged a note for an order to state a case in which he averred that in the course of the proof the following facts had been established:—" . . . (b) That on 2nd April 1912, while the appellant was assisting to moor the ship in the harbour at Halifax, he slipped and fell on the deck and sustained injuries to his left hand through the lever of the anchor compressor falling on it while he was in that position. (c) That thereafter the appellant was treated daily by the medical officer of the ship for contusion of the left hand—especially of the third and fourth metacarpal bones. (d) That, as the result of the said injuries, the appellant was totally incapacitated for work until 11th April 1912. (e) That on 11th April 1912 the appellant engaged in a trifling scuffle with a quartermaster named Miller who had reprimanded him for being on shore. (f) That no report of the said scuffle was made to the master of the ship, no entry thereof was made in the official log, and the appellant received a very good discharge both as to conduct and ability at the end of the voyage. (g) That on the night of the 11th April 1912, after the said scuffle, the appellant's hand was in no worse condition than it had been before the scuffle took place. (h) That on 12th April the appellant resumed duty and worked all the way home doing light work. (i) That on the 13th April 1912, after the appel-

lant had been at work for more than a day, his injured hand was dressed by the ship's doctor, who found that the swelling and stiffness had increased since he had last examined it. (j) That the doctor did not ask the appellant the cause of the increased stiffness but attributed it to the scuffle which he thought had taken place on the 12th April, his information being derived from the first officer who was informed by the fourth officer who had received his information from a man named Moore who was not examined as a witness. (k) That the appellant was paid wages till the end of the voyage on 22nd April 1912. (l) That, owing to the condition of his injured hand, the appellant was totally incapacitated for work between 22nd April and 12th July 1912." He prayed for an order upon the respondents to show cause why a case should not be stated by the arbitrator on the question of law which he had refused, as well as upon that which he had stated in the case, on the grounds (1) that the proposed questions were raised by the facts proved before the arbitrator, and (2) that certain findings in fact contained in the case which the arbitrator had stated were contrary to the evidence led before him.

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Counsel were heard on 28th June 1913, before the First Division (without the Lord President), upon this note and upon answers which had been lodged for the respondents.

Argued for the appellant;—It was a question of law whether a finding in fact could reasonably be supported by the evidence led.¹ In considering such a question the Court were in a position analogous to that which they occupied when reviewing the verdict of a jury.² Such a question arose in the circumstances of this case, and the arbitrator was wrong in refusing to submit it for the determination of the Court. In any case, the Court should order the transmission of the process, so that they might be in a position to determine what was the effect of the evidence. If the Court considered itself bound in every case to accept the findings in fact of the arbitrator, there would in many cases be no means of preventing a miscarriage of justice.

Counsel for the respondents were not called on to reply.

LORD KINNEAR.—I think that this is a very clear case, and that we are not entitled to ask the Sheriff-substitute to state a case for the purpose of raising a question of fact and nothing else. The learned counsel for the appellant, who has argued the point very ingeniously, says that whether the Sheriff-substitute has found facts contrary to evidence is a question of law, and has always been so considered. That is not, in my opinion, an exact statement of the law. I think if a Sheriff-substitute has pronounced findings in fact which there was no evidence before him to enable him to find one way or the other, it is a question of law whether his award can stand. But that is not the kind of case which is made in this application, because the appellant begins his statement by saying that the Sheriff-substitute allowed a proof, "in the course of which the following facts were established," and accordingly he says that there was evidence laid before the Sheriff-substitute upon which it was his duty to find the facts in the appellant's favour. But if he could find one way, provided he thought it right, it was equally open to

¹ Walker v. Murray, 1911 S. C. 825, per the Lord President, at p. 828.

² Mackinnon v. Miller, 1909 S. C. 373, per the Lord President, at p. 378.

June 28, 1913. him to find the other way if that was right. The statement simply comes to this, that there was a question of fact before the Sheriff, and that evidence was led, upon which he was invited to decide it. But then he had to decide it according to his own judgment, and we cannot listen to the complaint that he has decided it wrongly.

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Now, if we are to review the Sheriff-substitute's judgment in these circumstances, we are simply entertaining an appeal upon a question of fact and nothing else. I do not think it would be possible to sustain this appeal without making the statutory limitation on this Court a dead letter. I am therefore for refusing the motion.

Lord Kinnear.

LORD JOHNSTON.—In dealing with appeals under this Act I think that the Court has probably gone already further than the Legislature intended, and that certainly we should not open the door any wider to appeals from the judgments of Sheriffs-substitute as arbitrators.

I agree with your Lordship that to accede to the demand of the appellant here would be to reduce the limitation of review to a dead letter. There are cases where it may be quite proper to remit to the Sheriff-substitute to reconsider facts, as, for instance, where the facts stated by him are not the facts which really raise the question which he puts, or where there are allegations upon the one side or the other that there were facts in the case which, were they stated, would allow the Court to dispose of some additional question of law. We should then certainly remit to the Sheriff-substitute and ask an explanation, or ask what was the state of the facts, or whether he was in agreement with the party demanding review as to the state of facts alleged by him.

But here we are not in that position. The position is that there is an absolute controversy between one of the parties and the Sheriff-substitute as to what the facts are. In that position the Sheriff-substitute is absolute master. He has found the facts, and to accede to the demand of the appellant here would really be allowing him to appeal or reclaim against a judgment on fact where the Sheriff-substitute holds one way and he happens to be disposed to hold another. In a case of that sort we cannot accede to the demand, which is really that we should instruct the Sheriff-substitute as to what facts he is to find.

LORD MACKENZIE.—I am very clearly of the same opinion. I think that Mr King Murray has said everything that could possibly be said on behalf of his client. The reason why he has failed to convince us is simply because of the plain terms of the Act of Parliament. We cannot interfere with the Sheriff-substitute on a question of fact, and the case states that proof was led and certain facts established. No statement has been made to us that no proof was led, or that there was no evidence before the Sheriff-substitute upon which he could proceed; but merely a statement that, upon the evidence that was before him, he has come to a wrong conclusion. I think it is out of the question that we should take the case up under these circumstances.

THE COURT refused the note.

D. MACLEAN, Solicitor—BOYD, JAMESON, & YOUNG, W.S.—Agents.

MARY DALGLEISH, Pursuer (Appellant).—*J. R. Christie—Fenton.*
 THE EDINBURGH ROPERIE AND SAILCLOTH COMPANY, LIMITED,
 Defenders (Respondents).—*Constable, K.C.—A. M. Stuart.*

No. 142.

July 4, 1913.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule, (1) (b) and (2) (c)—Average weekly earnings—Grade of employment—Change of grade—Appointment to work higher class machine dealing with finer material. Dalgleish v. Edinburgh Roperie and Sailcloth Co., Limited.

A girl in a rope and sailcloth factory, employed at a weekly wage of 7s. 6d. to work a drawing machine dealing with hemp which was afterwards spun into rope, was promoted to work, at a weekly wage of 8s., a drawing machine dealing with tow, a finer material which was afterwards woven into sailcloth. Five weeks after the change she was accidentally injured.

Held that the change was a change in the "grade" of her employment within the meaning of the Workmen's Compensation Act, 1906, First Schedule (2) (c), and that compensation fell to be calculated on the basis of her average weekly earnings for these five weeks.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court of the Lothians and Peebles at Leith, at the instance of Mary Dalgleish against the Edinburgh Roperie and Sailcloth Company, Limited, the pursuer claimed compensation at the rate of 8s., or alternatively 7s. 6d., a week in respect of an accident sustained by her in the defenders' employment. The Sheriff-substitute (Guy) found that her average weekly earnings prior to the accident were 6s., and awarded compensation at that rate. At her request he stated a case for appeal.

1ST DIVISION.
 Sheriff of the
 Lothians and
 Peebles.

The case set forth:—

"The following facts were admitted or proved. The appellant, who is fifteen years old, entered the employment of the respondents in January 1912. She worked in the department where hemp and tow, after being teased and carded by machinery, are drawn out by a drawing machine and thereafter twisted and filled into bobbins in a roving machine before being spun into twine or rope or woven into sailcloth. The work performed by the employees in said department consists in tending the machines and performing various duties connected therewith. The rate of wages paid to the female employees in the said department depends partly on the particular duty assigned to them and partly on the length of their employment and partly on the aptitude for their work which they may develop by experience. The employees have their duties assigned to them from time to time by the manager of the department. The appellant's duties at first were to act as one of a number of girls in removing bobbins, which had been filled with twisted yarn, from the roving machines to the spinning or weaving machines. She continued at this work till 23rd May 1912, her wage up to this time being at the rate 5s. 6d. a week. On 23rd May 1912 the appellant was assigned the duty of acting as signal girl at a wage of 6s. a week, her duty then being to give a signal to the other girls when bobbins were to be removed as aforesaid. On 1st June the appellant had assigned to her by the manager of the department the duty of operating a drawing machine where coarse yarn made from New Zealand hemp was drawn out, her wage then being raised to 6s. 6d. a week. On 17th October 1912 the appellant was appointed by said manager of the department to operate a drawing machine where finer hemp was dealt with, her wage for

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this work being raised to 7s. a week. On 14th November 1912 the appellant was appointed by said manager to work a drawing machine where a still finer hemp, called Russian hemp, was dealt with, her wage being raised to 7s. 6d. a week. The hemp dealt with at these three machines was afterwards spun into rope. On 5th December 1912 the appellant was appointed by the said manager to operate a drawing machine where a different and a finer quality of material, called B and C tow, was dealt with, her wage being raised to 8s. a week. This material, after being drawn, is woven into sailcloth. At each change in her duties as aforesaid the appellant's wages were increased as aforesaid. On 11th January 1913, while the appellant was engaged at said last-mentioned work and in receipt of said wage of 8s. a week, her right hand was caught in the machinery and crushed and cut. In consequence of said injuries the first finger of her right hand was afterwards amputated at the knuckle joint. She was and still is totally incapacitated for work as the result of said accident. During the twelve months previous to the accident the appellant's total actual earnings amounted to £15, 4s. 2d. . . . A statement showing the amount of the appellant's earnings and her work as appearing in the respondents' wages book is annexed hereto, and forms part of this stated case. In these books the only particulars given of the appellant's work is that it was classified under the description 'Preparing' from July 1912 up to 14th November 1912, and thereafter under the description 'Drawing frames (tow).' . . .

"I found in fact and in law that the various changes in the appellant's duties were not changes in the grade of her employment. . . . In these circumstances, I found that the average weekly earnings of the appellant prior to the accident were 6s. per week. I awarded her compensation at this rate. . . ."

The questions of law for the opinion of the Court included the following:—" (2) Was the change in the employment of the appellant from the work of removing bobbins to that of machinist a change in the grade of the employment of the appellant in the sense of the Workmen's Compensation Act, 1906? (3) Were the subsequent changes in the employment of the appellant, viz., the successive changes from the work of operating a drawing machine of a lower class to that of operating one of a higher class, changes in the grade of her employment in the sense of the said Act?" *

The appeal was heard before the First Division (without the Lord President) on 25th June 1913.¹

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), enacts, First Schedule (1) (b), that where total or partial incapacity results from an injury compensation shall be a weekly payment not exceeding a certain percentage of the average weekly earnings of the workman during the twelve months previous to the accident, "if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer"; and further enacts, (2) (c), "employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident. . . ."

¹ The following authorities were referred to at the hearing.—Babcock & Wilcox, Limited, v. Young, 1911 S. C. 406; Perry v. Wright, [1908] 1 K. B. 441; Edge v. John Gorton, Limited, (1912) 5 Butterworth's W. C. C. 614; Jury v. Owners of s.s. "Atalanta," (1912) 5 Butterworth's W. C. C. 681, per Farwell, L.J., at p. 684; Barnett v. Port of London Authority, [1913] 2 K. B. 115, per Hamilton, L.J., at p. 128.

At advising on 4th July 1913,—

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LORD JOHNSTON.—The injured person in this case, who is the appellant, was a mill girl employed in a large rope and sailcloth factory in Leith. She entered the Company's employment in January 1912 when about fourteen years of age. From that date to 1st June 1912 she served as a beginner, at a wage of 5s. 6d. a week, very much in the position of a departmental message girl, carrying bobbins from one set of machines to another. But on 1st June 1912 the manager set her to the work of operating a drawing machine, where coarse yarn from New Zealand hemp was drawn, and increased her wages to 6s. 6d. a week. On three occasions, 17th October, 14th November, and 5th December 1912, she was moved to other drawing machines, where finer and still finer qualities of material were drawn, each time with an increase of 6d. of wages. From 5th December 1912 to 11th January 1913, or for a period of five weeks, she operated the last drawing machine to which she was assigned at a wage of 8s. a week. On 11th January 1913 she met with an accident, which wholly incapacitated her, at any rate for the time in question.

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The Sheriff, after a proof, averaged the appellant's wages during the twelve months previous to the accident, and awarded her 6s. compensation accordingly. The question whether he was right in so doing depends upon the effect of paragraph (1) (b) as interpreted by paragraph (2) (a) and (c) of the First Schedule to the Act of 1906. Under paragraph (1) (b) the appellant is entitled to a weekly payment based on her average weekly earnings during the twelve months, if so long employed, but if not, then during any lesser period of employment by the same employer. Did the Act stop there, there is no doubt that the Sheriff would have been right in striking an average as he did. But then paragraph (2) says that for the purposes of the provisions of the Schedule relating to "earnings" and "average weekly earnings" the following rules shall be observed, viz., *inter alia*, "(c) employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident." Reading these words into paragraph (1) (b) what the Sheriff had to determine was, what was the grade in which the appellant was employed at the time of the accident, because upon the determination of this question depends the answer to the further question, whether the compensation is to be based on an estimate of the average wages for the twelve months previous to the accident, or for a shorter, and if so, for what period?

Was, then, the grade in which the appellant was employed at 11th January 1913 the same grade in which she had been employed during the past twelve months? or did any of the various changes made in the work on which she was employed amount to a change or changes in the grade of her employment in the sense of the Schedule?—in which latter case the average wage must be calculated on the wage not of twelve months but of a lesser period. I think that in this matter the nature of the employment has an all-important bearing. And in addition to summarising as above the information afforded by the case as to the changes in the appellant's work and wages, I should probably have read the Sheriff's further explanation of the circumstances of the employment, which is as follows:—"She worked

July 4, 1913. *Dalglish v. Edinburgh Ropery and Sailcloth Co., Limited.*
Ld. Johnston. in the department where hemp and tow, after being teased and carded by machinery, are drawn out by a drawing machine and thereafter twisted and filled into bobbins in a roving machine before being spun into twine or rope or woven into sailcloth. The work performed by the employees in said department consists in tending the machines and performing various duties connected therewith. The rate of wages paid to the female employees in the said department depends partly on the particular duty assigned to them and partly on the length of their employment and partly on the aptitude for their work which they may develop by experience. The employees have their duties assigned to them from time to time by the manager of the department."

Some employments have in them an element of the casual, and some of the seasonal as well as the casual in the ordinary sense, such as are illustrated in *Perry v. Wright* and the other cases reported at [1908] 1 K. B. 441; other employments are of a regular nature, where the employee is almost as much a part of the machinery of the establishment as the machine which he or she operates. In the former case a change of work by no means involves a change of grade of employment; in the latter case *prima facie* it much more readily does so. In the former case a rise or fall of wages, whether or not accompanied by a change of work, is no criterion of a change of grade of employment; in the latter a change of wages accompanied by a change of work goes very far to import such change of grade. There may be a change of department; there may be a change of the class of machine in the same department. A change of wages will not of itself import a change of grade; but if it accompanies a change of department, or a change of the class of machine, or even of the species within the same genus of machine, and is not temporary but reasonably permanent, I think that there is in the sense of the Schedule a change of grade. If so, then the appellant changed her grade of employment when on 5th December 1912 she was moved to a drawing machine drawing "a finer quality of material, called B and C tow," and her wages were raised to 8s. a week. And it is unnecessary to consider the effect of earlier changes.

There remains to consider the effect of paragraph (2) (a). On the assumption that the view I have expressed is correct, the basis of the compensation is the average wage of a period of about five weeks during which the appellant was employed in a grade in which she "was employed at the time of the accident." That is a comparatively short time. But paragraph (2) (a) says "average weekly earning shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." Remunerated when? The manifest answer is at the date of the accident. But that answer must be read reasonably. It does not mean at the rate being earned on a casual job, without any reference to what I may call the industrial history of the workman during a more extended period. There are cases in which current earnings at the actual date of the accident do not give the rate, in the sense of the statute, "at which the workman was being remunerated," and accordingly the subparagraph under consideration provides "that where by reason of the shortness of the time during which the workman has been in the employment of his employer," (that expression being interpreted according to paragraph (2)

(c) "or the casual nature of the employment, or the terms of the employ- July 4, 1913.
ment, it is impracticable, at the date of the accident to compute the rate of remuneration, regard may be had" to outside considerations.

This provision, instead of creating any difficulty in the present case, con- Dalglish v. Edinburgh Roperie and Sailcloth Co., Limited.
firms, I think, the view which I have expressed. For, short as the time may have been, it was long enough to give a continuous and uniform rate of wages over more than a month. The work was as far as possible removed from the casual. Given good conduct, there was no ground for saying that the employment was not permanent with a prospect of a rise, as the word "permanent" is understood in relation to employment. But "the terms of the employment," by which I understand the circumstances of the employment in fact, as well as the conditions of the employment as a contract, strongly support the view that the computation of the average weekly earnings on the basis of the wages earned in fact at the date of the accident by this particular employee "is best calculated to give the rate per week at which" she "was being remunerated." Ld. Johnston.

I should therefore propose to answer question 3 to the effect that the change in the employment of the appellant on 5th December 1912 to the work of operating a drawing machine of a higher class was a change in the grade of her employment in the sense of the Workmen's Compensation Act, 1906, and to find it unnecessary further to answer questions 2 and 3.

The case will have to go back to the Sheriff to assess the compensation, for though the average wage is by this judgment practically fixed at 8s., it does not follow that the compensation will be exactly that sum, as there may have to be certain allowances made.

I do not deal with the first question, as it was not argued on the footing of the view of the case which I have found myself called on to take.

LORD MACKENZIE.—I have had the opportunity of reading the opinion which has just been delivered by Lord Johnston, and I concur in it.

LORD KINNEAR.—I also agree.

THE COURT pronounced this interlocutor:—"Find in answer to the third question of law that the change in the employment of the appellant on 5th December 1912 to the work of operating a drawing machine of a higher class was a change in the grade of her employment in the sense of the Workmen's Compensation Act, 1906; find it unnecessary to answer the other questions of law."

T. M. POLE, Solicitor.—J. FERGUSON REEKIE, S.S.C.—Agents.

No. 143.

July 4, 1913.

Shields v.
Shearer.

STEPHEN SHIELDS, Pursuer.—*G. Watt, K.C.—A. M. Mackay.*
JAMES SHEARER AND ANOTHER, Defenders.—*Morison, K.C.—*
Macquisten.

Reparation—Illegal apprehension—Arrest by constables without warrant of person "reasonably suspected of" crime—Privilege—Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 88.

Issue—Illegal apprehension "without reasonable grounds of suspicion"—Malice and want of probable cause.

The Glasgow Police Act, 1866, sec. 88, empowers constables within the city to take into custody, without any other authority than the Act, any person "who is either accused or reasonably suspected of having committed" a penal offence.

In an action of damages for wrongous arrest brought against two Glasgow constables who had apprehended the pursuer without a warrant, the defenders maintained that, as they had *bona fide* suspected the pursuer of a crime and as, in their judgment, their grounds of suspicion were reasonable, they were protected by section 88 of the Glasgow Police Act and the action should be dismissed; or, otherwise, that if a trial were allowed, malice and want of probable cause must be put in issue.

Held (1) that it was a question for the jury whether the grounds of the defenders' suspicion were or were not reasonable, and that the pursuer was entitled to an issue; (2) that malice and want of probable cause need not be put in issue: and an issue whether the defenders "wrongfully and illegally, and without reasonable grounds of suspicion, apprehended the pursuer," *approved.*

Harvey v. Sturgeon, 1912 S. C. 974, *discussed.*

2D DIVISION.
Sheriff of
Lanarkshire.

STEPHEN SHIELDS brought an action in the Sheriff Court at Glasgow against James Shearer and John Bruce, police-constables, Glasgow, concluding for £100 in name of damages for wrongous apprehension.

The pursuer's averments were thus summarised in the note of the Sheriff-substitute (Lyell):—"The pursuer says that on 14th October 1912 he sold a watch to a general dealer in a shop in Glebe Street, Townhead, for 1s. 6d., and then walked in the direction of Stirling Road. While going along the road he was stopped by two police-constables, the defenders, who were then in plain clothes. They asked him what he had done with the watch, and he answered that he had sold it, and took them to the shop where he had disposed of it. He also explained that he purchased the watch on the previous Saturday from a hawker's barrow in Great Clyde Street, Glasgow. When the pursuer and defenders returned to the dealer's shop in question the woman in charge corroborated his story that he had sold her the watch, and informed the police that she was quite satisfied of the pursuer's honesty. In spite of this, however, and although no complaint of the theft of such a watch had been made to the defenders, they there and then apprehended the pursuer, marched him between them to St Rollox Police Office, and charged him with being in possession of a watch of which he was unable to give a satisfactory account. He was, accordingly, detained in custody for two days, and then discharged. Now, it is averred that the defenders had no warrant for this arrest, and *prima facie* it was, therefore, illegal."

The pursuer pleaded, *inter alia*;—(1) The defenders, having

illegally, unwarrantably, and without probable or any cause, apprehended the pursuer, taken him into custody, and detained and searched him as aforesaid, are liable to the pursuer for the loss, injury, and damage sustained by him. (2) The pursuer, having been wrongfully arrested by the defenders without a warrant, and on a charge which was false, and having been detained in prison in consequence thereof, is entitled to reparation for the loss thereby sustained, and for the injury to his feelings and reputation. (3) The actings of the defenders, as condescended on, having been malicious and without probable or any cause, they are liable to pursuer in reparation for the loss, injury, and damage sustained by him.

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The defenders pleaded, *inter alia* :—(1) The action is irrelevant. (2) The defenders having been acting as police-constables in the honest discharge of their duties under the powers conferred upon them by the Glasgow Police Act, 1866, section 88,* without malice and with probable cause, are privileged.

The Sheriff-substitute having on 25th February 1913 allowed a proof, the pursuer required the cause to be remitted to the Second Division of the Court of Session.

The case was heard before the Second Division on 24th May and 7th June 1913, when the pursuer proposed the following issue for the trial of the cause :—“Whether on or about 14th October 1912 the defenders wrongfully and illegally apprehended the pursuer in or about Glebe Street, Townhead, and conveyed him to the St Rollox Police Office in Glasgow, to his loss, injury, and damage?”

Argued for the defenders :—The case should be dismissed, as there was nothing to suggest that the defenders had acted maliciously; or, at all events, malice and want of probable cause must be put in issue. The defenders in apprehending the pursuer were acting under the statutory warrant contained in section 88 of the Glasgow Police Act, 1866. That section spoke of persons “reasonably suspected” of an offence, but it was plain that it was for the constables to determine whether the suspicion was reasonable. Where constables acted under the statute the presumption was that they were acting reasonably. It was settled by a series of cases¹ that, in actions against officials for wrongous apprehension, malice and want of probable cause must be put in issue, and a mere general averment that the defenders had acted maliciously would not entitle a pursuer to such an issue,² except in cases where the outrageous nature of the action complained of in itself indicated a malicious motive.³ The only cases in which malice and want of probable cause were not put in issue were *Pringle v.*

* The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), enacts :—Sec. 88. “It shall be lawful for the chief constable, or for any superintendent, lieutenant, or constable acting under or appointed by him . . . without any other authority than this Act, to do any of the following acts within but not beyond the city, viz : They may search for, take into custody, and convey to the police office any person who is either accused or reasonably suspected of having committed . . . a penal offence. . . .”

¹ *McCormack v. Glasgow Corporation*, 1910 S. C. 562, at p. 567; *Hill v. Campbell*, (1905) 8 F. 220; *Leask v. Burt*, (1893) 21 R. 32; *Young v. Magistrates of Glasgow*, (1891) 18 R. 825; *Hassan v. Paterson*, (1885) 12 R. 1164; *Cameron v. Hamilton*, (1856) 18 D. 423.

² *Beaton v. Ivory*, (1887) 14 R. 1057, at p. 1061.

³ *Denholm v. Thomson*, (1880) 8 R. 31; *Cameron v. Hamilton*, 18 D. 423, *per* Lord Deas, at p. 427.

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Shearer.

Bremner and Stirling,¹ which was distinguishable, as the defenders there had no warrant and no statutory authority for their action, and *Harvey v. Sturgeon*,² where not only were the proceedings complained of altogether unreasonable, but antecedent malice was also set forth in the record. In any event the decision in the latter case was inconsistent with all the previous decisions and should be reconsidered.

Argued for the pursuer;—The pursuer was entitled to an issue, and the issue proposed was in the form considered and approved in *Pringle v. Bremner and Stirling*,¹ *Lundie v. MacBrayne*,³ and *Harvey v. Sturgeon*.² A constable was not entitled to arrest a person without a warrant unless (a) the person was caught committing a crime, or (b) where information was given to the constable of a crime recently committed, or (c) where power to arrest without a warrant was conferred by statute. The defenders here relied on the Glasgow Police Act, 1866, but they could not plead that statute unless they had observed its conditions.⁴ On the terms of the statute the defenders must show not merely that they suspected the pursuer, but that they had reasonable grounds for doing so. This might appear at the trial, but at the present stage of the case it could not be determined whether the defenders were or were not entitled to invoke the statute. In *Lightbody v. Gordon*⁵ Lord President Inglis discussed the meaning of the terms "maliciously," and "without probable cause," and in *Milne v. Smiths*,⁶ Lord McLaren pointed out that the defence of "probable cause" was permitted only in a limited class of cases. The cases cited by the defenders were all distinguishable on the facts. On the other hand, *Harvey v. Sturgeon*² was precisely in point.

At advising on 4th July 1913,—

LORD SALVESSEN.—In this case the pursuer sues for damages in respect of an alleged illegal apprehension and detention in custody for a period of two days. The facts which he avers are so well summarised by the Sheriff-substitute that it is unnecessary to recapitulate them. The defenders, who are police-constables in Glasgow, maintained that the action was irrelevant, on the ground that their actings were privileged, and that there was no sufficient averment of malice. They attempted to distinguish the case from that on which the Sheriff-substitute had proceeded—*Harvey v. Sturgeon*,² and they further asked us to reconsider that decision and the issue which was there allowed. The importance of the decision from the point of view of the police force in Glasgow is no doubt great; and, speaking for myself, I should have been very willing to have submitted the case for consideration by a larger tribunal had I been satisfied on the fuller argument which has now been submitted to us that the previous decision was open to question. As, however, I have been confirmed in the view that the decision was right, I see no reason why we should take this course.

There is a distinction between the facts in the case of *Harvey*² and those

¹ (1867) 5 Macph. (H. L.) 55.

² 1912 S. C. 974.

³ (1894) 21 R. 1085.

⁴ *Sutherland v. Magistrates of Aberdeen*, (1894) 22 R. 95; *Mitchell v. Magistrates of Aberdeen*, (1893) 20 R. 253.

⁵ (1882) 9 R. 934, at p. 938.

⁶ (1892) 20 R. 95, at p. 100.

averred here that is not without some force. No charge was made against July 4, 1913. the pursuer Harvey after he had been brought to the police office; whereas ^{Shields v.} in the present case the pursuer was charged before a magistrate with being ^{Shearer.} found in possession of a watch of which he was unable to give a satisfactory ^{Lord Salvesen.} account. He was remanded on the first occasion for inquiry; and when he was brought up next day before the magistrate officiating in the Police Court he was discharged. The fact that the present pursuer was brought up before a magistrate and that a definite charge was made against him may have a bearing on the defence, but does not necessarily lead to the conclusion that he has not stated a relevant case.

The main foundation of the action is that the pursuer was apprehended without a warrant. At common law such an apprehension is *prima facie* illegal except in certain well-defined cases. If a policeman has seen an offence committed or "has such evidence as is equivalent to personal observation" (to use the words of Lord M'Laren in *Lundie v. MacBrayne*¹) he is, of course, entitled to apprehend the accused and bring him before a magistrate. No such special circumstances occur here. According to the pursuer's allegation he had simply on the day of his apprehension sold to a broker a watch which he had purchased some days before; and even the defenders do not say that they personally observed or had been informed that he had committed an offence. At common law therefore the apprehension of the pursuer was *prima facie* an illegal act.

The defenders, however, appeal to section 88 of the Glasgow Police Act, 1866, which provides that police-constables may within but not beyond the city "search for, take into custody, and convey to the police office any person who is either accused or reasonably suspected of having committed either within the city or at any place whatsoever beyond the city a penal offence." As the pursuer's apprehension took place within Glasgow, it is obvious that his arrest by police-constables without a warrant is not necessarily an illegal act. If the person apprehended by them is reasonably suspected of having committed a penal offence they are protected although it may be proved that he was entirely innocent. The defenders' counsel maintained that the question of reasonableness is one entirely in the judgment of the police-constable who effects the arrest, and that therefore he is privileged if he did not act maliciously. I cannot so construe the language of the section. Such a construction gives no effect whatever to the word "reasonably"—a word which is carefully inserted in this and most of the succeeding clauses of the same section which deal with similar powers conferred upon police-constables. I think the section does not empower a police-constable to arrest any person merely because he *bona fide* suspects that person of having committed a penal offence. Such a suspicion, although honestly entertained, may be entirely without reasonable ground; and I think it would be remarkable if a police-constable were to have the same absolute protection in arresting a person without a warrant which he undoubtedly enjoys when he is effecting an arrest in pursuance of a proper warrant. Apart from the case of *Harvey*,² which raised a similar question under somewhat different circumstances, there is no authority upon the

¹ 21 R. 1085.² 1912 S. C. 974.

July 4, 1913. point. In the case of *Young*¹ the constables against whom an issue was allowed had acted under the same section of the Glasgow Police Act of 1866, but under a clause which does not say anything about reasonable ground of suspicion. In the argument it was, moreover, admitted that the words "maliciously and without probable cause" must be inserted in the issues directed against the constables. The form of the issue was therefore not considered, and the only question argued was whether the facts and circumstances averred were such that malice could be inferred from them. The case is therefore no authority for the proposition that police-constables enjoy an absolute privilege when acting in the *bona fide* discharge of what they believe to be their duty, a privilege which could not be displaced by a mere averment that they acted without probable cause, but only by averments from which it might reasonably be inferred that they were actuated by some illegitimate motive. On the other hand, in the case of *Lundie v. MacBrayne*² an issue was allowed in respect of an alleged illegal apprehension without malice and want of probable cause being inserted in the issue, although there, as here, a statutory warrant was pleaded as justifying the conduct complained of. In order to allow the defenders the protection of the enactment on which they rely it must be shown that they acted within its terms; in other words, that they had reasonable grounds of suspicion for taking the pursuer into custody. The reasonableness of their conduct is a matter for the jury, and does not depend entirely on the *bona fides* of the defenders. If it were otherwise every citizen might be exposed to arrest without any remedy, simply because a constable *de facto* harboured a suspicion against him of having committed some penal offence, however stupid and unreasonable such suspicion might be.

It does not, however, follow that we should adopt the form of issue which was allowed in the case of *Harvey*.³ No discussion took place there as to the form, except as to whether malice and want of probable cause should be inserted. What happened was that the pursuer's counsel called attention to the case of *Pringle v. Bremner*,⁴ where the House of Lords thought that the words "wrongfully and illegally" only should go into the issue. That, however, was not a case where any protection was afforded to the constables by statute. As regards one of the wrongs, namely, the arrest and imprisonment of the pursuer without a warrant, the Lord Chancellor (Lord Chelmsford) made the following observations: "But then, it is said, the constable having discovered matters which, in his judgment, brought home to the pursuer complicity in the alleged crime, he was justified in exercising his discretion upon the subject, and in apprehending the pursuer and lodging him in prison. Again, I say, answering in the same way as I answered with regard to the searching for papers, the result will either justify him or will not justify him; if the papers he seized really proved or gave a fair and reasonable ground to believe that the pursuer was implicated in the grave crime which was charged, then, although the officer might have had no warrant for his apprehension (and he had no warrant upon this occasion), yet the event would justify him and he would protect

¹ 18 R. 825.

² 1912 S. C. 974.

³ 21 R. 1085.

⁴ 5 Macph. (H. L.) 55.

himself by the circumstances afterwards discovered." In other words, as I July 4, 1913. read the passage, the constable who arrests a person without a warrant takes the risk of justifying the apprehension. Shields v. Shearer.

Here it is not alleged that the pursuer had in fact committed the crime with which he was charged, but looking to the provisions of the statute this is, I think, not necessary to justify the constables. It is enough if the jury think that they did not act without reasonable grounds of suspicion, and it is important that this should be put pointedly in issue rather than explained, as it might be, by the Judge at the trial. The presumption is that the officer acts in pursuance of his duty, and the pursuer must rebut this presumption. I propose, therefore, that the issue which we allow should be expressed as follows: "Whether on or about 14th October 1912 the defenders wrongfully and illegally, and without reasonable grounds of suspicion, apprehended the pursuer," and so on, as in the form proposed. It is said that this is a departure from the stereotyped form, and that the Court ought to be slow to introduce any novelties into the forms of issue. I assent generally to that view, but each issue must be adjusted according to the particular circumstances of the case, and there is no authority which settles conclusively the form of issue where a police-constable effects an arrest without a warrant but acting under statutory authority. It is obvious that the pursuer cannot succeed unless he convinces the jury that the defenders had no reasonable cause to suspect him of the crime charged, and it is desirable that officers of the law should as far as possible be protected in the discharge of their duty by the grounds of liability being pointedly brought under the notice of the jury. Lord Salvesen.

LORD DUNDAS.—I agree that an issue ought to be allowed in the terms suggested by Lord Salvesen, and that substantially upon the grounds he has so fully explained. I have had an opportunity of reading his opinion, and I add nothing more.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor of the Sheriff-substitute of Lanarkshire, dated 25th February 1913: Vary the issue by adding after the word 'illegally' in the second line thereof the words 'and without reasonable grounds of suspicion,' and with this addition approve of the said issue . . ."

J. FERGUSON REEKIE, Solicitor—CAMPBELL & SMITH, S.S.C.—Agents.

No. 144. HUGH TENNENT AND OTHERS (Montgomerie-Fleming's Trustees),
First Parties.—*Gilchrist*.

July 4, 1913.

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MRS E. T. M.-F. CARRE AND OTHERS, Second Parties.—*Gilchrist*.
JAMES B. MONTGOMERIE-FLEMING AND MISS MARGARET M. MONT-
GOMERIE-FLEMING, Third and Fourth Parties.—*D. P. Fleming*.

Succession—Testament—Construction—Liferent or right of occupancy of house—Incidence of burdens—Fee and liferent.

A testator, in bequeathing the residue of his estate in shares to his son in fee and to his daughters and their issue in liferent and fee respectively, expressed the desire that his children so long as they remained unmarried should live together in his house; and directed his trustees when either his son or all his daughters should be married, whichever of these events should first occur, to convey the house to his son. He also declared that, as his unmarried daughters would on the son's marriage be deprived of a residence, the son should thereupon pay to each unmarried daughter an annuity of £50, terminable on marriage.

Held that the unmarried children had a mere right of occupancy, and not a liferent, of the house; and therefore were not liable in payment of any annual burdens and charges thereon beyond those payable by a tenant occupier.

2D DIVISION. JAMES B. MONTGOMERIE-FLEMING of Kelvinside, Glasgow, died on 18th June 1899 leaving a trust-disposition and settlement, dated 4th February 1898.

By this trust-disposition and settlement the testator conveyed his whole estate to trustees, and, after directing payment of the expenses of the trust and of his debts, directed the trustees to hold the residue of the estate for behoof of his widow in liferent allennarily, the liferent to terminate in case of her entering into a second marriage. The fourth purpose of the trust-disposition and settlement was in the following terms:—"It is my wish and desire that on the death or second marriage of my said wife my children should, so long as they remain unmarried, live together at Kelvinside House,* Kelvinside: And further, as it is my wish and desire that my son, James Brown Montgomerie-Fleming junior, should occupy Kelvinside House on his marriage, I hereby direct and appoint my said trustees, on the death or second marriage of my said wife, if and when the whole of my daughters are married or when my son is married, whichever of these latter events shall first happen, to assign and dispone to" his son Kelvinside House and certain adjacent subjects, "but that under such burdens as may at the date of my death exist over the said subjects: Declaring that as my unmarried daughters will on my son's marriage and entry to and occupation of Kelvinside House and pertinents before mentioned, be deprived of a residence at Kelvinside House, I provide and declare that my son if and when my unmarried daughters are so deprived of a residence at Kelvinside House shall be bound and obliged, as by acceptance of the foresaid conveyance in his favour of Kelvinside House and others before mentioned he shall be held to bind and oblige himself, to make payment to each of my unmarried daughters till each of them shall respectively be married of a free

* At the date of the trust-disposition and settlement the house was known as Beaconsfield House, but the name was subsequently changed to Kelvinside House, and the latter name is used throughout this report.

yearly annuity of £50," and it was declared "that if and when each July 4, 1913. of my daughters shall be married the annuity of the daughter so getting married shall cease as at the date of such marriage." By the fifth purpose of the trust-disposition and settlement the trustees were directed to "hold, apply, convey, and make over" the whole residue of the estate to the testator's son to the extent of two-sixth shares, and to each daughter one-sixth share, the share falling to the son to be paid and conveyed by the trustees to him in fee, and the shares falling to the daughters to be held and applied for them in liferent alienably and for their respective children in fee.

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The testator was survived by his wife, who died on 14th February 1913, and by a son and four daughters, who were all unmarried at the date of his death.

The annual charges in respect of Kelvinside House, viz., the annual interest (which was, less tax, £178, 18s. 4d.) on a bond and disposition in security over it, the feu-duty, the annual premiums of fire and owners' liability insurances over the house, the annual landlord's taxes and assessments, and annual repairs, amounted to approximately £276, 0s. 6d.

Questions having arisen, *inter alia*, as to the nature of the right of unmarried children in Kelvinside House under the fourth purpose of the trust-disposition and settlement, and as to the incidence of the above-mentioned annual charges, a special case was presented to which the testator's trustees were the *first parties*; three of the testator's daughters, who had married after his death, and their husbands were the *second parties*; the son, who was unmarried, was the *third party*; and an unmarried daughter was the *fourth party*.

The first and second parties maintained that the third and fourth parties were entitled to a liferent use and enjoyment of Kelvinside House until the marriage of either, and were bound, in addition to the annual charges and burdens payable by an occupier, to free and relieve the trust-estate of the payment of the above-mentioned annual charges. The third and fourth parties maintained that they were entitled to a mere right of occupation of Kelvinside House till the marriage of either, free of the above-mentioned annual burdens, and on payment only of the usual annual charges falling to be paid by a tenant occupier.

The following question of law was, *inter alia*, submitted:—" (2) Are the third and fourth parties entitled to have (a) the liferent use and enjoyment of Kelvinside House and pertinents until the marriage of either, or (b) a mere right of occupation of Kelvinside House until the marriage of either?" By the third and fourth questions the opinion of the Court was desired as to whether the third and fourth parties were bound to pay until the marriage of either the above-mentioned annual charges.

The case was heard before the Second Division (without the Lord Justice-Clerk) on 24th June 1913. At the debate the undernoted cases were referred to.¹

¹ For the *first and second parties*.—Johnstone v. Mackenzie's Trustees, 1912 S. C. (H. L.) 106; Glover's Trustees v. Glover, *supra*, p. 115. For the *third and fourth parties*.—Smart's Trustee v. Smart's Trustees, 1912 S. C. 87; Clark and Others, (1871) 9 Macph. 435; and the cases as tabulated in the opinion of the Lord Ordinary in Johnstone v. Mackenzie's Trustees, 1911 S. C. 321, at p. 324.

July 4, 1918. At advising on 4th July 1913,—

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LORD DUNDAS.—[After referring to the circumstances in which the case was presented]—By the second question we are asked, “Are the third and fourth parties entitled to have (a) the liferent use and enjoyment of Kelvinside House and pertinents until the marriage of either, or (b) a mere right of occupation of Kelvinside House until the marriage of either?” In my opinion, we should answer head (a) in the negative and head (b) in the affirmative. As matter of fair and reasonable construction of the language of the settlement, according to the natural and ordinary meaning of the words used, I think the testator did not intend to create a right of “liferent” in the strict legal sense, but intended that the house and pertinents should be used as a home or residence where his unmarried children should live together so long as any of the daughters remained single, and until the son should marry. They were to occupy the house, but I do not think they could have let it. The testator evidently viewed this as a valuable privilege to his unmarried daughters, for, in the event of any of them being “deprived of a residence” in Kelvinside House by his son’s marriage and entry to the premises, the son was taken bound to pay each of his unmarried sisters a compensatory allowance of £50 a year until she should marry. It does not seem consistent with this idea, when one looks at some of the figures disclosed in the case, that the unmarried children should, during their occupancy of the house, have to bear the full legal burdens which would attach to proper liferenters. I do not think the mere fact that the occupation was not intended necessarily to subsist during the whole lives of the daughters, but only until marriage, is in itself sufficient to negative the theory of a proper liferent—*cf. Glover’s Trustees v. Glover*.¹ On the other hand, one observes that the property is to be conveyed to the son, if he marries, “under such burdens as may at the date of my death exist over the said subjects.” As matter of construction, I have no difficulty in affirming that the testator’s intention must be held to have been to give a right of occupation, and not of proper liferent use and enjoyment, to his unmarried children.

The cases to which we were referred seem to me to support this view. Each case of the kind must, of course, depend upon the particular terms of the settlement under consideration. But some light may be obtained from the decisions, especially from the recent judgment of the House of Lords in *Johnstone v. Mackenzie’s Trustees*,² reversing the decision of this Division.³ “Two propositions of general import” were there stated by Lord Shaw,⁴ who delivered the only opinion of the House. “First, the extent of the obligations attaching to a right of this character conferred by deed or settlement is a question to be determined by the intention of the maker, as that intention can be derived from the language which he has employed, and from the provisions which he has made with regard to, *inter alia*, the administration and realisation of his estate. Secondly, when the language employed is entirely apt and appropriate for the creation of an ordinary liferent right, it rests upon those who contend that the ordinary obligations

¹ *Supra*, p. 115.

² 1911 S. C. 321.

³ 1912 S. C. (H. L.) 106.

⁴ 1912 S. C. (H. L.), at p. 111.

which attach to a liferenter should not apply to him in the particular case— July 4, 1913. it rests upon those putting forward such a proposition of exception to establish it.” The language of this settlement does not, in my opinion, comply with the test of being “entirely apt and appropriate for the creation of an ordinary liferent.” It is significant that no case was cited, and I am not aware that there is any, where an ordinary liferent has been held to have been created without the words “liferent use and enjoyment,” or words of clearly similar import and effect. As regards Lord Shaw’s first proposition, I have already indicated the reasons which lead me to think that the testator’s intention was not to create a liferent, but merely to give a right of occupation. It was argued that, upon that footing, there would here be no fund from which the trustees could satisfy the burdens from which, *ex hypothesi*, the occupiers were intended to be freed. I do not think this is so. The trustees have, in point of fact, the whole residue in their hands. They are bound to retain two-thirds of it for behoof of the daughters in liferent alimentary and their issue in fee. Even as regards the son’s one-third of the residue, I see no reason to doubt that, if he called upon the trustees to pay it over to him—which he has not yet done, and I gather that there are practical reasons which make it improbable that he will do so—they would be entitled to retain, as against his demand, a portion of his share sufficient to meet one-fifth of the burdens affecting the occupation of the premises in question. This is not, therefore, a case such as Lord Shaw figures¹ where “the residue is in fact distributed and the fund available for disbursements of trust charges is gone.”

I am not sure whether the actual judgment of the First Division in *Smart’s Trustees*² can be regarded as authoritative since the decision of the House of Lords in *Johnstone’s case*.¹ It was laid before that House in the argument, but is not specially referred to in Lord Shaw’s opinion. Assuming, however, that the decision in *Smart’s Trustees*² has been overruled, I see no reason to doubt that Lord Dunedin’s observations upon the point I am dealing with are sound law; and they seem to be apposite to this case. His Lordship said³: “It seems to me that the construction of the direction to the trustees to allow the lady the use of the house cannot be altered by the fact that they are told to divide the residue. Whether trustees, as a matter of fact, should retain part of the residue in order to meet these burdens is a question for themselves, and a question of circumstances. I cannot see how the mere existence of a direction to divide the residue can possibly affect the true construction of a direction that you are to give a certain person one thing or another.”

[His Lordship then dealt with other questions on which the case is not reported.]

LORD SALVESEN.—The substantial question in this case is whether under the fourth purpose of the testator’s trust-disposition and settlement his unmarried children were given a proper liferent of the house in which he resided at his death, or merely a personal right of occupation. In the

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¹ *Johnstone v. Mackenzie’s Trustees*, 1912 S. C. (H. L.) 106, at p. 110.

² 1912 S. C. 87.

³ 1912 S. C. 87, at p. 92.

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former event, according to the decision of the House of Lords in *Johnstone v. Mackenzie's Trustees*,¹ the burdens on the property fall to be paid by the liferenters; in the latter event the burdens fall to be borne like any other annual debt affecting the trust-estate out of the income before distribution of the surplus amongst the beneficiaries.

It was argued for the first and second parties that the present case is ruled by the decision in *Johnstone v. Mackenzie's Trustees*.¹ With every desire to follow loyally the views laid down by the House of Lords (which indeed I should myself have given effect to in that case had I not conceived myself bound by a chain of previous decisions) I have found myself unable to assent to this view. The dominant consideration is the intention of the testator as it can be gathered from the language of the instrument. Here there are no words constituting a liferent. The testator simply expressed his desire that his children so long as they remained unmarried should live together at Kelvinside House. He plainly regarded this as a privilege, because he provides in a later clause that, in the event of his daughters being deprived of a residence there in consequence of the direction to the trustees to make over the house to his son on his marriage, the latter was to pay each of them a free yearly annuity of £50 so long as they remained unmarried. In a rough way, accordingly, he valued the privilege to each of his unmarried daughters of residing in the house at £50; whereas, in the event, which has happened, of there being only two children in a position to take advantage of the privilege, the cost of occupation approximates £150 for each if they are to bear the annual burdens afflicting to the property. These burdens all existed at the time when the will was drawn; and that the testator had them fully in view is plain from the express provision which he makes that the conveyance in favour of his son when it comes to be made is to be "under such burdens as may at the date of my death exist over said subjects."

Further, if the view of the first and second parties be well founded, it must be assumed that the testator intended that the right of occupation should become more burdensome as the numbers of those entitled to occupy diminished. If all the children had remained unmarried no practical question would have arisen as to the source from which the burdens were to be provided; but as soon as one daughter married and left the family home, a conflict of interest would at once arise. It can scarcely be maintained that the testator did not contemplate the successive marriages of his daughters; and, if while they all resided in family together the burdens were borne equally, it is difficult to suppose that, whenever one left to make her home with her husband, a new system should be inaugurated. The daughter who married no longer required the family home as a residence; and it is not unreasonable to suppose that the testator did not desire the children who remained in occupation to have their position thereby changed for the worse. All these circumstances lead me to the conclusion that it was not the testator's intention that his unmarried children should pay for the privilege of residing together in the family home.

Is there, then, anything in the other provisions of the trust settlement

¹ 1912 S. C. (H. L.) 106.

which tend to a contrary result? It was said that the residue clause, while July 4, 1913. it provides for the trustees holding the daughters' shares and paying them only the annual income, gives the testator's son the right to demand payment of his share of the residue; and that there is thus no fund out of which the burdens can annually be met. I think there is a plain fallacy here. If what is conferred upon the unmarried children is a mere right of occupancy, then the annual burdens on the property, so long as it is held by the trustees, are debts due by the trust-estate which must be provided for *pro tanto* before the son's share of residue is paid over. The circumstances of this case are entirely different from those which influenced the judgment in *Johnstone v. Mackenzie's Trustees*.¹ The only sum which remained undistributed in the latter case was the £20,000 expressly set aside to provide an annuity. The capital of this sum was conveyed to another set of beneficiaries, and the surplus revenue after payment of the annuity was specially destined. There is nothing of the kind here, and I respectfully concur in the opinion of Lord President Dunedin in the case of *Smart's Trustee v. Smart's Trustees*,² where he says:—"It seems to me that the construction of the direction to the trustees to allow the lady the use of the house cannot be altered by the fact that they are told to divide the residue. . . . I cannot see how the mere existence of a direction to divide the residue can possibly affect the true construction of a direction that you are to give a certain person one thing or another."

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The above considerations lead me to the conclusion that the right conferred on the unmarried children of the testator was not a proper *liferent* but a personal privilege, and that this case is ruled by the decision in the case of *Clark*,³ which was approved by the House of Lords. There are other considerations pointing in the same direction. It is an inherent quality of a true *liferent* of a heritable subject that the *liferenter* need not occupy it, but is entitled to let it and to draw the rents. This cannot be affirmed of a right to occupy a house which is shared by others. So long as one of the privileged class wishes to occupy in person, obviously the others could not let their right of occupation to third parties. This would be to defeat the purpose of the testator, which was to provide a joint residence for his unmarried children. The right is a purely personal one; and if none of them desire to exercise it the result would seem to be that the trustees could let the house for the benefit of the trust-estate. Moreover, it is not a privilege that is primarily intended as lasting during life. I do not say that a bequest of the *liferent* use of a dwelling-house to a person so long as he or she remained unmarried would not have the qualities of a true *liferent*. It might subsist during the whole of the legatee's life; but the testator here, I think, really contemplated that the right of occupation would cease during the lifetime of all or most of his children. It would only not do so if his son or one or more of the latter's sisters did not marry. If the son married, or all the daughters, the right of occupation would equally come to an end. I am therefore of opinion that head (a) of the second query falls to be answered in the negative and head (b) in the affirmative.

[His Lordship then dealt with the other questions in the case.]

¹ 1912 S. C. (H. L.) 106.

² 1912 S. C. 87, at p. 92.

³ 9 Macph. 435.

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LORD GUTHRIE.—I am of the same opinion. This case has evidently been brought in order to settle the question which is raised in the second query. It was admitted that no case has hitherto occurred in which the use, permanent or limited, of a house has been held to come within the category of liferent use and enjoyment without the use of the word "liferent." It was not maintained that there might not be an equivalent expression which might be conceived leading to the same result. In the absence of the word "liferent" are there any equivalents to be found in the trust-disposition and settlement? I can find none; and I conclude both from the words of the will and from the surrounding circumstances of the testator and his family that only a right of occupancy was intended. The testator talks of his unmarried daughters being "deprived of a residence" at Kelvinside House; and, as I understand, what he gave them was a residence at Kelvinside House and nothing more. That seems to me to be quite on the same lines as the expression in the case of *Clark*,¹ "use of my house," which was held only to give a mere right of occupancy.

THE COURT answered head (a) of the second question in the negative, and head (b) in the affirmative, and questions three and four in the negative.

H. B. & F. J. DEWAR, W.S.—LAING & MOTHERWELL, W.S.—Agents.

No. 145. ANDREW MALCOLM Junior, Pursuer (Appellant).—*G. Watt, K.C.—MacRobert.*

July 4, 1913.

Malcolm v.
Thomas
Spowart &
Co., Limited.

THOMAS SPOWART & COMPANY, LIMITED, Defenders (Respondents).—*Hon. W. Watson—Strain.*

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule (16)—Review—Minor workman—Probable earnings at date of review—General rise in wages—Agreement fixing probable earnings at prior date—Rise in wages between date of agreement and date of review.

The Workmen's Compensation Act, 1906, First Schedule (16), provides, with regard to review of weekly payments, that "where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding fifty per cent of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound."

The compensation payable to a minor workman was fixed by agreement at a weekly sum representing half the amount which, in the opinion of the parties, he would have been earning at the date of the agreement had he remained uninjured. Some months afterwards, in consequence of a general rise in wages, he applied to the Sheriff to have the compensation increased.

Held that the fact that there had been a general rise in wages between the date of the agreement and the date of the application did not *per se* entitle the workman to an increase, but that it was merely one of the items to be taken into consideration by the Sheriff in determining for himself the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured.

¹ 9 Macph. 435.

IN an arbitration under the Workmen's Compensation Act, 1906, in July 4, 1913. the Sheriff Court at Dunfermline, at the instance of Andrew Malcolm junior against Thomas Spowart & Company, Limited, colliery owners, the Sheriff-substitute (Umpherston) refused the workman's application for an increase of compensation, and, at his request, stated a case for appeal.

Malcolm v. Thomas Spowart & Co., Limited.

1st Division.
Sheriff of Fife
and Kinross.

The case set forth :—

"The appellant, who was born on 13th January 1893, received injury by accident arising out of and in the course of his employment with the respondents on 2nd September 1907, since which date he was totally incapacitated for work up to the date of the application to review.

"The appellant whose average weekly earnings prior to his accident were 13s., was paid compensation at the rate of 10s. per week from the date of his accident to 19th January 1912, when the rate was by agreement increased to 12s. 6d. per week on the ground that if he had remained uninjured the appellant would probably have been earning 25s. per week.

"The present application, which was presented on 23rd September 1912, is to have said compensation of 12s. 6d. increased to 17s. 6d. per week on the ground that but for his accident the appellant would have been able to earn at least 35s. per week. The appellant averred that he would have been fit to do any work in connection with the pit which a young man of his age and intelligence, and with the experience and skill he would have possessed but for the accident, could have got. In particular, he contended that he would in all probability have been employed at the face, earning from 6s. 6d. to 8s. a shift, and that he could also have been working as a brusher earning 7s. to 8s. a shift, or as a fireman or repairer earning an average of 6s. 6d. a shift.

"The case was heard before me on 14th November 1912 and 13th January 1913, and on 22nd January 1913 I found as follows :—(1) That the appellant is at present in receipt of compensation from the respondents by agreement dated 19th January 1912 at the rate of 12s. 6d. per week. (2) That said compensation is based on an earning power of 25s. per week as the weekly sum which the appellant would probably have been earning at the date of the agreement, if he had remained uninjured. (3) That it was not proved that the earning capacity of lads of nineteen years of age exceeds 25s. per week, and that there was nothing in the evidence which made me think that the appellant would have earned more than other lads of his own age. (4) That the appellant has failed to prove that his earning capacity at the date of the application to review would probably have increased since said 19th January 1912 if he had remained uninjured.

"It was maintained in argument that I was bound to increase the claimant's compensation because there had been a general increase in miners' wages in the district of 9d. per shift between the date of the agreement and the date of the arbitration. I held this increase in miners' wages to be proved as a fact in the case, but refused to give effect to the argument for these reasons, viz. :—(a) Although in the case of a workman who has been injured while under the age of twenty-one mere lapse of time apart from any change in his actual physical capacity may be considered as such a change of circumstances as to entitle him to have the rate of compensation reviewed, yet a

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LORD GUTHRIE.—I am of the same opinion. This case has evidently been brought in order to settle the question which is raised in the second query. It was admitted that no case has hitherto occurred in which the use, permanent or limited, of a house has been held to come within the category of liferent use and enjoyment without the use of the word "liferent." It was not maintained that there might not be an equivalent expression which might be conceived leading to the same result. In the absence of the word "liferent" are there any equivalents to be found in the trust-disposition and settlement? I can find none; and I conclude both from the words of the will and from the surrounding circumstances of the testator and his family that only a right of occupancy was intended. The testator talks of his unmarried daughters being "deprived of a residence" at Kelvinside House; and, as I understand, what he gave them was a residence at Kelvinside House and nothing more. That seems to me to be quite on the same lines as the expression in the case of *Clark*,¹ "use of my house," which was held only to give a mere right of occupancy.

THE COURT answered head (a) of the second question in the negative, and head (b) in the affirmative, and questions three and four in the negative.

H. B. & F. J. DEWAR, W.S.—LAING & MOTHERWELL, W.S.—Agents.

No. 145. ANDREW MALCOLM Junior, Pursuer (Appellant).—*G. Watt, K.C.—MacRobert.*

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THOMAS SPOWART & COMPANY, LIMITED, Defenders (Respondents).—*Hon. W. Watson—Strain.*

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule (16)—Review—Minor workman—Probable earnings at date of review—General rise in wages—Agreement fixing probable earnings at prior date—Rise in wages between date of agreement and date of review.

The Workmen's Compensation Act, 1906, First Schedule (16), provides, with regard to review of weekly payments, that "where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding fifty per cent of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound."

The compensation payable to a minor workman was fixed by agreement at a weekly sum representing half the amount which, in the opinion of the parties, he would have been earning at the date of the agreement had he remained uninjured. Some months afterwards, in consequence of a general rise in wages, he applied to the Sheriff to have the compensation increased.

Held that the fact that there had been a general rise in wages between the date of the agreement and the date of the application did not *per se* entitle the workman to an increase, but that it was merely one of the items to be taken into consideration by the Sheriff in determining for himself the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured.

¹ 9 Macph. 435.

In an arbitration under the Workmen's Compensation Act, 1906, in July 4, 1913. the Sheriff Court at Dunfermline, at the instance of Andrew Malcolm junior against Thomas Spowart & Company, Limited, colliery owners, the Sheriff-substitute (Umpherston) refused the workman's application for an increase of compensation, and, at his request, stated a case for appeal.

Malcolm v.
Thomas
Spowart &
Co., Limited.

1st DIVISION.
Sheriff of Fife
and Kinross.

The case set forth :—

"The appellant, who was born on 13th January 1893, received injury by accident arising out of and in the course of his employment with the respondents on 2nd September 1907, since which date he was totally incapacitated for work up to the date of the application to review.

"The appellant whose average weekly earnings prior to his accident were 13s., was paid compensation at the rate of 10s. per week from the date of his accident to 19th January 1912, when the rate was by agreement increased to 12s. 6d. per week on the ground that if he had remained uninjured the appellant would probably have been earning 25s. per week.

"The present application, which was presented on 23rd September 1912, is to have said compensation of 12s. 6d. increased to 17s. 6d. per week on the ground that but for his accident the appellant would have been able to earn at least 35s. per week. The appellant averred that he would have been fit to do any work in connection with the pit which a young man of his age and intelligence, and with the experience and skill he would have possessed but for the accident, could have got. In particular, he contended that he would in all probability have been employed at the face, earning from 6s. 6d. to 8s. a shift, and that he could also have been working as a brusher earning 7s. to 8s. a shift, or as a fireman or repairer earning an average of 6s. 6d. a shift.

"The case was heard before me on 14th November 1912 and 13th January 1913, and on 22nd January 1913 I found as follows :—(1) That the appellant is at present in receipt of compensation from the respondents by agreement dated 19th January 1912 at the rate of 12s. 6d. per week. (2) That said compensation is based on an earning power of 25s. per week as the weekly sum which the appellant would probably have been earning at the date of the agreement, if he had remained uninjured. (3) That it was not proved that the earning capacity of lads of nineteen years of age exceeds 25s. per week, and that there was nothing in the evidence which made me think that the appellant would have earned more than other lads of his own age. (4) That the appellant has failed to prove that his earning capacity at the date of the application to review would probably have increased since said 19th January 1912 if he had remained uninjured.

"It was maintained in argument that I was bound to increase the claimant's compensation because there had been a general increase in miners' wages in the district of 9d. per shift between the date of the agreement and the date of the arbitration. I held this increase in miners' wages to be proved as a fact in the case, but refused to give effect to the argument for these reasons, viz. :—(a) Although in the case of a workman who has been injured while under the age of twenty-one mere lapse of time apart from any change in his actual physical capacity may be considered as such a change of circumstances as to entitle him to have the rate of compensation reviewed, yet a

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rise or fall in the rate of wages, being dependent on the conditions of the labour market, was to be regarded exactly in the same way in the case of a minor workman as in that of one of full age, and I held that it could not be considered as a change of circumstances which entitled either party to have the compensation reviewed. (b) Apart from the agreement of 19th January 1912 I found that it was not proved that the claimant's earning capacity would probably, but for the accident, have exceeded 25s. at the date of the arbitration.

"I accordingly refused the crave of the minute for review."

The question of law for the opinion of the Court was:—"Was I right in refusing to consider the general increase of 9d. a day in the miners' wages between the date of the agreement (19th January 1912) and the date of the application to review, as entitling the claimant to increase in compensation?"

The appeal was heard before the First Division (without the Lord President) on 25th June 1913.

Argued for the appellant;—The arbitrator was wrong in refusing to consider that in the circumstances of this case the rise in the rate of wages entitled the appellant to the increase which he asked. His earning capacity in January 1912 was 25s. per week. It followed that it had been increased since that date by an amount proportionate to the general rise. It was not contended that a rise in the rate of wages was a circumstance that *per se* entitled the workman to an increase of compensation, but it was a circumstance which was relevant and must be taken into consideration in arriving at the man's wage-earning capacity at the date of review.¹ The arbitrator had expressed the opinion in his finding (a) that a rise or fall in the rate of wages was to be regarded exactly in the same way in the case of a minor workman as in that of one of full age, that is to say, whether he was dealing with an application under paragraph (3) or with one under paragraph (16) of the First Schedule.* Now, it had been held, in the first two cases cited, that the circumstance of such a rise or fall was one which the arbitrator was bound to consider in proceeding under paragraph (3), and therefore, if he was right in the opinion referred to, it followed that he was bound to apply the same considerations in proceeding under paragraph (16). The provisions of these two paragraphs might quite properly be read together as applying to the present application. But, in any case, looking at the terms of paragraph (16) by themselves, it was clear that the arbitrator could not ascertain "the weekly sum which the workman would probably

¹ Black v. Merry & Cunninghame, Limited, 1909 S. C. 1150; Bevan v. Energlyn Colliery Co., [1912] 1 K. B. 63; Malcolm v. Bowhill Coal Co., Limited, 1910 S. C. 447; Edwards v. The Alyn Steel Tinplate Co., Limited, (1910) 3 Butterworth's W. C. C. 141.

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule (3), enacts:—"In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

Paragraph (16) is quoted in the rubric.

have been earning at the date of review if he had remained uninjured" July 4, 1913. without taking into consideration all the relevant circumstances, including the rate of wages and any rise or fall therein. The arbitrator's finding (a) was a finding to the effect either (1) that the rise or fall in the rate of wages was not a relevant consideration; or (2) that he had not in fact taken this element into consideration. In either case he was wrong in law. If there was any doubt as to what the arbitrator's view really was, the case should be remitted to him for more explicit statement.

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Argued for the respondents;—This was an application by a minor workman suffering from total incapacity, and the paragraph which regulated such an application was the 16th, and not the 3rd, of the First Schedule. Under the 16th paragraph the arbitrator's only duty was to arrive at a finding upon the facts of what wage the workman would probably have been able to earn at the date of review had he remained uninjured. Upon that question the arbitrator had found that the workman would probably not in fact have been able to earn at that date more than 25s. per week. It must be inferred that the arbitrator had taken all relevant circumstances into account in deciding this question of fact, including the rate of wages at the time. The question really raised in the case was, Did this rise in the rate of wages *per se* entitle the workman to an increase of compensation? although it was not stated in these precise terms in the question of law. The answer to this question should clearly be in the negative. The arbitrator was concerned only with the workman's probable earning capacity,¹ and a rise or fall in the rate of wages did not *per se* determine this question.² The arbitrator was not concerned with the calculation of any difference between two rates of wages. The duty of calculating a difference only arose in dealing with an application under paragraph (3). That paragraph applied only to application for review by a workman of full age, and its directions with regard to calculating a difference applied only in a case of partial incapacity. Even if the arbitrator were concerned with the calculation of a difference, which he was not, the rate of wages on the basis of which the voluntary agreement proceeded was not to be taken as concluding against the respondents the appellant's wage-earning capacity at its date. The arbitrator had rightly decided that he was not bound, upon the evidence of the agreement plus the rise in the rate of wages, to increase the compensation, and the appeal should be dismissed.

At advising on 4th July 1913,—

LORD KINNEAR.—The question in this case depends upon the construction of paragraph (16) of the First Schedule to the Workmen's Compensation Act, 1906.

The facts are that the appellant, the workman, who was born on 13th January 1893, received injury by an accident arising out of and in the course of his employment on 2nd September 1907, when he was still a boy, since which date he was totally incapacitated from work up to the date of the application to review. Therefore it is a case of the total incapacity of

¹ Vickers, Sons, & Maxim, Limited, v. Evans, [1910] A. C. 444.

² Jamieson v. Fife Coal Co., Limited, (1903) 5 F. 958; Black v. Merry & Cunninghame, Limited, 1909 S. C. 1150.

July 4, 1913. a minor arising from an injury in the course of and arising out of his employment. The appellant, whose average earnings before the accident were 13s. a week, was paid compensation at the rate of 10s. per week from the date of the accident to 19th January 1912, and then the rate was increased by agreement to 12s. 6d. per week, and the Sheriff says that that alteration was made because the parties were agreed that, if he had remained uninjured, the probable amount of his earnings at the date when the increase was made would have been 25s. a week.

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Now, so matters stood until the present application was presented on the 23rd September 1912. It is an application by the workman to have the compensation of 12s. 6d. increased to 17s. 6d. per week on the ground that, but for his accident, the appellant would have been able to have earned at least 35s. per week. Then the Sheriff-substitute goes on to say that the appellant averred in support of his application that he would have been fit to do any work in connection with the pit which a young man of his age and intelligence, and with the experience and skill which he would have possessed but for the accident, could have got. And then he gives some particulars as to the exact amount of wages that he might earn at certain employments. Now that was a perfectly relevant claim for the consideration of the Sheriff-substitute, because it is exactly within the rule of paragraph (16). That is the paragraph which allows weekly payments to be reviewed and ended, diminished, or increased, at the request either of the employer or of the workman. And to that general allowance it adds this proviso that, where the workman was, at the date of the accident, under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding 50 per cent of the weekly sum which the workman would probably have been earning at the date of review if he had remained uninjured.

Now the facts which the Sheriff-substitute says were alleged by the workman bring his case exactly within that provision. The workman says that, if he had remained uninjured, he would, at the date when he asked for review, have been able to earn a sum which he estimated at, at least, 35s. a week. That laid upon the Sheriff-substitute the duty of taking evidence and of determining, as a question of fact, whether the applicant's case was made out or not, and that was the course which he took. He says the case was heard before him and that he found certain facts. In the first place, that the appellant is in receipt of compensation from the respondents at the rate of 12s. 6d. per week. That is upon the agreement. Secondly, that that compensation is based on an earning power of 25s. per week as the weekly sum which the appellant would probably have been earning at the date of the agreement if he had remained uninjured. I pause simply to point out that that is not the sum which he was earning at the date of the accident but a considerably larger sum which both parties had agreed should be taken as the sum that he would probably have been earning at the date when the agreement was made. Thirdly, that it was not proved that the earning capacity of lads of nineteen years of age exceeds 25s. a week, and that there was nothing in the evidence which made the Sheriff-substitute think that the appellant would have earned more than other lads of his own age.

Fourthly, that the appellant had failed to prove that his earning capacity July 4, 1913. at the date of the application for review would probably have increased since 19th January 1912, that is since the date of the agreement, if he had remained uninjured. Now these are perfectly clear and distinct findings in fact. As a matter of fact, the Sheriff says the earning capacity of other lads of his age does not exceed 25s. a week. There is nothing in the evidence to show that he could have earned more than other lads of his age. He has failed to prove that his earning capacity would have increased at the date of review if he had remained uninjured. I think that is a plain question of fact that the Sheriff-substitute has had to determine, and he has decided it in the way I have read. Nothing could be clearer to my mind than that that was a question for the Sheriff-substitute, and that we have no grounds for reviewing or interfering with the Sheriff-substitute's finding.

He then goes on to say that a case was made before him which raises a question of law, and it was made in this Court. I confess it seems to me that the contention of the appellant upon the point which the learned Sheriff-substitute now goes on to consider is somewhat singular. But still, it was seriously maintained. It was maintained in argument that the Sheriff-substitute was bound to increase the claimant's compensation because there had been a general increase in miners' wages in the district of 9d. per shift between the date of the agreement and the date of the arbitration. That is to say, the appellant contends, not merely that the fact of the wage at the date of the arbitration being at a certain rate is to be taken into account, and the fact of that rate being higher than it had previously been, but that the Sheriff-substitute is bound, upon that consideration alone, to increase the amount of the claimant's compensation. I entirely agree with the Sheriff-substitute that that is an extravagant claim. What the Sheriff-substitute has to do is to ascertain what, as a matter of fact, so far as it is ascertainable, is the sum which the minor workman would probably have been earning at the particular date. That is what he has considered and determined. And it is not, so far as I can see, of the slightest consequence whether the sum which it is thus shown the man might have earned is greater or less than the weekly wages which he might have earned at some previous time.

I think that a great deal of confusion was introduced into the appellant's argument by dragging into the discussion a number of decisions upon a totally different question, and they are decisions which are quite irrelevant to the question which we have to determine, because the learned counsel cited to us all the cases—and there are several—in which the Court, in considering the comparison which is to be made under paragraph (3) between the average weekly earnings before the accident of a workman who, notwithstanding his injury, is still able to work, and the average weekly amount which he is able to earn after the accident, had occasion to consider what circumstances ought to be taken into account by the arbitrator in determining that question. But that is not the provision under which the arbitrator in this case was required to act at all, and he has nothing to do with the problem that paragraph (3) raises. That arises only in the case of partial incapacity. It is expressly so put, and the obvious meaning of it is that, in fixing the amount of the weekly payment to be made to the

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July 4, 1913. man who, although he has been injured, has still a partial capacity for work, you are to take, and the arbitrator is to take, into account the amount of wages which, in his injured condition, he can still earn, and that he is to fix the compensation at a sum which shall not exceed the difference between the average earnings of the workman before the accident and that amount. His problem, therefore, is to compare these two amounts and take care that, in fixing the compensation, he does not exceed the difference between them. But under the 16th paragraph we have nothing to do with any such process at all. When the application is made by a workman suffering from total incapacity in consequence of the injury, you have nothing to do with that comparison, because the workman is earning nothing. The condition of the case is that he has been totally incapacitated for work, and the only reason of any difference being made between his case and that of other workmen is that which is very clearly brought out in the paragraph, that, because he was a boy at the time of the injury, and had not yet attained his full earning capacity, the arbitrator, in reviewing the compensation after the lapse of twelve months, may take into account what he might reasonably have been expected to earn if he had been allowed to grow up without injury; but in doing that there are no considerations put before the arbitrator by the statute except the single question: What is the amount of weekly wage the man would probably have earned if he had been uninjured?

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The argument, apparently before the Sheriff-substitute, and before us, apart from the contentions which seem to me to be quite irrelevant upon the cases to which I have referred, was based upon this, that it was said that there was an agreement between the parties, on 19th January 1912, by which the compensation was fixed upon the footing that the workman would, at that date, have been earning 25s. per week. And then it is said that gives you a point to start from, and, if he shows now that the general wages in the district had risen to a certain amount since that date, the only process the arbitrator is required to go through is the arithmetical one of ascertaining the difference between the present rate of wages and the amount which the parties agreed the appellant should have more than a year ago. I entirely disagree with that proposition. I had some difficulty in following the ground in law upon which it was maintained, but I think it was put in two different ways. In the first place, it was put as if the appellant had, by virtue of this agreement, a legal right by contract to say that the standard for all future renewals of compensation was fixed once for all by agreement between the parties. If that is the argument, it is quite untenable. The agreement fixes nothing except that, until either party shall be dissatisfied and require it to be reviewed, a certain amount of compensation shall be paid by the one to the other. That is all that it fixes. If it fixed more, the appellant would still not be in a position to found upon anything fixed, because he is dissatisfied and throws it over. He is not content to abide by the agreement, and he says, "I am dissatisfied, and I want my compensation to be fixed not by agreement but by arbitration, so that I may get my legal compensation fixed." That is an intelligible proposition, but he must take his legal right apart altogether from the agreement.

But there was another view, a more plausible one although not a more

sound one, which was this, that you are to take this agreement as conclusive evidence that, as a matter of fact, the appellant could have earned 25s. a week on 19th January 1912, and, that being accepted, then you prove that he is entitled to more now, because you prove that the general rate of wages has increased since then. I think that is as unsound a view as the other. The agreement proves nothing as to the fact of what he could have earned in January 1912. We do not know why the employer agreed to give him that amount. All we know is that the two parties settled that amount between them, and it stood as long as they were both satisfied with it. But upon what specific grounds it was given we do not know. I quite agree that, in certain circumstances, it might be an item of evidence tending to show what the alleged earning capacity was—that his own employer had agreed to give him a certain amount. That may or may not be, according to circumstances; but if it is an item of evidence, then it is just one of the points which the arbitrator has to consider, and it certainly is not a final and conclusive fact which compels him to increase the compensation in the way in which it is argued he should have done. The question remains for his decision.

That the arbitrator has considered this question is plain enough, because he tells us it was before him. Then he tells us that there was other evidence before him. He tells us, as a matter of fact, that the general rate of wages in the district has increased; but he also finds that boys in the same position and of the same age as this appellant were not earning more than 25s. a week, and that there was nothing to show that this appellant would have earned more than they did. It is plain enough that a rise in the general rate does not necessarily involve an increase in the amount earned by a particular workman or boy. Therefore, he treats the case as a question of fact, and upon precisely the right grounds, when he considers what is the evidence as to what the man would in fact have been earning if, at the date of the review, he had been uninjured.

The only difficulty I have had in considering the case arises from the reasoning of the learned Sheriff-substitute in the paragraph which is marked (a). I am not satisfied that I have quite followed the line of the reasoning which is there explained, because, in the course of that paragraph, the learned Sheriff-substitute makes an observation, the exact bearing of which I confess I do not understand, but which might be interpreted in a way to which I should certainly not assent, for he says that the rise or fall in the rate of wages, being dependent on the conditions of the labour market, is to be regarded in exactly the same way in the case of a minor workman as in the case of one of full age. If that means that, when it is proved that a workman at the date of review would have been earning more than he earned at the date of the accident, and that in the meantime the rate of wages had risen, therefore the amount that he would have so actually earned, according to that rate, is not to be taken into account in terms of the section, I should dissent altogether from that view. I think the learned Sheriff-substitute had nothing whatever to do with whether the actual rate was higher or lower than the actual rate at some other and previous time. The statute means that you are to find out what the wages would have been at the particular time. That must mean the wages at the rate then current,

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July 4, 1913. and the rate then current must always be affected, one way or the other, by the state of the labour market.

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I confess, however, that I think the remark to which I have referred is a remark in passing which did not determine the learned Sheriff-substitute's judgment. If it had, I should not have been able to follow it, because, in that part of the case, he is treating only of the argument as founded upon the fact of the agreement, and he says, I think quite rightly, that that is not a sound argument. But then he goes on to decide the case irrespective of the agreement altogether, and in that I think he was right, and his true ground of judgment is this, that it is not proved that the claimant's earning capacity would probably, but for the accident, have exceeded 25s. per week.

Well, then, the question in law he puts to us is this: Was I right in refusing to consider the general increase of 9d. a day in the miners' wages between the date of the agreement (19th January 1912) and the date of the application to review, as entitling the claimant to increase in compensation? If that meant, Was I to take into account the fact of the general rise at all? I should have very little hesitation in saying that it was a fact that he might take into account. But the true meaning of that question seems to me to be, Was I right in refusing to give effect to the applicant's argument that the rise in the general rate of wages in itself entitled him absolutely to an increase—not merely to have his case considered, but to an absolute increase in compensation? Now, I think that the Sheriff was quite right in saying that it did not, and therefore that we may answer the question in the affirmative.

LORD JOHNSTON.—I think that the question of law stated for the opinion of the Court cannot be answered without knowing something of its origin and its bearing; for I think it possible that I may agree in the abstract with the Sheriff in the answer which he has himself given to his question, and yet differ from him in the conclusions which have led him to state the question, and also differ from him in the effect which he would give to the answer.

The injured workman was at the date of the accident, viz., 2nd September 1907, and still is, a minor, and his case therefore falls to be exceptionally treated as provided for in the statute. He was earning 13s. a week, and accordingly under proviso (b) of paragraph (1) of the First Schedule he received at first 10s. a week of compensation. On 19th January 1912 the rate of compensation was increased to 12s. 6d. a week by agreement, on the assumption that if he had remained uninjured he would probably have been earning 25s. a week. On 23rd September 1912 he presented the present application to have his compensation reviewed and raised to 17s. 6d. a week, on the ground that, but for his accident, he would have been able to earn 35s. a week. He was at that date only nineteen years of age. It is a further fact in the case that between the agreement of 19th January 1912 for 12s. 6d. a week and the date of the proof in the present application there had been a general increase in miners' wages in the district of 9d. per shift, and the real question in dispute I understand to be, how does this fact affect the Sheriff's disposal of the matter of review?

In arbitrations under the statute and its schedules, in the general case

the workman's average weekly earnings preceding the accident form a fixed July 4, 1913. datum in the estimation of his compensation. The first maximum figure under the First Schedule (1) (b) is fifty per cent of this weekly average, the second maximum under the same sub-paragraph is £1, and the third maximum is, under paragraph (3) of the same Schedule, the difference between the amount of this weekly average and the average weekly amount which the workman is earning or is able to earn after the accident. The lowest of these three is therefore the extreme compensation which the workman can recover. There is in the last-mentioned paragraph a clause limiting even this maximum in the case of partial disablement, but it has no bearing upon the present question. So stands it with the claimant when he is an adult, and it follows that the Sheriff as arbitrator is not concerned with the fact that wages may have risen or fallen since the date of the accident, except so far as this may affect the wages which the injured man is earning or is able to earn at the date of the Sheriff's consideration of the question of compensation.

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But to this rule of the Schedule the case of the minor workman forms an exception. He is, under paragraph (1) (b) of the First Schedule, to get 100 per cent of his previous average weekly earnings if these are under 20s., but not exceeding the weekly payment of 10s. But then when it comes to reviewing this payment under paragraph (16) it is specially provided that where the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding 50 per cent of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not exceeding £1. Consequently the actual wages prior to the accident of the injured man form in this case no element in the consideration. The maxima in this case are only two in number, viz., £1, and the potential earnings of the injured man, had he remained uninjured, at the date of review. Hence it appears to me that the Sheriff must consider the state of the wage market, whether affected by rise or fall, at the date of the arbitration, and that the Sheriff's first reason (a) for refusing to give effect to the contention that wages had risen 9d. a shift between the date of the agreement of January 1912 and the date of the arbitration was ill-founded. But then his second reason (b) for the refusal is that, apart from the agreement of January 1912, it was not proved that the claimant's earning capacity would probably, but for the accident, have at the date of the arbitration exceeded the 25s. assumed as the basis of the agreement. This I understand to mean that even if there had been, as the Sheriff holds proved, a rise of 9d. after 19th January 1912, still the workman was as well or better off with the agreed-on 12s. 6d. a week than he would have been had the Sheriff been called upon to fix his compensation *de novo* at the date of the arbitration. In these circumstances it is not a little difficult to understand the true bearing of the question stated, which is: "Was I right in refusing to consider the general increase of 9d. a day in the miners' wages between the date of the agreement (19th January 1912) and the date of the application to review as entitling the claimant to an increase in compensation?" If this means, was the Sheriff right in refusing to consider the rise of wages in determining the potential wage-earning capacity

July 4, 1913. of the injured man at the date of the proof, then I should answer the query in the negative. But if it means, was the Sheriff right in refusing to consider the rise of wages, since the last fixing of the compensation, as *per se* a reason for increasing the compensation without regard to the potential earning capacity of the claimant, then I should answer the query in the affirmative.

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Though the Sheriff might have stated more clearly the point which he intended to present to the Court, I think that the second alternative view of the meaning of the question is the correct one, and that the Sheriff came to a right conclusion in holding that he was not entitled or bound to take the agreed-on figure of 19th January 1912 as a fixed starting point, and automatically to add 50 per cent of the rise of wages as from the date of the present application. I think that he was right in considering the earning capacity of lads of the same age in the same employment at the date of the inquiry, and if, as he says, he was satisfied that that did not exceed 25s., even allowing for a market rise in wages, that it followed that there was no call for an increase in the compensation at the date of the application to him.

I would therefore propose to your Lordships that the question should not be answered as it stands, because I think the result of the question, so answered, would be misleading; but that it should be answered to this effect, that the Sheriff was right in refusing to consider the general increase of 9d. a day in miners' wages between the two dates specified as *per se* entitling the claimant to an increase in compensation.

LORD MACKENZIE.—This is an appeal from an award of the Sheriff-substitute refusing, on an application for review, to increase the workman's compensation in respect of total incapacity.

The workman was under twenty-one at the date of the accident; the review took place more than twelve months after the accident. The provisions of the First Schedule (16) of the Act of 1906, therefore applied to the case, under which "the amount of the weekly payment may be increased to any amount not exceeding 50 per cent of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound." What the Sheriff-substitute had to do was to ascertain what was the weekly sum that the workman would probably have been earning. No comparison is needed, as would be the case under (3), where during partial incapacity the weekly payment is not to exceed the difference between the average weekly earnings before and after the accident.

The Sheriff-substitute has made a finding directly applicable to (16). He finds:—" (3) That it was not proved that the earning capacity of lads of nineteen years of age exceeds 25s. per week, and that there was nothing in the evidence which made me think that the appellant would have earned more than other lads of his own age." That would appear to end the case, but the appellant contends that the Sheriff-substitute was bound to have proceeded thus:—First, to take the rate of compensation fixed by agreement, on 19th January 1912, at 12s. 6d. (50 per cent of 25s.), as fixing a standard; then to make an addition to that in consequence of a general

increase of 9d. a day in miners' wages between the date of the agreement July 4, 1913. and the application for review on 23rd September 1912, and by a purely mathematical process bring out an increase as due to the appellant. Accordingly he asked the Sheriff to state a case in which this is the question of law put :—" Was I right in refusing to consider the general increase of 9d. a day in the miners' wages between the date of the agreement (19th January 1912) and the date of the application to review, as entitling the claimant to increase in compensation?" The question is not so clearly put as it might be, but I read it as meaning, whether the increase of 9d. a day in the wages *per se* entitled the appellant to an increase in compensation. This is the reading consistent with the appellant's argument, which was that the Sheriff-substitute was bound to increase the compensation because there had been a general increase in wages.

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I can find no warrant in the statute for the appellant's contention. Nor can I see that any question of general principle is raised by this case. The point is not whether the Sheriff-substitute was entitled to shut his eyes to the fact that at the date of review wages had gone up by 9d. It is not to be supposed that he would do so, and it must be taken that in fixing under (16) what the workman would probably have been earning as at 23rd September 1912 he took the rate of wages then being paid. The observations that the Sheriff-substitute makes in paragraph (a) bear solely on his view as to what is sufficient to constitute a change of circumstances. If the Sheriff-substitute had dismissed the application for review on the ground that there had been no change of circumstances it might have been necessary to consider the question so raised. But he did not. He disposed of the application on its merits, and refused it. There appears to me no ground for holding that the Sheriff-substitute went wrong in law, and in my opinion the question should be answered in the affirmative.

LORD KINNEAR.—I quite assent to Lord Johnston's suggestion that we should find in the terms which he has proposed, introducing the words "*per se*" into the finding although they are not in the question. That is exactly in accordance with the view expressed by myself and by Lord Mac-kenzie as our understanding of the question, but it will certainly be more convenient and desirable that it should be clearly expressed.

I cannot see any reason why the expenses should not follow the appeal in the ordinary way.

THE COURT pronounced this interlocutor :—" Find in answer to the question of law in the case that the Sheriff-substitute as arbitrator was right in refusing to consider the general increase of 9d. a day in the miners' wages between the date of the agreement (19th January 1912) and the date of the application to review as *per se* entitling the claimant to increase in compensation : Dismiss the appeal, and decern."

No. 146.

ROBERT MICKEL, Pursuer (Respondent).—*Horne, K.C.*—*D. P. Fleming.*July 11, 1913. MRS SARAH M'COARD, Defender (Appellant).—*M'Lennan, K.C.*—*MacRobert.*Mickel v.
M Coard.

Expenses—Taxation—Sheriff Court expenses awarded on appeal in Court of Session—Scale of taxation—Time for determination of scale—C. A. S., 1913, M. ii.

The C. A. S., 1913, M. ii., provides that, in actions for damages in the Sheriff Court, expenses shall be taxed on a higher or a lower scale according to whether or not the sum decerned for exceeds £50, unless the Sheriff shall direct otherwise.

In an action of damages in the Sheriff Court the pursuer was awarded £100, but on appeal to the Court of Session that sum was reduced to £50 with expenses. The Auditor of the Court of Session having taxed the Sheriff Court expenses on the lower scale, the pursuer lodged a note of objections.

Held that the Auditor had rightly taxed the expenses on the lower scale, and *observed* that, if the pursuer desired taxation on the higher scale, he should have moved for an instruction to the Auditor to that effect at the time when he obtained his award of expenses, it being too late to raise the question by way of objection to the Auditor's report.

2D DIVISION. (SEQUEL to previous report, *supra*, p. 896.)

Sheriff of
Lanarkshire.

On 1st June 1911 Robert Mickel brought an action in the Sheriff Court at Glasgow against Mrs Sarah M'Coard, concluding for payment of £350 in respect of damage to a house belonging to the pursuer of which the defender was the tenant.

On 15th February 1912, after a proof, the Sheriff-substitute (Craigie) decerned against the defender for payment of £100 as damages and found her liable in expenses.

On 19th March 1912 the defender appealed to the Court of Session, and on 26th March 1912 the defender lodged a minute by which she tendered £50 with expenses in full of the conclusions of the action.

The tender was not accepted, and the case was heard before the Second Division who, on 16th May 1913, recalled the interlocutor of the Sheriff-substitute, decerned against the defender for payment of £50 as damages, found the defender liable to the pursuer in expenses down to the date of the minute of tender, but subject to modification, found the pursuer liable to the defender in expenses subsequent to the date of the tender, allowed accounts thereof to be lodged, and remitted the same to the Auditor to tax and report.*

At the advising no motion was made to the Court with regard to the scale upon which the pursuer's account of expenses in the Sheriff Court should be taxed.†

* Reported *supra*, p. 896.

† The Codifying Act of Sederunt, 1913, M. ii., enacts:—

Sec. 1. "In the Ordinary Sheriff Court, except as after stated, there shall be two scales of taxation, viz., first, for causes where the amount of principal concluded for does not exceed £50; and second, for causes exceeding that amount. In all cases the Sheriff may appoint that expenses shall be subject to modification."

Sec. 2. "(1) The scale for taxation shall in the ordinary case be deter-

The pursuer lodged an account of his expenses down to the date July 11, 1913. of the tender, amounting in the Sheriff Court as stated on the higher scale to £197, 17s. 1d. and in the Court of Session to £15, 18s. 6d. Mickel v.
M'Coard.

The Auditor taxed the expenses in the Sheriff Court on the lower scale at £124, 8s. 2d., and in the Court of Session at the sum claimed, viz., £15, 18s. 6d.

The pursuer lodged a note of objections to the Auditor's report, "in so far as the Auditor has taxed the pursuer's account in the Sheriff Court on the lower scale."

Counsel were heard on the Auditor's report and the note of objections on 11th July 1913 in the Single Bills of the Second Division.

Argued for the pursuer;—(1) Under the C. A. S., 1913, M. ii. (which embodied the Act of Sederunt, 10th April 1908), the power of determining the scale upon which expenses in the Sheriff Court should be taxed was conferred on the Sheriff alone. The case of *Thomson v. Glasgow Taxi-Cab Company, Limited*,¹ was not an authority against this view, because there the pursuer's acceptance of a tender of £25 made it clear that expenses on the higher scale could never have been given in the Sheriff Court. In the case of *Reid v. North Isles District Committee of County Council of Orkney*,² the Court had remitted to the Sheriff to exercise his discretion in analogous circumstances. In the present case the pursuer's expenses should have been taxed on the higher scale originally allowed by the Sheriff, or at least the case should be remitted to the Sheriff in order that he might fix the scale in view of the judgment of the Court upon the appeal. (2) In the circumstances only a slight modification of the pursuer's expenses should be allowed.

Argued for the defender;—(1) The Auditor had acted rightly. Having no instructions to the contrary, he had acted in conformity with the Act of Sederunt which provided that the scale for taxation should be regulated by the amount decerned for.³ The Court of Session had an absolute discretion as to expenses in all cases, but if a litigant desired special treatment he should ask for it at the proper time. If the pursuer had wanted to have his expenses taxed on the higher scale, he should have made a motion to that effect when the judgment was pronounced. (2) In the circumstances the defender was entitled to a substantial modification of the pursuer's account of expenses.

LORD JUSTICE-CLERK.—A question has been raised regarding the scale upon which the pursuer's expenses in the Sheriff Court should be taxed. It is too late now to raise this question. According to the Act of Sederunt the scale of taxation in an action of damages is determined by the sum decerned for, and as our decerniture was for a sum of £50, the Auditor has acted rightly in taxing the pursuer's expenses upon the lower scale. If the

mined by the principal sum concluded for, but in all cases it shall be competent to the Sheriff to direct that the expenses shall be taxed according to the scale applicable to the amount decerned for. . . . (3) In actions of damages, the scale for taxation of the account between party and party shall for the pursuer's Agent be regulated by the sum decerned for, unless the Sheriff shall otherwise direct."

¹ (1911) 1 S. L. T. 375.

² 1912 S. C. 627.

³ C. A. S., 1913, M. ii. 2 (3).

July 11, 1913. pursuer desired a different scale to be applied, he should have made the appropriate motion before the account was remitted to the Auditor.
 Mickel v. M'Coard.

As to the amount of modification, this is a matter which can only be determined in a general way. My view is that the expenses of the pursuer in the Sheriff Court should be modified to £100.

LORD DUNDAS.—I agree.

LORD SALVESEN.—The only point of general interest is what is to happen when an award by the Sheriff for a sum which implies taxation on the higher scale has been reduced by this Court to one for a sum to which the lower scale is in ordinary circumstances appropriate. I am clear that we have power to deal with the scale of taxation. I am also clear that if any question is to be raised on that point, it should be raised at the time when judgment is pronounced, for the Auditor should receive his instructions at the time when the account is remitted to him. There need be no difficulty if counsel have the provisions of the Act of Sederunt in view when the case is disposed of, and move the Court then to tax the accounts upon the scale which they think appropriate. It is too late to come back to the Court after the Auditor has dealt with the matter. The question comes up upon a note of objections, but these objections are untenable seeing that the Auditor has already taxed the account upon the only scale which it was competent for him to apply.

As regards modification, I think that substantial justice will be done if the pursuer's account is modified to the extent indicated by your Lordship.

LORD GUTHRIE.—I concur with your Lordship in the chair.

THE COURT pronounced this interlocutor:—" . . . Approve of the Auditor's report on the pursuer's account . . . and decern and ordain the defender to make payment of the sum of £115, 18s. 6d., the amount contained in said account as taxed and modified."

W. B. RANKIN & NIMMO, W.S.—CUMMING & DUFF, S.S.C.—Agents.

No. 147.

WILLIAM ADAMSON, Pursuer (Respondent).—*Cooper, K.C.—D. P. Fleming.*

July 12, 1913.

GEORGE ANDERSON & COMPANY (1905), LIMITED, Defenders (Appellants).—*Constable, K.C.—MacRobert.*

Adamson v. George Anderson & Co. (1905), Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—Accident arising out of and in the course of the employment—Injury by falling slate during a gale.

During a severe gale an engineer's fitter was engaged in erecting machinery in an open yard near to a building from the roof of which slates were being blown. While stooping to adjust a large piece of machinery he was struck on the head by a falling slate and injured.

Held that the arbitrator was entitled to find that the accident arose out of the employment.

IN an arbitration under the Workmen's Compensation Act, 1906, July 12, 1913. between William Adamson and his employers, George Anderson & Company (1905), Limited, the Sheriff-substitute at Dundee (Neish) awarded compensation, and at the request of the employers stated a case for appeal.

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Anderson &
Co. (1905),
Limited.

The case set forth :—

" By joint minute of admissions the following facts (reserving all questions of relevancy and competency) were admitted :—

1st DIVISION.
Sheriff of
Forfarshire.

" 1. On 26th November 1912 the pursuer in the course of his employment with defenders as a foreman fitter was engaged in erecting a stone-planing machine in the yard of Messrs John Emery & Sons, masons, builders, and contractors, Polmadie, Glasgow, to which they were then in course of removing from their former yard in another part of the city. The new yard in question is on the north-east side of the eastern division of Jessie Street, Polmadie, Glasgow. Messrs Emery purchased from defenders a new stone-planing machine, defenders undertaking in their contract to erect same in the new yard, and also the old machines brought from the former yard, which they did. Pursuer, as foreman fitter for defenders, was in charge of and did this work.

" 2. On the west of Messrs Emery & Sons' yard and next to it is the yard of Messrs Montgomery & Strachan, saw millers, the entrance to which is on the same side of Jessie Street as the entrance to the yard of Messrs Emery. In the yard of Messrs Montgomery & Strachan is a building used as a wood-store, running back from and at right angles to Jessie Street and parallel with Messrs Emery's yard. This wood-store is a building about 76 feet in length and is approximately 21 feet 10 inches in height to the wall head from the ground level, and approximately 31 feet 6 inches in height to the ridge of the roof from the ground level. Between said wood-store and the western boundary of Messrs Emery & Sons' yard is a yard or open space about 50 feet in width, on the west of the yard being said wood-store, and on the east a wooden paling or fence about 6 feet in height, which divides it from the said yard of Messrs Emery & Sons.

" 3. On said 26th November 1912 a very violent gale from the south-west was raging. As a result of the gale, slates, chimney-cans, iron roofing, bricks, stones, and other parts of buildings were blown from the roofs of a number of houses and other buildings in Glasgow, and several passengers in the streets, a few persons inside buildings, and others, received injuries. In particular, during the more violent gusts of wind, a considerable number of slates were blown off the roof of said wood-store, some of them into Messrs Montgomery & Strachan's yard and others into the yard of Messrs Emery & Sons.

" 4. During the gale, and between eleven and twelve o'clock on 26th November aforesaid, pursuer was engaged in the open air stooping over and placing in position a large spur wheel, and tightening a nut, forming part of said stone-planing machine which he was erecting in Messrs Emery's said yard as aforesaid. There were a number of men in the employment of Messrs Emery & Sons and others also working in the open air in said yard. Said spur wheel had just been lowered into position by means of a hand-crane belonging to Messrs Emery & Sons. Said machine was being erected at a point in Messrs Emery's said yard about 127 feet 6 inches from the north-east corner, and about 172 feet from the south-east corner of said wood-store belonging to Messrs Montgomery & Strachan. While so engaged

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pursuer was struck and injured on the head by one of said slates blown from off the roof of said wood-store. Owing to the pursuer's stooping position at his work at the time he did not see the slate coming, and was thereby prevented from dodging it, as that and other slates were dodged by other workmen there at the time. Owing to the then incomplete state of Messrs Emery's yard—due to the fact that the fitting-up of same was not yet finished—the place where said machine was being erected was not enclosed and roofed in, as it now is and was then intended to be (after erection of this and other machines), by a wooden shed which would, had it been there then, have protected the pursuer from the injuries he received as aforesaid. The shed was not put up by defenders, and was not meant to be erected before completion of pursuer's work. It contains and protects said stone-planing machine and other machines used by Messrs Emery in said yard." The parties further admitted that the pursuer, as a result of his injuries, was at present totally incapacitated for work, and renounced probation.

The Sheriff-substitute's finding was as follows:—"I found in fact in terms of the minute of admissions (Nos. 4 and 6 of process). I found in fact and in law that the respondent was injured by accident arising out of and in the course of his employment, and awarded the respondent compensation at the rate of £1 sterling per week from 26th November 1912 until the further orders of the Court."

The question of law for the opinion of the Court was:—"Whether there was evidence upon which it could competently be found that the personal injury sustained by the pursuer and respondent was the result of an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906?"

The case was heard before the First Division (without Lord Mackenzie) on 21st June 1913.

Argued for the appellants;—The accident did not arise out of the pursuer's employment. The risk to which he was exposed was not peculiar to the place of his employment or to the posture he had assumed. It was a risk common to all who were out of doors in every part of Glasgow on the day of the accident.¹

Argued for the respondent;—The nature of the pursuer's employment, which kept him working in an exposed yard, and the stooping posture he was forced to assume at his work, which prevented him from keeping a lookout for falling slates, exposed him to a risk that was not common to all who were out of doors on that day. It was an extra risk incidental to his employment, and justified the finding that the accident had arisen out of that employment.²

¹ Blakey v. Robson, Eckford, & Co., Limited, 1912 S. C. 334, Lord President, at p. 338; Rodger v. Paisley School Board, 1912 S. C. 584; Warner v. Couchman, [1912] A. C. 35; Revie v. Cumming, 1911 S. C. 1032, Lord President, at p. 1034.

² Blakey v. Robson, Eckford, & Co., Limited, 1912 S. C. 334, Lord President, at p. 337; M'Neice v. Singer Sewing Machine Co., Limited, 1911 S. C. 12; Millar v. Refuge Assurance Co., Limited, 1912 S. C. 37; Manson v. Forth and Clyde Steamship Co., Limited, *supra*, p. 921; Andrew v. Failsworth Industrial Society, Limited, [1904] 2 K. B. 32; Challis v. London and South-Western Railway, [1905] 2 K. B. 154; Ismay, Imrie, & Co. v. Williamson, [1908] A. C. 437.

At advising on 12th July 1913,—

July 12, 1913.

LORD JOHNSTON.—This case is lucidly stated by the learned Sheriff-substitute by reference to a comprehensive minute of admissions.

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The material facts are that a foreman fitter was engaged on 26th November 1912, in the employment of an engineering firm, in fitting up heavy stone-planing machinery in a builders' yard which at the time was not covered in. An exceptionally severe storm occurred on that day, sufficiently severe to justify the admission that, "As a result of the gale, slates, chimney-cans, iron roofing, bricks, stones, and other parts of buildings were blown from the roofs of a number of houses and other buildings in Glasgow, and several passengers in the streets, a few persons inside buildings, and others, received injuries; in particular, during the more violent gusts of wind, a considerable number of slates were blown off the roof of" an adjoining wood-store, some of them into the yard in which Adamson was working. While engaged in his work Adamson was struck and injured on the head by one of the slates blown off the roof of the above-mentioned wood-store. At the moment Adamson "was engaged in the open air stooping over and placing in position a large spur wheel, and tightening a nut, forming part of said stone-planing machine which he was erecting."

The Sheriff-substitute has found that Adamson was injured by accident arising out of and in the course of his employment. I am of opinion that there is nothing to justify this Court in disturbing the Sheriff-substitute's judgment. We are not concerned with whether the accident arose in the course of the employment; the question is, did it arise out of the employment? No doubt the question whether an accident arises out of a man's employment is often a very difficult one, and this case is very near the border line; on which side it is to fall is, I think, a question of mixed law and fact. But I cannot find that the Sheriff's conclusion is affected by any wrong view of the law. Its soundness depends, I think, entirely upon whether the facts have been rightly estimated with reference to the law.

This case is one of the class where a workman is injured by accident arising from a cause or state of circumstances to which all persons are more or less exposed, such as street traffic, severe weather, &c. In these cases the risk is a common or normal risk, and the question broadly put is whether the workman's exposure to it was abnormal or excessive by reason of his employment. If it is the normal risk merely which causes the accident, the answer must be that the accident did not arise out of the employment. But if the position which the workman must necessarily occupy in connection with his work results in excessive exposure to the common risk,¹ or if the continuity or exceptional amount of exposure aggravates the common risk,² then it is open to conclude that the accident did not arise out of the common risk but out of the employment.

It was said by the County Court Judge in *Andrew's* case³: "In this case, therefore, if I come to the conclusion that, as a matter of fact, the

¹ Cf. *Ismay, Imrie, & Co.*, [1908] A. C. 437; *Rodger*, 1912 S. C. 584.

² Cf. *M'Neice*, 1911 S. C. 12; *Warner*, [1912] A. C. 35.

³ [1904] 2 K. B., at p. 35.

July 12, 1913. position in which the man was working was dangerous, and that, in consequence of the dangerous position, the accident occurred, I could fairly hold that the accident arose out of the employment. Now was it a dangerous position? Was the man exposed to something more than the normal risk, which everybody, so to speak, incurs at any time and in any place during a thunderstorm? We know that lightning is erratic, and possibly no position or circumstances can afford absolute safety. But, if there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of his employment; and if, in consequence of that extra danger, a fatality occurs, I am entitled to say that the section applies, and the applicant is entitled to recover"; and in quoting with approval this statement, Collins, M.R., added: "I should be unable, I think, to frame a more accurate direction than this, if I had to direct a jury in such a case."

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I think that on such a direction the learned Sheriff-substitute here was entitled to find for the workman in respect that, though the results of a storm of such intensity as occurred on 26th November 1912 are a general risk, the fact that he was engaged in the open air bending over to adjust heavy machinery is a fact from which it may reasonably be deduced that under the circumstances of his particular vocation he was exposed to something apparently beyond the normal risk, and that to this abnormal exposure the accident was attributable. If so, we cannot disturb his verdict.

LORD PRESIDENT.—I am of the same opinion. I think the case is a narrow one, but, after all, the point that we have to decide is whether there was evidence on which the learned Sheriff-substitute as arbitrator was entitled to come to the conclusion at which he arrived. I think there was.

Upon the general law on the matter, I do not think I need say any more, because I really said all I had to say in *Blakey v. Robson, Eckford, & Company*.¹

LORD KINNEAR concurred.

THE COURT answered the question of law in the affirmative, and dismissed the appeal.

WARDEN & GRANT, S.S.C.—BONAR, HUNTER, & JOHNSTONE, W.S.—Agents.

¹ 1912 S. C. 334.

DAMPSKIBSSELSKABET DANMARK (Owners of s.s. "Helge") AND OTHERS, No. 148.

Pursuers (Respondents).—*M'Clure, K.C.—W. T. Watson.*

CHRISTIAN POULSEN & COMPANY, Defenders (Reclaimers).—

Sandeman, K.C.—C. H. Brown.

July 10, 1913.

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Danmark v.
Poulsen & Co.

Ship—Charter-party—Demurrage—Exceptions—Strikes—Loading delayed by strike—Liability of charterers—Failure of charterers to take reasonable measures to ensure timeous delivery of cargo.

A charter-party for the carriage of a cargo of coal, which stipulated for the completion of the loading within a certain period, contained a clause exempting the charterers from liability for time lost through "strikes," or any unavoidable accidents beyond their control, "preventing or delaying the working, loading, or shipping of the said cargo."

In an action for demurrage against the charterers they pleaded this clause of exception, averring that the delay had been caused by a strike. It was proved (1) that a strike of coal-trimmers had caused the colliery company, with whom the charterers had contracted for delivery of the coals, to restrict their output, and they did not deliver the coals in time for the loading which, but for the strike, they would probably have done; but (2) that the contract between the charterers and the colliery company contained no clause binding the company to deliver the coals in time for the loading; and (3) that it would not have been impossible for them to deliver the coals in time had they been bound to do so.

Held that the defenders were liable in demurrage, in respect that—even if the strike were the direct cause of the delay, which was not proved—the failure of the charterers to contract for the timeous delivery of the coal was a failure to take reasonable measures to prevent avoidable delay, which excluded them from the benefit of the exception in the charter-party.

ON 26th September 1911 Dampskibsselskabet Danmark, Copenhagen, Denmark, registered owners of the steamship "Helge," and Beveridge, Sutherland, & Smith, W.S., Leith, their mandataries, brought an action against Christian Poulsen & Company, coal exporters, Glasgow, concluding for payment of £142, 10s. as demurrage due to them by the defenders for a period during which the "Helge" had been detained in loading a cargo beyond the time stipulated in a charter-party entered into between the parties.

2D DIVISION.
Lord Cullen.

The charter-party, which was dated 5th July 1911, stipulated that the "Helge" should proceed to Leith, whence, after loading a full cargo of coals of about 2550 tons, she was to proceed to Cronstadt. The cargo was to be loaded in eighty-four running hours, commencing "not before 6 A.M. on the 15th/17th July," and counting from the date when notice was given to the charterers' agents.

The charter-party further provided:—

"6. If the steamer be detained beyond her loading time, the charterers to pay demurrage at the rate of 16/8 per running hour.

"The parties hereto mutually exempt each other from all liability (except under the strike rules) arising from or for time lost through riots, strikes, lockouts of workmen, or disputes between masters and men, or by reason of accidents to mines or machinery, obstructions on railways or in harbours (not including congestion of ships or traffic), or by reason of frosts, floods, fogs, storms and any unavoidable accidents and hindrances beyond their control, either preventing

July 10, 1913. or delaying the working, leading, or shipping of the said cargo, occurring on or after the date of this charter until the expiration of the loading time; and thereafter if the steamer be not available.”

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The pursuers averred that the “Helge” arrived at Leith on 16th July 1911. Notice of readiness to load was duly given on the following morning, and the running hours commenced at 9 A.M. on that day, and expired at 9 A.M. on 20th July. The loading was not completed till 3 A.M. on 28th July, and as a result the vessel was detained for 174 hours, in respect of which the demurrage due under the charter-party amounted to £142, 10s.

In reply to the pursuers’ claim, the amount of which was not in dispute, the defenders founded on the exception clause in the charter-party above quoted, and averred that they “contracted with colliery companies to supply the cargo of coal required to be provided by the said charter-party, and that, but for the occurrence of strikes and also stoppages of the collieries and unavoidable hindrances beyond the defenders’ control which delayed the working, leading, and shipping of the cargo, the same would have been loaded without any demurrage being incurred. In particular, a strike of dock coal-trimmers started on 5th and continued till 12th July 1911. This caused delay in the loading up of vessels booked to the said collieries, and resulted in stoppages at the pits from which coal for fulfilling the charter was being obtained on 7th, 8th, 10th, 11th, and 12th July, which in turn prevented the colliery from producing and forwarding in time the coal bought by the defenders, as otherwise would have been the case. In the result, the defenders were unable to get the cargo forward, through no fault of their own.”

In answer to this defence the pursuers averred that the cause of the delay was not the strike, but the failure of the defenders to contract with the colliery companies for the timeous delivery of the coal.

The facts relating to this defence are fully stated in the opinion of the Lord Ordinary.

The pursuers pleaded;—The defenders having failed to load said steamship “Helge” within the running hours specified in the charter-party and demurrage having been thereby incurred to the amount of the sum sued for, the pursuers are entitled to decree as concluded for.

The defenders pleaded, *inter alia*;—(4) The delay complained of having been due to causes in respect of which the defenders are exempted from liability under the terms of the charter-party, they should be assolizied.

On 26th July 1912 the Lord Ordinary (Cullen), after a proof, decerned against the defenders for payment to the pursuers of the sum sued for.*

* “OPINION.—[After narrating the terms of the charter-party]—The facts which are founded on by the defenders as bringing in the exception clause are as follows:—Between 5th July and 12th July there was a strike of dock coal-trimmers and scutchers at Leith. This prevented the loading of coal during that period. In consequence, collieries sending coal for shipment to Leith Docks had to restrict their output, as the coal already forward was not being shipped, and there was thus no outlet. In particular, the Edinburgh Collieries Company, Limited, with whom the defenders had placed an order for 1500 tons of Lothians steam coal for the ‘Helge’ was affected in this way. After the strike ended on 12th July there were arrears of shipment, and more ships wanting coal than could be at once

The defenders reclaimed, and the case was heard before the Second July 10, 1913. Division (without Lord Salvesen) on 12th and 13th June 1913.

Argued for the reclaimers;—The cause of the delay was the strike, or—which was the same thing¹—the congestion following on the termination of the strike; and accordingly the defenders were protected by the exemption clause in the charter-party. With regard to the contract between the defenders and the Edinburgh Collieries Company, the Lord Ordinary had taken a wrong view of the facts. On a sound construction of the contract, the colliery company were bound to deliver the coal for loading on 15th/17th July. But even if this were not so, the defenders' position was unaffected. Their duty was to act reasonably,² but they were not bound to take extraordinary measures to prevent delay.³ They had made a contract which under ordinary circumstances would have ensured timeous delivery of the coal. They were not bound to foresee a strike and to make provisions for neutralising its effect.

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supplied with it. Delays in loading thus took place, and, in particular, the 'Helge' was delayed in her loading to the extent of the time already stated.

"The answer made by the pursuers is that the defenders did not take due steps to provide a cargo for the 'Helge,' and that the delay in loading was due to this cause and not to the effects of the strike. They allow that had the strike not occurred there is every probability that the 'Helge' would have been loaded timeously. But they say that the defenders failed duly to arrange for the punctual supply of 1700 tons of the 2500 tons loaded, and that the evidence does not prove that if they had made due arrangements for such supply the strike would have had the effect of preventing the steamer from being loaded within the running hours.

"The defenders start with an absolute obligation to provide a cargo, so far as not qualified by exceptions in the charter-party; and the onus is on them to prove that the facts of the case bring them within the exception clause already quoted. This clause is not limited to strikes preventing or delaying only the shipping, but extends to the effect of strikes in preventing or delaying 'the working, leading, or shipping' of the cargo. It thus seems to contemplate the ship being booked for one or more particular collieries, and to intend to provide for the effects of a strike on these collieries.

"I shall now advert to the facts relating to the providing of the cargo by the defenders. They placed an order with the Ormiston Colliery for 800 to 1000 tons. The colliery obliged themselves only for 800 tons, and the remaining 200 tons were in their option. They exercised the option by supplying only 800 tons, which were loaded within the running hours. The reason why they did not supply 1000 tons was the restriction of their output consequent on the said strike. But as the defenders had made no firm bargain for 1000 tons they were, so far, left without any actual provision for 200 tons of the cargo. And they did not find this 200 tons until 26th July, and it was not shipped until 27th July.

"For the remaining 1500 tons the defenders placed an order with the Edinburgh Collieries Company, Limited. The colliery company's sale-note is No. 14 of process. It is dated 5th July, and bears that the coal is 'to be shipped this month, as may be mutually arranged. We do not undertake any liability for loading time unless under written guarantee.' The contract

¹ Leonis Steamship Co., Limited, v. Rank, (1908) 13 Com. Cas. 161, *aff'd*. p. 295; Moor Line, Limited, v. Distillers Co., Limited, 1912 S. C. 514; Richardsons v. M. Samuel & Co., [1898] 1 Q. B. 261.

² Milverton Co., Limited, v. Cape Town and District Gas Light and Coke Co., Limited, (1897) 2 Com. Cas. 281.

³ The "Alne Holme," [1893] P. 173.

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Argued for the respondents;—The authorities cited by the claimers had no application, for they were all cases where a cargo had been supplied, and where the only question was as to delay in loading or discharging. The obligation of the charterers to supply cargo was absolute,¹ and they could derive no protection from the "strikes" clause in the charter-party even if they had been able to prove—which they had failed to do—that, whatever contract had been made with the colliery company, the strike would still have delayed delivery of the coal. The strike and consequent restricted output of coal were not causes of delay in the sense of the exemption clause.² Further, on the evidence—of which the Lord Ordinary had taken the correct view—it appeared that the true cause of the delay was not the strike, but the failure of the defenders to make a binding contract with the colliery company for the timeous delivery of the coal. Such a contract would in all probability have prevented delay,

thus gave the company until 31st July to supply the coal, apart from mutual arrangement. The company have all along maintained this construction of the contract, and Mr Bonnington, their representative, who gave evidence for the defenders, reiterated it. It may not be of moment what the company maintain as matter of construction, but their construction appears to me to be right.

"The way in which the terms of this contract, so construed, bear on the question at issue is this. After the strike terminated the Edinburgh Collieries Company, Limited, had enough Lothian steam coal at their command to suffice for the loading of 1500 tons on the 'Helge' within the running hours. The 'Helge' was berthed for loading after arrival, but was more than once unberthed because there was no more coal forward for loading her. Coal was forward from the Edinburgh Collieries Company, Limited, for other ships which they had undertaken to supply, and these ships got their coal. They were to some extent 'preference ships,' preferable because of running contracts under which they were periodically supplied by the Edinburgh Collieries Company. Mr Bonnington states that once a vessel is berthed for loading it is not the practice to unberth her in favour of a preference or other vessel if there is coal forward for her. And he further says that the reason why the 'Helge' was unberthed and delayed was that there was not sufficient coal forward for her, and that this was due to the effects of the strike, which delayed them in supplying all the ships which they had undertaken to supply. He says further that, but for the strike, they would have been able to give the 'Helge' the 1500 tons within the running hours, and I see no reason to doubt this. The pursuers' point, however, is that, owing to the latitude of time given to the colliery company in the defenders' contract with them, the company was under no obligation to forward coal for the 'Helge' at any given time prior to the end of July; that if the contracts had bound them to provide coal punctually for the 'Helge' when her arrival was notified to them, it is to be presumed that they would have fulfilled their obligation; and that it is not proved that if they had been so bound they could not have done so, notwithstanding the strike. I am of opinion that the pursuers' contention is right. The Edinburgh Collieries Company had enough Lothian steam coal at their command to suffice for loading 1500

¹ Ardan Steamship Co., Limited, v. Weir & Co., (1905) 7 F. (H. L.) 126, per Lord Chancellor Halsbury, at p. 127; "Arden" Steamship Co., Limited, v. Mathwin & Son, 1912 S. C. 211.

² Gardiner v. Macfarlane, McCrindell, & Co., (1893) 20 R. 414; Grant & Co. v. Coverdale, Todd, & Co., (1884) 9 App. Cas. 470, per Lord Chancellor Selborne, at p. 475; Lilly & Co. v. Stevenson & Co., (1895) 22 R. 278, per Lord Wellwood, at p. 282, Lord Trayner, at p. 285.

and was an obvious and reasonable precaution which the defenders July 10, 1913.
 had neglected to take. As it was, they gave the colliery company
 the right to postpone delivery till the end of the month, and the
 company took advantage of this option, with the result that the
 loading of the vessel was delayed.

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At advising on 10th July 1913,—

LORD DUNDAS.—It is common ground between the parties that, though the running hours prescribed by her charter-party for the loading of the “Helge” expired on the evening of 20th July, her cargo was not in fact fully loaded until the early morning of the 28th. The defenders further admit that if, under the circumstances, demurrage is due at all, which they deny, they are liable in the sum sued for by the pursuers. The question of legal liability as between the parties, in view of the admitted fact that the cargo was not fully furnished in proper time, is a difficult one to decide; but I have come to the conclusion that the interlocutor reclaimed against is right.

The material facts of the case lie within narrow compass; they are summarised by the Lord Ordinary, and I need not go over them again. The whole question turns upon clause 6 of the charter-party, which, shortly read, provides that “the parties hereto mutually exempt each other from all liability . . . arising from or for time lost through . . . strikes . . . or by reason of . . . any unavoidable accidents or hindrances beyond their control, either preventing or delaying the working, leading, or shipping of the said cargo.” The words are peculiar. They have not, so far as I am aware, been used in any charter-party which has been brought to the notice of the law Courts. Causes delaying “the working, leading, or ship-

tons on the ‘Helge’ within the running hours. Having other ships to supply, and not enough coal for all, they might, in fact, have acted in one way or another in distributing the supply among them, even if they had undertaken to supply the ‘Helge’ punctually on her arrival. But I do not know what precisely were their contract obligations towards these other ships. And in the present question I think I must presume that, had the defenders taken them bound to supply the ‘Helge’ punctually on her arrival with the 1500 tons, they would have duly implemented their obligation. The evidence does not show that they could not have done so.

“Apart from the delay in shipping the 1500 tons from the Edinburgh Collieries Company, the 200 tons, which the defenders had made no bargain for with the Ormiston Colliery Company or otherwise, was not ordered until 26th July, and not shipped until 27th July. It is true that, owing to the strike, the defenders had difficulty in providing this part of the cargo after the Ormiston Company decided to supply only 800 tons. But they were, I think, at fault in making no more provision for this part of the cargo than a precarious one, dependent on the option of the Ormiston Colliery Company to supply it if it suited them to do so.

“On the whole matter I am of opinion that the defenders, on whom the onus lies, have not proved that the delay in loading the ‘Helge’ was due to the effects of the strike. It may be quite true to say that, but for the strike, the ‘Helge’ would have been loaded within the running hours. But, notwithstanding the strike, she might have been timeously loaded had the defenders made due provision for her being punctually supplied with cargo. This, in my opinion, they failed to do.

“Following these views, I shall grant decree for the sum sued for.”

July 10, 1913. ping" of the cargo seem to me clearly to extend to something much wider than the mere loading; i.e., to things occurring in the "working" at the collieries, or the "leading" of the coal by train or otherwise from the pits to the harbour. This view is strengthened by words (not above quoted) in clause 6 about "accidents to mines or machinery, obstructions on railways and in harbours," &c. It was, I think, intended that the charterers should be protected in the case of some causes of delay not merely in the loading, but in the furnishing of, the cargo, e.g., a strike or a serious breakdown of machinery occurring at the pits from which the charterers had contracted to get their coal at the proper time, or the collapse of a bridge upon the only railway line of communication. In such cases I think the defenders would probably have had a good answer, upon their contract in the charter-party, to a claim by the pursuers in respect of consequent delay in furnishing the cargo, provided they had taken all reasonable measures in their power towards expediting its advance. But the question still remains whether, in the circumstances which have occurred, the charterers are not liable to the shipowners in demurrage arising from the delay in furnishing this cargo, in respect that they failed to take such measures.

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The Lord Ordinary has held, upon the evidence, that but for the strike among the coal-trimmers the "Helge" would probably have been duly loaded within the running hours; but also that, notwithstanding the strike, she might have been timeously loaded if the defenders had taken the collieries from which the cargo was to be supplied bound by their contracts to forward the coal in proper time. I think these conclusions are warranted by the evidence. The defenders' contract with the Edinburgh Collieries Company for the supply of 1500 tons is contained in the printed correspondence. I rather think the pursuers' counsel are right in their suggestion that the four documents, all dated 5th July 1911 and numbered 7, 8, 9, and 10 respectively, are not printed in strictly chronological order; and that the sequence of these should probably be 8, 10, 7, and 9. This matter is not made clear in the parole evidence, as it should have been; but I do not think it is very important. We must consider the correspondence as a whole in order to decide what, reading it according to the natural and ordinary meaning of the words used, is the true import of the contract. So reading the documents, I find it impossible to avoid the Lord Ordinary's conclusion that "the contract . . . gave the company until 31st July to supply the coal, apart from mutual arrangement." It is hardly necessary to say anything about the defenders' contract with the Ormiston Colliery. That company had clearly an option, which they exercised, of declining to supply more than 800 tons. But the coal which the defenders obtained elsewhere, in order to make up the remaining 200 tons, was all shipped before the full amount of the Edinburgh Collieries' contract was put on board; and the delay in loading thus really arose in connection with that part of the cargo.

It is, of course, well-settled law that (to use the often quoted words of Lord Blackburn in *Postlethwaite v. Freeland*¹) "in the absence of something to qualify it, the undertaking of the merchant to furnish a cargo is

¹ (1880) 5 App. Cas. 599, at p. 620.

absolute." If he fails in that undertaking, he will certainly, apart from July 10, 1918. special contract, be liable in demurrage. For the contract one must look to the charter-party; and though, of course, a charter-party may be so framed as to exempt the charterer, under specified circumstances, from his absolute legal obligation, I think the exemption must be expressed in very clear language. The contract must, I apprehend, be strictly read. The Court will not lightly infer that the shipowner has agreed to relieve the charterer from liability for delays which he (the owner) has no possible means of preventing or lessening; still less for delays which the charterer himself could, by due diligence, have avoided. Where there is, as here in fact, a delay in furnishing the cargo, I think the onus is on the charterer to prove not only that the delay arose from one or other of the specified causes which, by the contract of charter-party, are to form grounds of exemption, but also that he did all in his power, by way of reasonable precaution or exertion, to avoid it. He is not entitled to fold his arms and do nothing, relying implicitly upon his clause of exemption. I may refer to the observations of Lord Esher, M.R., in *Bulman*,¹ and also to *Gardiner v. Macfarlane, McCrindell, & Company*,² where the charterers were not excused for their failure to have a cargo ready—withstanding their exemption clause—because the furnishing of the cargo was not rendered impossible by causes beyond their control; they failed to make arrangements to secure that they would get the coals in time, and the Court therefore held that they had taken the risk of anything occurring to prevent this.

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In the present case, even if it be assumed in the defenders' favour—and I do not think such an assumption could, upon the evidence, be justified—that they have proved that the strike was the *causa causans* of the delay, they would still, in my judgment, have to show that they had done everything they could reasonably be expected to do, in order to avoid the delay, and this, I think, the defenders cannot show. They did not, if I am right in my conclusion as to the true import of the contract, make a firm bargain with the Edinburgh Collieries Company for the timeous delivery of the coal—a precaution which they can hardly say would not have been a reasonable one to take, seeing that they maintain they intended to take it, and argue (I think erroneously) that they did effectually do so. The Lord Ordinary has held, and I think the evidence warrants him in so holding, that that company could, notwithstanding the strike, have supplied the full 1500 tons within the running hours, if they had been taken bound by their contract to do so. The defenders' counsel insisted that their clients, having secured by clause 6 of the charter-party, an absolute indemnity against all liability for delay in consequence of strikes, were not bound to have taken steps to avoid or lessen delay arising from that very cause—to neutralise, as they put it, the effect of the strike. I think the answer is that clause 6 did not furnish the defenders with an absolute indemnity. Such a clause of exemption, though it will avail to protect the charterer in many cases from liability which would otherwise have attached to him, when he has done his best to provide for the cargo being ready in proper time, will not, in my judgment, extend to relieve him from his inherent

¹ [1894] 1 Q. B. 179, at p. 185.

² 20 R. 414.

July 10, 1913. obligation to take all reasonable measures towards that end, and if he fails to do so, he must take the risk of consequences, if something happens, which might have been avoided, to prevent the due furnishing of the cargo. It seems to me that the true effect of the exemption clause is to alter the incidence of unavoidable loss as between two "innocent" parties, but that it does not extend to relieve the party originally responsible (the charterer) from his duty to avoid or minimise the loss by all means which he can reasonably adopt. The limits of that duty, in the particular circumstances of any given case, must in the last resort be determined by the Court, and the books abound in illustrations of the point (e.g., *Richardsons*,¹ *The "Alne Holme,"*² *"Arden" Steamship Company, Limited*,³ *Carver on Carriage by Sea*, (5th ed.) secs. 257(a), 258, 258(a), and cases cited). It seems to me that in the circumstances of this case the defenders fell short of their legal duty in failing to make a binding bargain with the collieries that the coal should arrive in due time for loading within the stipulated days. For the reason stated, I think we ought to adhere to the interlocutor reclaimed against.

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LORD GUTHRIE.—The essential facts in this case are not in dispute. The defenders admit the period of delay alleged by the pursuers, and the amount of demurrage, if demurrage is due; and the pursuers admit the facts as to the duration and effect, direct and indirect, of the strike at Leith, the port of loading, on which the defence is founded.

The first question is one of construction. The delay to the "Helge," the pursuers' vessel chartered by the defenders to carry about 2550 tons of coal, loaded at Leith, from Leith to Cronstadt, arose from the action of the Edinburgh Collieries Company—who had contracted to supply 1500 tons of the cargo—in not forwarding the coals contracted for in time to enable the defenders to complete the loading by the evening of 20th July, the expiry of the loading days under the charter-party. Delay which occurred in connection with the balance of the cargo need not be considered, as the total delay and the pursuers' claim for demurrage would have been the same even if the balance of the cargo had been loaded within the loading days.

The question of construction arises under the contract between the defenders and the Edinburgh Collieries Company. The pursuers say that, whereas under the contract between them and the defenders, the latter had only till the evening of 20th July to load, the defenders' contract with the Edinburgh Collieries Company gave that company till 31st July. The defenders say that they intended to contract with the colliery company, so as to avoid any claim for demurrage under the charter-party, and Mr Poulsen admits that, if his view that they did so contract be right, the words "shipped this month" (which he says he did not notice till shortly before the proof) should not have been in the sale-note. I think the Lord Ordinary is right in holding that no such contract was made. There is no evidence that there would have been any difficulty in arranging with the Edinburgh Collieries Company for a 20th July limit. The terms of the sale-note of 5th

¹ [1898] 1 Q. B. 261.

² [1893] P. 173.

³ 1912 S. C. 211.

July, taken by themselves, are clear. The coal is "to be shipped this July 10, 1913. month, as may be mutually arranged. We do not undertake any liability for loading time unless under written guarantee." No doubt, in the case of a mercantile contract such as we are here dealing with, a sale-note like this, which is in the form of a letter, must be read along with the preceding and contemporaneous correspondence. But, so reading it, I cannot find any obligation on the Edinburgh Collieries Company to supply the coal earlier than 31st July, and the admitted facts, taken along with the correspondence, in whatever order the documents dated 5th July may be placed, negative Poulsen's suggestion that "as may be mutually arranged," referred to the name of the ship being communicated by the defenders to the Edinburgh Collieries Company. Such a communication could not be an "arrangement," and it would not explain the use of the word "mutually"; and, besides, the Edinburgh Collieries Company had received either previous or contemporaneous notice of the ship's name. "As may be mutually arranged," evidently refers to the amounts and dates of supply of coal, to be forwarded not later than 31st July. It is admitted that no written guarantee was given as to loading time; and it is not alleged that there was any contract between the parties, except what is contained in the documents.

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If, then, the defenders failed to carry out their intention to bind the Edinburgh Collieries Company to supply coal so as to enable them to load within the loading days, was this, as the pursuers allege, the cause of the defenders' failure to implement their contract under the charter-party? It was a natural and sufficient cause; and I am of opinion that it was the true cause.

In these circumstances, the onus is on the defenders to prove that, even supposing they had made the contract with the Edinburgh Collieries Company which they intended to make, the delay would still have occurred owing to another cause, for the effects of which they are not liable under their contract with the pursuers. The defenders maintain that such a cause was constituted by a strike, lasting from the 5th to 12th July, of dock coal-trimmers and scutchers at Leith, from the effects of which, direct and indirect, they are protected by the strike clause in the charter-party, especially these words, "The parties hereto mutually exempt each other from all liability . . . arising from or for time lost through . . . strikes . . . either preventing or delaying the working, loading, or shipping of the said cargo, occurring on or after the date of this charter, until the expiration of the loading time." The facts of this case do not raise any question under the intervening part of the clause dealing with "unavoidable accidents and hindrances beyond their" (the charterers') "control."

The pursuers' replies are, I think, conclusive, namely, (first) the strike was over on 12th July, but, assuming that the defenders can found on the indirect effects of the strike, it is not proved that these lasted beyond 17th July, when the "Helge" gave notice that she was ready to load; and it is not proved that there was anything connected with the strike to prevent a certain amount of supply between the 12th and the 17th, and completion of the balance by the 20th. (Second) the pursuers have proved, by the supply of about 2000 tons of coal to the "Sir Walter Scott" and by other evidence, that the Edinburgh Collieries Company were in a position to

July 10, 1913. supply the "Helge" with 1500 tons by the 20th; and—had this been necessary for the pursuers' case, which I do not think it is—the defenders have not proved that, had the Edinburgh Collieries Company been taken bound to supply the "Helge" by the 20th, they would not have done so, notwithstanding the strike. It is proved that there was neither deficiency of coal nor of wagons, nor delay by the railway company in sending off the wagons after receiving intimations from the merchants; and I cannot assume that the colliery company would not have fulfilled their contract obligations. I therefore agree with the Lord Ordinary that the defenders' failure to make a contract with the Edinburgh Collieries Company identical in respect of loading days with the contract in the charter-party, and not the strike, was the cause of the delay founded on by the pursuers.

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Lord Guthrie.

But the defenders say that, but for the strike, the Edinburgh Collieries Company, even if only bound to deliver by 31st July, would have delivered by 20th, in ordinary course. I do not find this proved. At the best, it was only a probability, more or less great. It involved a risk, which the defenders were entitled to run if they chose, but which, as in a question with the owners of the ship, they were not entitled to add to the risk arising from strikes contemplated in the charter-party. The risk contemplated was from strikes alone, not strikes plus unwillingness on the part of the colliery, at probable loss to themselves, and without legal obligation, voluntarily and gratuitously to safeguard the defenders' interests. For aught that appears, the colliery company not only acted within their legal rights, but in the ordinary way of business, by fulfilling, in preference to the defenders' contract, orders which they could only have got on the footing that they were so fulfilled. The fact that, but for the strike, the natural consequence of the defenders' failure to make a proper contract with the colliery would probably have been avoided does not make the strike the cause of the defenders' breach of contract. The strike merely destroyed the defenders' chance of escaping the natural consequences of their action.

This view seems to me to follow from the cases referred to by Lord Dundas, and in particular from the cases of *Gardiner*,¹ *Bulman*,² and "*Arden*."³ In *Gardiner's* case¹ the charterers founded on the clause in the charter-party, exempting them from liability for the non-fulfilment of the contract on account of "dangers and accidents of the seas, rivers, and navigation, strikes, lockouts, or accidents at the colliery directed, or on railways, or any other hindrances of what nature soever beyond the charterers' or their agents' control." Owing to a strike, there had been an unusual demand upon the colliery with which they had contracted. It was held, notwithstanding, that the charterers were liable for demurrage. Lord Trayner said, "It has been clearly shown that the direct cause of the '*Lismore's*' detention was that the charterers had no cargo to give her. Now the obligation to have or provide a cargo is not a charter obligation. The contract of charter-party presupposes that the charterer has a cargo or will have a cargo ready for the ship when the ship is ready for it. . . . Having thus ordered the coals for the '*Lismore*' as well as for two other vessels which were named, the agents seem to have thought that they had done all that could

¹ 20 R. 414.

² [1894] 1 Q. B. 179.

³ 1912 S. C. 211.

be required of them. And, in ordinary circumstances, perhaps no more July 10, 1913.
 would have been necessary to enable them duly to fulfil their obligation to load the 'Lismore.' They took no precautions, however, to secure that they would get coals for the 'Lismore' in due time and took the risk of anything occurring which would prevent this. It is the chance so risked that has occurred . . . The charterers' agents could in May have contracted for the delivery to them of the coal ordered for the 'Lismore' by a certain day or within a certain number of days after the 'Lismore's' arrival. Nothing hindered them doing that, and if that course had been adopted it is to be presumed that the colliery so bound would have fulfilled its obligation, and no delay in loading the 'Lismore' would have occurred." In *Bulman's* case¹ the charterers were held exempt on account of a strike clause. Lord Esher said:—"A strike would in itself not be sufficient to exonerate the charterers from doing the best they could to accept delivery, and would not entitle them to fold their arms and do nothing. If, notwithstanding the strike, they could by reasonable exertion have taken delivery of the cargo within the proper time, the strike would not have afforded them any defence." And in the "*Arden*" case² where the clause, founded on in defence to an action for demurrage, referred to "any accidents or cause beyond the control of the charterers which may prevent or delay the loading," Lord President Dunedin said:—"I do not think the charterers escape under this clause of the charter-party. It seems to me that here they took their risk. As matter of fact, they did not make any contract by which they could be certain that the coals would come within the time they wanted them. I am not keeping out of view the fact that the representative of the Fife Coal Company stated that if he had been asked for a guarantee he would not have given one. That is his affair and the charterers' affair."

Dampskibs-
selskabet
Danmark v.
Poulsen & Co.
Lord Guthrie.

On the whole matter, I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD JUSTICE-CLERK.—I, like Lord Dundas, felt at first that this case looked difficult, but on full consideration I concur in the judgment proposed by him. His opinion commends itself entirely to me as expressing the right view of the case. The Lord Ordinary seems to me to have given the only answer that could reasonably be given to the question put to him on the evidence, oral and documentary, that was before him. I therefore content myself with stating my concurrence in the opinion of Lord Dundas, in which he shows the grounds on which it must be held that the charterers cannot excuse themselves, seeing they did not do what they might have done to secure that their contract to supply the full cargo might be fulfilled. They failed sufficiently to secure that the collieries company should deliver in time.

I may add that my concurrence extends to the opinion just delivered by Lord Guthrie.

THE COURT adhered.

BEVERIDGE, SUTHERLAND, & SMITH, W.S.—J. & J. ROSS, W.S.—Agents.

¹ [1894] 1 Q. B. 179.

² 1912 S. C. 211.

No. 149.

HUGH CAIRNS, Pursuer (Respondent).—*Wilton*.
 WILLIAM DAVIDSON, Defender (Reclaimer).—*Keith*.

July 11, 1913.

Cairns v.
 Davidson.

Trust—Proof of trust—"Deed of trust"—Deposit-receipt—Act 1696, cap. 25—Proof.

A deposit-receipt is not a "deed of trust" within the meaning of the Act 1696, cap. 25; and accordingly parole proof *allowed* in an action by a party for declarator that the sum contained in a deposit-receipt in the names of others truly belonged to him.

2D DIVISION.
 Lord
 Skerrington.

HUGH CAIRNS, miner, Hamilton, with the concurrence of his brother, Robert Cairns, residing in the United States of America, brought an action against William Davidson, miner, Larkhall, and the Clydesdale Bank, Limited. The conclusions of the action were for declarator that the pursuer had the sole right and title in and to a deposit-receipt for £260 granted by the Clydesdale Bank in favour of the defender William Davidson and Robert Cairns, and that the sum contained therein belonged in property to the pursuer; with further conclusions for payment and interdict.

The pursuer averred, *inter alia*, that on or about 18th October 1909 he was about to go to America and handed to the defender Davidson £360, "and asked him to deposit the said sum of £360 in bank upon a receipt in the names of the pursuer's brother, Robert Cairns, who was then residing in Hamilton, and of himself the defender William Davidson. The defender William Davidson agreed, and undertook to deposit the said sum in bank in the joint names of himself and of the pursuer's brother, and he agreed with the pursuer that the deposit-receipt, when obtained, should be retained by him for safe custody as agent or mandatary or custodier for the pursuer and against the instructions of the pursuer as to the further application of the sum so deposited. The pursuer gave him the sum of £1 in recognition of any trouble he might have. In the event of the death of the pursuer abroad, the defender William Davidson undertook at the time the said sum of £360 was handed to him that it would be divided by himself and the pursuer's said brother equally among the family of the pursuer in the absence of his other instructions by will or otherwise." This sum (the pursuer further averred) was deposited with the Clydesdale Bank by Davidson in the presence of Robert Cairns, the pursuer's brother, the deposit-receipt being taken in the names of Davidson and Robert Cairns; that the sums deposited with the bank were subsequently twice uplifted and redeposited in the same names, the deposit-receipts being held in each case by Davidson; that £100 of the original sum of £360 having been sent to the pursuer by Davidson, the sum in the deposit-receipt was £260; and that, although Davidson had possession of the receipt as "agent or mandatary or custodier for the pursuer," he refused to indorse and deliver it as requested by the pursuer.

The defenders the Clydesdale Bank, Limited, did not appear in the action, but defences were lodged for the defender Davidson. In these defences the defender admitted that in October 1909 the pursuer handed to him a sum of money in order that it should be under the charge of him and Robert Cairns during the pursuer's absence in America, but averred that the amount was £250; and further averred that when depositing this sum with the Clydesdale Bank he also lodged £110 of his own money, and that the deposit-receipt in name

of Robert Cairns and himself was taken for the total sum of £360. July 11, 1913.
He also averred that he had always maintained his right to the sum of £110 of the £260 remaining on deposit-receipt, and refused to indorse and deliver the deposit-receipt except upon payment of £110. Cairns v. Davidson.

The compearing defender pleaded, *inter alia* ;—(1) The action is incompetent. (2) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (3) The pursuer's averments, so far as material, are provable only by writ or oath.

The Lord Ordinary (Skerrington), after a hearing in the Procedure Roll, repelled the first, second, and third pleas in law for the compearing defender, and allowed the parties a proof of their averments on record.*

* "OPINION.—[After summarising the parties' averments]—These averments seem to me to raise a very simple issue of fact, but the defender's counsel argued that the action was entirely incompetent. He said that he construed the pursuer's pleadings as the averring of a contract of improper deposit, and that the pursuer's sole remedy, if he had one, was to bring an ordinary petitory action upon the footing that the defender was his debtor. He argued that in such a contract the property in the money passed and could not be vindicated by the depositor who had a mere claim of debt. I am inclined to agree with counsel in law, but I do not think that it has any application to the contract which the pursuer alleges. The averment which I have quoted seems to me to be an averment either of trust or of agency, namely, that the defender Davidson was to deposit the pursuer's money in bank in joint names of himself and Robert Cairns, and that they were to hold that deposit-receipt either as trustees for him or as his agents. Upon the question of proof it may be of vital importance whether the case is one of trust or of agency, but I have no hesitation in repelling the defender's first plea, that the action is incompetent. I am equally clear that a perfectly relevant case has been stated by the pursuer, and that therefore the defender's second plea also falls to be repelled.

"The defender's third plea raises the question whether the pursuer is restricted in his proof to writ or oath, and the defender's counsel founded upon the statute 1696, c. 25, which requires that trust shall be proved only by writ or oath. I do not think it necessary to form a decided opinion upon the question whether the pursuer's averments do or do not amount to trust, or whether he has made a relevant averment of agency as distinguished from trust. My present impression is that his real case is trust. But then any difficulty as to the mode of proof is obviated by the fact that the defender does not stand upon the terms of the deposit-receipt as truly expressing his legal right to the contents thereof. The apparent creditors in the deposit-receipt are the defender Davidson and Robert Cairns, and accordingly if we are to look at nothing but the deposit-receipt, the result would be that each of the gentlemen would be the owner of £130. But that is not the defender's case at all; he says that he is owner only of £110, and he further admits that the pursuer is owner of £150 and that Robert Cairns is not entitled to one halfpenny of the money. In these circumstances, even if the case be one of trust, the well-known principle which was applied in the case of *Grant v. Mackenzie*, (1899) 1 F. 889, comes in, and, as both parties are agreed that the title does not accurately express their legal rights, no alternative remains but to allow a general parole proof.

"The defender's counsel offered an alternative argument to the effect that the contract averred was really one of loan. If that were so, proof would have to be limited, but it seems to me that the contract averred was something entirely different. I shall accordingly repel the third plea in law and allow parties a proof in ordinary form. . . ."

July 11, 1913. The defender reclaimed, and the case was heard before the Second Division (without the Lord Justice-Clerk) on 27th and 28th June 1913.

Cairns v.
Davidson.

Argued for the reclaimer;—The action was an action of declarator of trust. Trust was defined by Lord M'Laren in his work on Wills and Succession,¹ and by Lord President Inglis in *Croskery v. Gilmour's Trustees*,² and according to these definitions what the pursuer here set forth on record was a trust. This being so, the proof must be by writ or oath.³ The deposit-receipt was a deed of trust within the meaning of the Act 1696, cap. 25,⁴ and the fact that one of the defenders admitted the trust did not, in a question with the other defender, exclude the application of the Act.⁵ The cases founded on by the pursuer in the Outer House—*Hotson v. Paul*,⁶ *Grant's Trustees v. Morison*,⁷ and *Grant v. Mackenzie*⁸—were distinguishable. They were not cases of trust. They were cases of actions to enforce contracts, in which, as the parties did not stand on the documents, parole proof was allowed.

Argued for the respondent;—The defender was sued as a mandatory and not as a trustee, and the ground of action being mandate, proof by parole was admissible.⁹ But, even assuming that the action were held to be in substance a declarator of trust, the Act 1696, cap. 25, did not apply, because (1) a deposit-receipt was not a deed of trust—it set forth the contract with the bank but did not purport to regulate the ownership of the money¹⁰; and (2) the defender had on record admitted that part of the money belonged to the pursuer.¹¹

At advising on 11th July 1913,—

LORD SALVESSEN.—In this case I have come to agree with the Lord Ordinary in the result at which he arrives, although I prefer to put my judgment upon different grounds. The argument for the defender was that the deposit-receipt for £260 in the joint names of himself and Robert Cairns, having been so taken by the instructions of the pursuer, is a deed of trust within the meaning of the Act 1696, cap. 25. If this proposition is well founded it is difficult to see how a proof at large can be competent even although there is an admission that to the extent of £150 the money con-

¹ 3rd ed. vol. ii. p. 825.

² (1890) 17 R. 697, at p. 700.

³ The General Assembly of the General Baptist Churches v. Taylor, (1841) 3 D. 1030; Chalmers v. Chalmers, (1845) 7 D. 865; Leckie v. Leckie, (1854) 17 D. 77; Dunn v. Pratt, (1898) 25 R. 461; Govan New Bowling Green Club v. Geddes, (1898) 25 R. 493, per Lord M'Laren, at p. 492, was also referred to.

⁴ Anderson v. North of Scotland Bank, Limited, (1901) 4 F. 49, per Lord Ordinary (Kincairney), at p. 52, was referred to.

⁵ Duncan v. Forbes, (1831) 9 S. 540; Chalmers v. Chalmers, 7 D. 865; Bertram & Co. v. Stewart's Trustees, (1874) 2 R. 255; Farquhar v. Farquhar, (1886) 13 R. 596.

⁶ (1831) 9 S. 685.

⁷ (1875) 2 R. 377.

⁸ (1899) 1 F. 889.

⁹ Dickson on Evidence, sec. 570. Taylor v. Nisbet, (1901) 4 F. 79, and Jopp v. Johnston's Trustee, (1904) 6 F. 1028, at p. 1036, were referred to.

¹⁰ Anderson v. North of Scotland Bank, Limited, 4 F. 49, per Lord President Kinross, at p. 53, Lord Ordinary (Kincairney), at p. 52; Dinwoodie's Executrix v. Carruthers' Executor, (1895) 23 R. 234, per Lord Young, at p. 239; Gardiner v. Cowie, (1897) 4 S. L. T. 256.

¹¹ Dickson on Evidence, secs. 586, 587.

tained in the deposit-receipt is the property of the pursuer. Mr Keith in July 11, 1913. his able argument went far to satisfy my mind that the case of *Grant v. Cairns v. Mackenzie*¹ has no application to a case to which the Act 1696, cap. 25, Davidson. applies. In *Chalmers v. Chalmers*² it was held not a sufficient ground for Lord Salvesen. admitting parole evidence, to prove a trust alleged to be constituted by an *ex facie* absolute conveyance of heritage, that the conveyance admittedly proceeded on a false narrative of a price paid, and I cannot see that the admission by the defender here that part of the contents of this deposit-receipt belonged to the pursuer is not quite consistent with his defence that the remainder belonged to himself and was included in the same deposit-receipt for his own convenience. The case of *Grant*¹ merely decided that, when a written contract relating to heritage is admitted by both parties to it not to express the true agreement between them, parole evidence is admissible to prove what the true contract was. The exclusion of such evidence where parties have embodied their contract in a formal writing rests upon a different principle and has no statutory sanction. Assuming, therefore, that the deposit-receipt here constituted a deed of trust within the meaning of the statute, I should hesitate to hold that parole evidence could be allowed because of the defender's qualified admission.

It is not, however, necessary to decide this point, for I have come to be of opinion that a deposit-receipt is not a deed of trust within the meaning of the Act 1696, cap. 25. Such a receipt no doubt gives the holder in whose name the money has been deposited a right of action against the bank who issued it. So far as the bank is concerned the only person who can demand payment is the holder in whose name it is made out, and to whom they have bound themselves to make payment. Unless they have been interpellated from making payment they have no answer to his demand, and his indorsation is a good discharge. But the deposit-receipt is not conclusive evidence of the ownership of the money deposited. As Lord M'Laren said in the case of *Anderson*³ the receipt "may prove nothing more than this, that the true owner has deposited money under an arrangement with someone, by which that party, it may be the wife or child or agent of the depositor, is empowered to uplift the money." One is familiar with the case of a fund which is the subject of a litigation being deposited by arrangement between parties in the joint names of the solicitors who act for them. It would be rather startling if in such a case the solicitors could not be called upon to denude without proof by writing under their hands that the money truly belonged to the parties or one of them. The truth is that the Act primarily applies where (as the editor of Bell's Principles⁴ expresses it) "for some reason of convenience and by agreement of parties the documents of title to some property have been taken in the name of the trustee though the beneficial right is really in the other party to the arrangement." Now a deposit-receipt is not a document of title in this sense. It is true that in one case—*Dunn v. Pratt*⁵—it was held that the Act applied to missives of sale; and that, as the alleged trustee was authorised to complete the purchase in his own name, the averment of trust could only be proved by

¹ 1 F. 889.² 7 D. 865.³ 4 F. 49, at p. 54.⁴ 10th ed., sec. 1995 (1).⁵ 25 R. 461.

July 11, 1913. his writ or oath. It is to be noticed, however, that there was a vigorous dissent by Lord Kinneir, and I should not be surprised if the decision in that case required at some future date to be reconsidered. At all events, I do not think that the decision covers such a document as a deposit-receipt. It was conceded that if the money had been simply deposited with the defender his liability to account for it could be established by parole evidence. It follows that if after having so received it he had deposited it in bank without special authority the Act would not apply. But it was said that a different result must be reached where the money is handed to him with an instruction to deposit it in his own name for behoof of the true owner. The distinction is a subtle one, and does not carry conviction to my mind. Once it is assumed that deposit-receipts are often used to enable the agent of the true owner to deal with the money for his behoof the principle upon which the Act 1696, cap. 25, is based has no application. Where a title to land or to scrip is taken in the name of any person the presumption is that it is so taken because he has the ownership of the property thus absolutely transferred to him. The same thing does not apply to a deposit-receipt except as in a question between the bank and the payee named in it. There is no authority which favours such a contention, and the consequences of so holding might operate great injustice in many cases.

I have hitherto dealt with the matter on the assumption that the defender's name was the only one mentioned in the deposit-receipt. The case is, however, much less favourable for him. The deposit-receipt is payable only on the joint signature of Robert Cairns and the defender. Robert Cairns makes no claim to the money, and is a consenting party to the action being raised. It has never yet actually been decided whether in a proper deed of trust in favour of two trustees, where one admits the existence of the trust and the other denies it, the latter shall still have the benefit of the limitation of proof enacted by the Act 1696. In my opinion, however, it cannot be so, for one of two joint payees can qualify no right, as in a question with the bank, to any particular part of the deposit-receipt. The security that the true owner has where a deposit-receipt is so made is that he cannot be defrauded except by both of the payees acting in concert. If, therefore, proof by writ was not forthcoming against the defender, and his oath were negative of the reference, there would be a resulting *impasse*, for the money would still be retained by the bank until Robert Cairns authorised payment, and in an action against him by the defender to compel him to concur in a discharge to the bank it would be perfectly open to him to plead that the money truly belonged to the pursuer.

On the above grounds I have come to be of opinion that we must allow the parties a proof of their averments on record. It will be just as easy for the defender, if he has an honest case, to prove that part of the contents of the deposit-receipt in question belonged to him as it will be for the pursuer to establish that it is all his money.

LORD GUTHRIE.—It is sufficient for the decision of this case to hold as Lord Salvesen has done that the deposit-receipt is not a deed of trust in the sense of the statute of 1696, chapter 25. But I am not prepared to differ

from the Lord Ordinary, where he says,—“Even if the case be one of trust, July 11, 1913. the well-known principle which was applied in the case of *Grant v. Mac-Cairns v. kenzie*¹ comes in, and as both parties are agreed that the title does not Davidson. accurately express their legal rights, no alternative remains but to allow a Lord Guthrie. general parole proof.”

I concur also in the separate ground not founded on by the Lord Ordinary on which Lord Salvesen has proceeded, namely, the specialty in this case that the deposit-receipt was in favour not only of the defender William Davidson but of Robert Cairns, the pursuer's brother, who not only adopts a different attitude in regard to the nature and reality of the transaction from the defender, but is a consenting party to the action.

LORD DUNDAS.—I concur, but I reserve my opinion on the matters on which Lord Salvesen has expressed doubts.

THE COURT adhered.

HENDERSON & MUNRO, W.S.—SIMPSON & MARWICK, W.S.—Agents.

JOHN M'ARA, Pursuer (Respondent).—*Crabb Watt, K.C.*—*J. B. Young*. No. 150.
THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF
EDINBURGH, Defenders (Reclaimers).—*Cooper, K.C.*—*Macmillan*, July 12, 1913.
K.C.—*Hon. W. Watson*.
M'Ar v. Magistrates of Edinburgh.

Statute—Act for staying unlawful conventions (Act 1606, cap. 17)—Desuetude—Partial desuetude.

The Act 1606, cap. 17, has fallen into desuetude.

Deakin v. Milne, (1882) 10 R. (J.) 22, commented on.

Observations on the extent to which a statute may fall into partial desuetude.

Burgh—Use of streets—Powers of magistrates—Proclamation prohibiting holding meetings in streets—Act for staying unlawful conventions (Act 1606, cap. 17).

The Magistrates of Edinburgh issued a proclamation prohibiting the holding of meetings in certain streets of the city, unless a licence to do so had been previously obtained, and imposing penalties for a breach of the proclamation. The form of licence granted by the magistrates bore to be issued in virtue of the powers conferred by the Act 1606, cap. 17.

A street orator, who had been convicted of a breach of the proclamation, brought an action for declarator, *inter alia*, that the magistrates had no authority to issue the proclamation, and that he was not bound to obey it.

The Court granted the declarator, holding (1) that the Act 1606, cap. 17, was in desuetude, and (2) that the magistrates were not empowered by common law or by any other statute to issue such a proclamation.

Observations (*per* the Lord President) as to the powers of magistrates to prevent, by means of the police, any conduct tending to interfere with the paramount use of the streets for passage or to lead to a breach of the peace; and as to the right of the public to hold meetings in the streets.

July 12, 1918. ON 21st September 1912 John M'Ara, residing in Edinburgh, brought an action against the Lord Provost and Magistrates of the city of Edinburgh concluding (1) for declarator " (but always under reservation of the powers of the said defenders or any of them, under statute or common law, to regulate traffic and suppress disorder), that the defenders, the said Magistrates, or alternatively any of them, had and have no warrant or authority to issue, and the pursuer was not at 19th or 21st July 1912, and is not now, bound to obey a proclamation, notice, or order" prohibiting, under penalties, the holding of meetings in certain public places in Edinburgh without a licence; (2) for declarator that the defenders had no authority to issue licences for the holding of such meetings, containing certain conditions; (3) and (4) for interdict against the defenders issuing proclamations or licences in the terms complained of; and (5) for payment of £250 as damages for wrongous arrest and imprisonment.

M'Ara v.
Magistrates
of Edinburgh.

1st DIVISION.
Lord
Skerrington.

The pursuer averred :—(Cond. 1) " The pursuer is a cork-cutter to trade and resides at No. 3 Guthrie Street, in the city of Edinburgh. He is interested in social, political, and religious questions, and has held meetings in Edinburgh with his fellow-citizens for the discussion of such questions for many years. He is one of a large number of politicians, reformers, and street preachers who do so in Edinburgh and throughout the Kingdom and Colonies connected therewith. . . ." (Cond. 3) " From time immemorial and as they believe in pursuance of or in accordance with their constitutional and common law rights as citizens and lieges, numbers of the indwellers of Edinburgh have been in use to hold meetings on the evenings of weekdays and on the afternoons and in the evenings of Sundays in certain open spaces in the city of Edinburgh in order to discuss political, religious, and social questions. . . ." After averring that the defenders had resolved to silence the pursuer because the doctrines advocated by him were obnoxious to them, he further averred :—(Cond. 8) " After the defenders discovered that they possessed no powers other than those conferred by common law or police statutes, with reference to the use of the streets by the lieges, they decided to carry out their policy of suppressing speakers, restricting the number of meetings, and discriminating between different classes of individuals and societies who might be allowed to hold meetings in the streets and open spaces in the city, by reverting to the statute 1606, cap. 17, and invoking its obsolete powers.* . . . "

* " The statute 1606, cap. 17, entituled ' Act for staying of vnlauchfull conventionis within burgh and for assisting of the Magistrattis in the executioun of thair offices,' is in the following terms :—' Ours Souerane Lord and Estaittis of this present parliament Ratefeis and appreves all and quhatsumeuir actis maid heirtofoir be his maiestie and his hienes progenitouris and the Estaittis of the Realme for staying of all tumultis and vnlauchfull meitingis and convocationis within burght And ordinis the samin to have effect and to be put to dew executioun aganis the controvenaris thairrof in all pointis with this additioun that na persone nor persones within burgh of quhatsumeuir rank qualitie or conditioun they be of presume or tak vpon hand fra this furth vnder quhatsumeuir collour or pretext To convocat or assemble thame selfis togidder at ony occasioun Except they mak dew intimatioun of the lauchfull causes of thair meittingis To the provest and bailleis of that burght and obtene thair licence thairto Sua that nothing be done or attemptit be thame in thair saidis meitingis quhilkis may tend to the derogatioun or violatioun of the actis of parliament Lawis and constitu-

(Cond. 10) "The said statute has long been in desuetude or im- July 12, 1913.
pliedly abrogated by contrary usage or by simple non-use. . . . M'Ara v.

The whole occasion for said statute has long since passed away. Magistrates
. . . The right of free speech and the right to convene and hold of Edinburgh.

meetings have been for a large number of years and are now in
accordance with the constitutional law of the country, and can-
not be interfered with. No example of such intimation, or licence,
or permit, written or verbal, can be produced from any part of Scot-
land applicable to any period in the last three centuries. . . ."

(Cond. 11) "Knowing full well that their powers were limited to
their common law and statutory powers exclusive of said statute,
the defenders the said Magistrates, or some of them, in or about the
beginning of July 1912 resolved upon a course of proceeding as
regards the pursuer and other lieges highly oppressive, invidious, and
illegal; for the purpose of carrying out their aforesaid illegal objects.
On the 19th of July 1912 the said Magistrates . . . decided to
make a proclamation of an unparalleled character creating the offence
of not conforming to a proclamation or order by them for which there
existed no warrant of any kind, and to be punished or punishable by
themselves without any authority if the proclamation or order was
not obeyed. . . . Said proclamation was duly published by posters
and advertisements in the newspapers. . . ." (Cond. 12) "The

said proclamation is in the following terms:—' City and Royal Burgh
of Edinburgh—Public Proclamation by the Magistrates—Whereas
complaints have been made to the Magistrates of the City and Royal
Burgh of Edinburgh by residents in the neighbourhood and by other
citizens, of the annoyance, disorder, and obstruction caused by various
meetings, congregations, or assemblages of persons being habitually
held on the public footpaths and roadways at the foot of the Mound,
and more particularly within the areas lying to the south and east of
the building there occupied by the Royal Scottish Academy Gal-
leries, within the said City and Royal Burgh, and WHEREAS, although
requested by the Police to remove, persons responsible for or forming
part of these meetings, congregations, or assemblages have refused or
delayed to do so, and have persisted in continuing the meetings, con-
gregations, or assemblages complained of, and WHEREAS the said
Magistrates consider that in the interests of public order such meet-

tionis maid for the weil and quietnes of the saidis burghis Declaring be
thir presentis the saidis vnlauchfull meittingis and the persones present
thairat To be factious and seditious and all proceedingis thairin to be null
and of nane avail And the saidis persones to be pvnischit in thair bodeis
gudis and geir with all rigour conforme to the lawes of this realme And to
the effect the saidis vnlauchfull meittingis with all vtheris tumultis tru-
blances and pleyis that salhappin to fall out within the saidis burrowes
may be substantiounlie suppressit Ordanis the hail inhabitantis of the saidis
burrowes at all occasiounes To reddelie assist and concur with the Magis-
tratis and officiaris thairof for satling of the saidis tumultis and trublances
And pvnischeing of the authouris and movearis thairof And sic as sall nocht
Assist and concur with the saidis Magistratis redelie or thair officiaris for
redding and satling of the saidis tumultis and trublances as said is Sall be
repute and haldain as fosteraris and mantenaris of the saidis tumultis and
pvnischit thairfoir in thair persones and vnlawit in thair guidis at the
arbitriment of the Magistrattis and Counsaill of the said Burgh And ordinis
publicatioun to be maid heirof at the marcat croces of the saidis burrowes
that nane pretend Ignorance thairof."

July 12, 1913. ings, congregations, and assemblages should be prohibited unless and until a licence has been obtained from the said Magistrates for holding the same:—THEREFORE the said Magistrates do hereby Order that persons shall not assemble or congregate or hold meetings on any part of the footpaths or roadways within the areas above described, or in the neighbourhood thereof, from and after the date of this Proclamation unless they have previously applied for and obtained the licence of the said Magistrates thereto. All persons contravening this Order are liable to the penalties set forth in the Summary Jurisdiction (Scotland) Act, 1908. Dated at Edinburgh this nineteenth day of July nineteen hundred and twelve.' . . . (Cond. 14) "In carrying out said oppressive scheme the defenders at a meeting of four Magistrates, on July 19th, 1912, . . . decided to issue permits in the following terms:—* . . ." (Cond. 17) "The pursuer and many of his fellow-citizens connected with one or other of" certain societies that conducted meetings in the streets, "having ascertained the terms of the said permit or licence, held meetings, on or about 20th and 21st July, on the subject of their right to hold meetings in open spaces, and to speak to each other on the aforesaid topics. The pursuer, believing that his rights were illegally threatened by the Magistrates by the issue of said permit or licence and the conditions thereof, did not apply for a permit. Other speakers accepted permits and held meetings on and after 21st July 1912 . . ." (Cond. 18.) "About 6 o'clock P.M. on Sunday, 21st July, two days after said proclamation and permits were issued, the pursuer took up his customary position in the open space to the east of the National Galleries at the Mound. . . . The pursuer had just commenced to address a perfectly orderly meeting comprising two or three dozen persons when Inspector Bain of the city police, assisted by several police-constables," arrested him, "and conveyed him to the police-station in the High Street, where he was locked up in a cell for a period of two hours till bail to the amount

* The terms were these:—"City and Royal Burgh of Edinburgh—Licence to hold meetings at the Mound—The Magistrates of the City and Royal Burgh of Edinburgh, in virtue of the powers conferred upon them by 'An Act for Staying of Unlawful Conventions within Burgh and for Assisting of the Magistrates in the Execution of their Offices,' 1606, cap. 17, having considered an application by

Did and do hereby licence the said

to hold Meetings on the Public Roadways (excluding footpaths) at the foot of the Mound, within the areas lying to the South and East of the Building there occupied by the Royal Scottish Academy Galleries, in the said City and Royal Burgh, from the date hereof till 31st December next, but on the following conditions, viz. :—(1) That the said Meetings shall be conducted with order and decorum, and in such a manner as not to excite any breach of the peace, tumult, or disorder, and that effect shall be given to such instructions as may be given for that purpose by any Officer of Police not under the rank of Inspector. (2) That no Meetings shall be held within these areas, except between the hours of 2 and 10 o'clock P.M., without the special permission of the Magistrates being granted therefor. (3) That the persons responsible for such meetings shall observe and conform to these and to any additional conditions which the Magistrates may from time to time make and intimate to them. (4) That the Magistrates, or any of them, may at any time suspend or revoke this licence. Given at Edinburgh this Nineteen hundred and twelve years."

of £2 was deposited by his friends. . . .” The pursuer further July 12, 1913. averred that he was charged in the City Police Court with a breach of the proclamation, and the case was remitted to the Burgh Court; ^{M'Ara v. Magistrates of Edinburgh.} that he was tried in the Burgh Court on a charge that for the first time also contained a charge of breach of the peace; and that he was convicted of breach of the proclamation, but not of breach of the peace.

The pursuer pleaded;—(1) The statute 1606, cap. 17, having been superseded by contrary usage, and being now in desuetude, the pursuer is entitled to decree of declarator and interdict as concluded for. (2) The said proclamation being without warrant and *ultra vires*, the pursuer is entitled to decree of declarator and interdict as concluded for. (3) *Separatim*, the pursuer having by constitutional law and usage the right in common with His Majesty's lieges to converse with and to fellow-citizens on matters of public interest on the streets and open places of the city as long as private right and public order are observed, the said proclamation and licence are *ultra vires* and illegal, and the pursuer is entitled to interdict and declarator. (4) The defenders, the said Magistrates, having intimated that they will prosecute the pursuer and his fellow-citizens if they hold meetings in said open spaces without a licence in accordance with said unwarrantable and illegal proclamation, the pursuer is entitled to decree of declarator and interdict as concluded for. (5) Said licence, *et separatim*, said conditions of licence proposed and issued by the defenders, the said Magistrates, as condescended on, being *ultra vires* of said defenders, the pursuer is entitled to decree of declarator and interdict as concluded for. (6) The defenders, the said Magistrates, having wrongfully, maliciously, and without probable cause, caused the pursuer to be arrested and incarcerated, and the pursuer having been wrongfully arrested and incarcerated by the said officers of police acting under or at the instigation of the said defenders, he is entitled to reparation as concluded for.

The defenders pleaded, *inter alia*;—(1) The action is incompetent and excluded in respect of the statutory method of review provided by the Summary Jurisdiction (Scotland) Act, 1908. (2) No title to sue. (3) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons, so far as directed against these defenders either as Magistrates or as individuals, and the action should therefore be dismissed as against them. (4) In respect that the pursuer has no right at common law or under statute to use the streets, and in particular those at the Mound or in the neighbourhood thereof, for the purpose of addressing meetings, the action should be dismissed. (5) The statute 1606, cap. 17, not having fallen into desuetude nor having been superseded as alleged, these defenders should be assoilzied. (6) The said proclamation being legal and *intra vires* of these defenders, they are entitled to decree of absolvitor. (7) The said form of licence settled on 19th July 1912 and the form of licence settled on 25th July being legal and *intra vires* of these defenders, these defenders should be assoilzied.

On 29th January 1913 the Lord Ordinary (Skerrington) pronounced an interlocutor which, after repelling the second plea in law for the defenders and their first plea, so far as regarded the conclusions of the summons for declarator and interdict, proceeded:—“Finds and declares that the Magistrates of the city of Edinburgh were not empowered by the common law or by any statute to issue the proclama-

July 12, 1913. tion mentioned in the summons, and that the pursuer was not at 19th or 21st July 1912, and is not now, bound to obey said proclamation, and decerns: *Quoad ultra* finds it unnecessary to pronounce any further declarator or to grant interdict: Dismisses the conclusions to that effect, and decerns." He further allowed the pursuer to lodge issues with regard to his claim of damages, and granted leave to reclaim.*

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* "OPINION.—[After narrating the averments of parties and the conclusions of the summons]—The pursuer has taken no steps to set aside the judgment of the magistrate convicting him of a breach of the said proclamation. His counsel explained that his client wished, if necessary, to obtain a judgment of the House of Lords as to the legality of the proclamation. Further, there is a decision of the High Court of Justiciary which presents a difficulty in the way of the pursuer, and he thought that he would have a better prospect of success in a Civil Court. The defenders' first plea in law is as follows:—'The action is incompetent, and excluded, in respect of the statutory method of review provided by the Summary Jurisdiction (Scotland) Act, 1908.' The defenders' counsel explained that this plea was intended to apply only to the conclusion for damages, and accordingly, it must be repelled, in so far as regards the conclusions for declarator and interdict.

"The defenders' second plea in law is 'No title to sue.' The Magistrates of Edinburgh have issued a proclamation threatening their fellow-citizens with penalties, but they now wish to avoid a judgment as to its legality. I do not understand this policy on their part or why the pursuer should not have a title to challenge the legality of a proclamation which attempts to stop a practice which he has pursued for years without objection upon the part of the Civic Authorities. The defenders' counsel argued that the only remedy open to a citizen who objected to the proclamation was to disobey it and to plead the illegality in defence to a prosecution. This argument seems to me contrary to good sense and to good order. I do not see why, in order to obtain a judgment upon a purely legal question, a citizen must expose himself to arrest and imprisonment, or why the Magistrates must be exposed to claims of damages. As regards this matter the observations of Lord Robertson in *Rossi v. Magistrates of Edinburgh*, (1904), 7 F. (H. L.) 85, pp. 89-90, are in point. The defenders' counsel admitted that it was not necessarily illegal to hold a meeting on a highway (*Burden v. Rigler*, [1911] 1 K. B. 337), but he argued that no one can have an absolute legal right to hold a meeting on a road or street. If the pursuer had claimed such a right I should have sustained his title to sue, but I should have assoilzied the defenders upon the ground that no such right exists. In his third plea in law the pursuer claims a right to converse with his 'fellow-citizens on matters of public interest on the streets and open places of the city as long as private right and public order are observed.' If he had asked for a declarator of such a right I should have sustained his title to sue, but I should have dismissed the conclusion as too vague, and upon the ground that it was impossible and incompetent for the Court of Session to try to regulate the right of the citizens of Edinburgh to the use of their streets. The matter is one for the Local Authorities, and all that this Court can do is to protect the citizens against illegal actings on the part of their rulers. I construe the pursuer's first conclusion as a challenge of the legality of the proclamation though it contains a reservation of the defenders' power 'to regulate traffic and suppress disorder,' which seems to me quite unnecessary. I do not propose to follow the defenders' counsel in his able and learned argument as to the nature and extent of the right of the public to the use of a road or street. I merely say that I dissent from the view that the public have only a bare right of passage over a country high-

The defenders reclaimed, and the case was heard before the First July 12, 1913.
Division on 11th, 12th, 19th, and 20th March, and on 21st May 1913.

Argued for the reclaimers;—(1) The proclamation in question was within the powers conferred on the Magistrates by the Act 1606, cap. 17, which was still in force. It was not suggested in the works of Hume or Alison¹ that that Act was in desuetude, and it had been before the Court as recently as in *Deakin v. Milne*.² The fact too that it had been left unrepealed by the Statute Law Revision Acts showed that it was regarded as still in force. Though there had certainly been toleration of meetings in the streets for many years, it did not follow that there had been any abrogation of the right of the Magistrates to prohibit meetings under this Act whenever they deemed it necessary. An Act too might be in partial desuetude by reason of adverse possession, but outwith the limits of that possession it would continue to be in force for all purposes. The respondent had entirely

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way or over the streets of a burgh. It is a question of fact whether any particular use of a road or street is reasonable, and different considerations may apply to country roads and to streets in burghs. The decision of the House of Lords in *Galbreath v. Armour*, (1845) 4 Bell's App. 374, does not support the argument of the defenders' counsel. I accordingly repel the plea of 'No title to sue.'

"The Magistrates maintain that their proclamation was justified by the Act 1606, cap. 17. This statute and the earlier statutes dealing with the same topic are referred to or commented on in Mackenzie's Observations on the Acts of Parliament (1686), pp. 105, 169, 325-6; Kames's Statute Law of Scotland (2nd ed., 1769), s.v. 'Mob,' p. 224; Erskine's Institutes (1773), iv. 4, 29; Hume on Crimes (3rd ed., 1829), vol. 1, pp. 416, 430-4, 557-8; Allison's Principles of the Criminal Law (1832), vol. 1, pp. 528-9. The Act 1606, cap. 17, is quoted *verbatim* in condescendence 9, and the following points may be noted in regard to it:—

(1) It ratifies all former Acts 'for staying of all tumults and unlawful meetings and convocations within burgh.' According to Hume (vol. 1, p. 416), what is now called 'mobbing' used to be called 'the tumultuous convocation of the lieges.' In his opinion, what was struck at by these Acts was not so much sedition, as Erskine thought, but rather the crime of rioting and convocation, the objects of which are local and private rather than general (pp. 430-1 and 557-8). No doubt, however, seditious meetings fall within the purview of the Acts. The earlier statutes, which apparently are the ones referred to in the Act, are three in number, and they are summarised as follows by Lord Kames:—'Convocating of the lieges within burgh discharged, under the pain of confiscation of moveables, and the lives of the transgressors to be at the King's will, 1457-77, 1491-34. Convocations or meetings in arms within burghs, without licence from the king or magistrates, to be punished with death, 1563-83.'

"(2) The Act 1606, cap. 17, makes a very remarkable 'addition' to the earlier legislation by enacting that no persons within burgh shall 'convocate or assemble themselves together on any occasion except they make due intimation of the lawful causes of their meetings to the Provost and Bailies of that burgh and obtain their licence thereto so that nothing be done or attempted by them in their said meetings which may tend to the derogation or violation of the Acts of Parliament laws and constitutions made for the weil and quietness of the said burghs declaring by these presents the said unlawful meetings and the persons present thereat to be factious and seditious and all proceedings therein to be null and of no avail and the said

¹ Hume, i. 430; Alison, i. 529.

² (1882) 10 R. (J.) 22, 5 Coup. 174.

July 12, 1913. failed to prove what was necessary to justify the Court in holding that this Act had fallen into total desuetude.¹ (2) Apart, however, from the Act of 1606 the Magistrates had a general power at common law to make proclamations, because they were the recognised fountain of knowledge as to the sovereign will, as, for instance, on the occasion of a King's accession. They had also power to preserve peace in the streets, and to prohibit the use of streets for any but the primary public purposes, and to regulate their use for these purposes.² This proclamation, therefore, was within the powers of the Magistrates, and the Court would not interfere with their actings unless it were shown that they had in some way acted *ultra vires*.³ This proclamation invaded no right acquired by the public, for, though meetings had been held in the past without hindrance within the area dealt with in the proclamation, such use, even if exercised without obstructing

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persons to be punished in their bodies goods and gear with all rigour conform to the laws of this realm.' This new enactment imposes upon the inhabitants of burghs a positive duty to intimate to the Magistrates the purpose of any proposed meeting, and to obtain their sanction to the holding of the meeting. Failing obedience, it renders unlawful meetings of a kind which otherwise would have been lawful. Contravention of the statute is declared to be constructive sedition. According to Erskine (iv. 4, 23), the words used in the statute are 'seldom or never stretched to a capital punishment.'

"(3) After ordaining that the whole inhabitants of the burgh shall assist the Magistrates to put down unlawful meetings, the Act 'ordains publication to be made hereof at the market crosses of the said burghs that none pretend ignorance thereof.' This Act derogates, according to Mackenzie, from the general law contained in the Act 1581, c. 128, which was to the effect that the lieges should be bound to obey the Acts of the Scottish Parliament on the expiry of forty days from the publication thereof at the Market Cross of Edinburgh. On the principle, *omnia præsumentur solemniter acta*, it must be assumed that the Act 1606, c. 17, was duly proclaimed in all burghs as ordered. No further or renewed publication was required by the Act in order to make it binding upon the lieges, nor is any further publication averred to have been made in Edinburgh. The Act does not authorise or contemplate the issue of Proclamations by the Magistrates.

"The language of the 'addition' is very general, and may be construed so as to include all meetings within burgh, whether in the open air or within a building. Mackenzie says that it has been doubted whether keepers of conventicles within burgh may be punishable by this Act, but

¹ Bute v. More, (1870) 9 Macph. 180, 1 Coup. 495; Nicol v. McNeill, (1887) 14 R. (J.) 47, 1 White, 416.

² Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. cap. cxxxii.), sec. 242; Threshie v. Magistrates of Annan, (1845) 8 D. 276, Lord President Boyle and Lord Mackenzie, at p. 281; Bell's Prin. sec. 660; Harrison v. Duke of Rutland, [1893] 1 Q. B. 142, Lord Esher, M.R., at pp. 145-6, Lopes, L.J., at p. 152; Hume on Crimes, ii. 7; Report of Commission on Municipal Corporations, (1835) p. 55, *et seq.*; Tailors of Edinburgh v. Their Journeymen, (1762) M. 7682; Journeymen Tailors in Edinburgh v. The Incorporation of Tailors in Edinburgh, (1770) M. 7364; Incorporation of Tailors in Edinburgh v. White and Others, (1777) M. Jurisdiction, App. No. 6.

³ Paterson and Others v. Magistrates of Stirling and The Corporation of Weavers, (1783) M. 1997; Ferguson and Others v. Magistrates of Glasgow, (1786) M. 1999.

traffic, was not capable of growing into a right.¹ Further, the power July 12, 1913.
which resided in the Magistrates to make proclamations carried with
it all powers necessary to enforce their orders, and it was immaterial
that the penalties attached to contravention of such proclamations
were not defined.² The jurisdiction which the Magistrates exercised
within the ancient royalty of the city of Edinburgh (which, as ex-
tended, embraced the area in question³) had been specifically pre-
served,⁴ and their powers were not limited to those conferred by local
Acts. Further, the pursuer had mistaken his remedy in seeking
declarator that he was not bound to obey the proclamation, his proper
remedy being by way of suspension of a conviction in the High Court.
The respondent's argument founded on the special powers conferred
on the Magistrates by certain local Acts did not affect the disposal
of this case, for there was no conclusion in the present action with
reference to such special powers, and accordingly the Court should find

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this doubt is founded merely upon the fact that there were later statutes, now repealed, which specially mentioned and prohibited conventicles within houses and in fields. It may, I think, be assumed that the Act 1606, c. 17, is now in desuetude as regards meetings within private buildings, but meetings in the open air are in a different category, because they may lead to obstruction of the streets, breach of the peace, and mobbing, and rioting. Further, if the Act is still in force, it may also be assumed that the punishment for contravention would now be very different from that contemplated by its authors. Authority for the proposition that Scottish statutes may fall into partial desuetude will be found in some of the opinions in the case of *Bute v. More*, (1870) 1 Couper, 495, 9 Macph. 180. These opinions are of great weight and authority, but they were merely *obiter*, seeing that the only judgment of the Court was to the effect that a contravention of the old statutes anent the profanation of the Sabbath could not competently be tried under the Summary Procedure Act, 1864. This decision was followed in the case of *Nicol v. M'Neill*, (1887) 14 R. (J.) 47, but both Lord Young and Lord M'Laren said that in their view it was an open question whether these statutes were or were not in desuetude.

"The question whether the Act 1606, c. 17, is still in force depends primarily upon the construction which ought to be given to the decision of the High Court of Justiciary in the case of *Deakin v. Milne*, (1882) 5 Couper, 174, 10 R. (J.) 22. That case may be quoted as an authority for the proposition that the Act is not in desuetude, or, alternatively, for the proposition that the Magistrates of a burgh have power at common law to issue a proclamation prohibiting a meeting, with the result that any person who disobeys is guilty of a substantive offence. I have come to the conclusion that the Judges (Lord Justice-Clerk Moncreiff, Lord Young, and Lord Craighill) did not intend to affirm either of these propositions. The facts were as follows:—In the Royal Burgh of Arbroath the processions of the Salvation Army had led to opposition, and an antagonistic army, called the Skeleton Army, had been raised. There had been street fights within the burgh, and people belonging to both armies had been brought before the Magistrates and fined. The Magistrates, finding that the evil continued, and that the processions led to 'riotous proceedings, and are

¹ *Ex parte Lewis*, (1888) 21 Q. B. D. 191, Wills, J., at pp. 196-7; *Reg. v. Cunninghame Graham and Burns*, (1888) 16 Cox Criminal Cases, 420, Charles, J., at p. 429.

² Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 27.

³ Act, 1767 (7 Geo. III. cap. 27).

⁴ Edinburgh Municipal and Police Act, 1879, sec. 364.

July 12, 1913. that the pursuer had no such right as he maintained in this action, and assolvie the defenders. In any event, the pursuer had no title to sue.

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Argued for the respondent;—(1) The Act of 1606 was in desuetude.¹ Its purpose was to make all meetings unlawful except those sanctioned by the Magistrates, but meetings had for long been held in all burghs regardless of the Act, and it had never been referred to in recent years except in the case of *Deakin v. Milne*.² In that case the conviction was sustained quite independently of the Act, as was explained in the opinion of the Lord Ordinary in the present case. When the Act of 1795 for "Preventing seditious meetings"³ (which was subsequently repealed) was passed it was clear that the Act of 1606 was not regarded as still in force, for otherwise the later Act would not have been required. Even if the Act of 1606 were still in force it gave no powers for adjecting conditions to the licences, or for imposing

likely to cause a breach of the peace,' issued a proclamation prohibiting all processions of the Salvation Army, and giving notice that persons taking part therein would 'render themselves liable to prosecution.' Certain persons who were members of the Salvation Army were charged in the Police Court with 'the crime of breaking the public peace, as also of a breach of the terms of a proclamation made and published by the Provost and Bailies of Arbroath, on the 17th day of March 1882, by virtue of the powers conferred on the Provost and Bailies of the said burgh by the Act of Parliament passed in the reign of James the Sixth, in the year 1606, cap. 17, actors or actor, or art and part.' It was objected that a charge of breach of a proclamation was not a *nomen juris* according to the law of Scotland, and also that the Act 1606, cap. 17, was in desuetude. These objections were repelled, and the accused were convicted of both offences, and fined. An appeal was taken upon a case stated, and one of the questions for the Court of appeal was whether the appellants 'were properly convicted of an offence punishable by a Magistrate of the burgh, in consequence of violating the provisions of the said proclamation issued in virtue of the powers conferred upon the Magistrates by the said Act, James the Sixth, in the year 1606, cap. 17, or otherwise in virtue of their powers as Magistrates of Arbroath on the occasion libelled?' The High Court, without answering any of the questions, dismissed the appeal, and affirmed the 'determination of the inferior Judge. Counsel for the appellants argued that the Act was in desuetude, but none of the authorities bearing on this branch of the law were cited on either side. In reply, counsel for the respondent argued that there was 'no authority for the contention that the Act of 1606 is in desuetude. The issuing of the proclamation and the institution of the prosecutions were quite legal, and were proper and necessary acts on the part of the Magistrates. The offence is charged, and the proclamation is referred to in the complaint, more for the purpose of showing that the principal offence, viz., the breach of the peace, was committed after due warning had been given to the appellants, and so charged more as an aggravation of the first offence; and it is perfectly relevant.' Each of the Judges expressed the opinion that the proclamation was within the powers of the Magistrates, but none of them made any reference to the Act of 1606: I read the opinions as meaning that in the special circumstances the Magistrates had power to prohibit a procession which was likely to cause a breach of the peace. The Lord Justice-Clerk said that the breach of the proclamation was 'a municipal offence,' but I do

¹ *Bute v. More*, 9 Macph. 180, Lord Justice-General Inglis, at p. 182, 1 Coup. 495.

² 10 R. (J.) 22, 5 Coup. 174.

³ 36 Geo. III. cap. 8, sec. 23.

penalties. (2) If the Act of 1606 was no longer in force the Magistrates had no common law powers to which they could appeal in support of their proclamation. Indeed, if they had such powers the Act of 1606 would not have been required and would never have been passed. The community had, in addition to the right of free passage, a right to the reasonable use of the streets for purposes which included the holding of peaceful meetings. If a peaceful meeting of the citizens was not *per se* an offence against the law, it could not become such by reason of a proclamation by the Magistrates. Meetings having been held during past years within the areas described in the proclamation in question, without any breach of the peace having occurred, the Magistrates were acting *ultra vires* in issuing such a proclamation as would *ab ante* make lawful meetings unlawful, and so bar a plea of ignorance of the illegality of such meetings.¹ The pursuer was not seeking to enforce any right but that of meeting, subject to good order,

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not think that he or the other Judges intended to affirm that disobedience to the proclamation was a substantive offence apart from breach of the peace. It is noteworthy that the present Lord Justice-Clerk, who was counsel for the respondent in the case of *Deakin*, refers to that decision in his *Treatise on the Criminal Law of Scotland* (1894, 3rd edition, p. 326), merely for the purpose of showing the *modus* in which a charge of breach of the peace may be made. In the case of *Hutton v. Main*, (1891) 19 R. (J.) 5, the present Lord Justice-Clerk referred to the case of *Deakin* in terms which indicate that in his view the case was simply one of breach of the peace. It should be noticed that the complaint in the case of *Deakin* was not for contravention of the Act of 1606, cap. 17, but for breach of the proclamation. The person who framed the complaint had read the case of *Bute v. More*, and knew that a prosecution for contravention of the statute would be incompetent under the Summary Procedure Act, 1864.

"No other example was cited of a prosecution founded on the Act 1606, c. 17. Neither that Act nor the earlier statutes as to unlawful convocations are referred to in Macdonald's *Criminal Law of Scotland*. When one goes back to Hume, Alison, and Erskine, it is remarkable that not one of these writers makes any reference to the addition to the previous law which was effected by the Act of 1606. Hume says that the fundamental law is the Act of James II., 'which the others only reintegrate.' Though the terms of the 'addition' are correctly stated by Kames and Mackenzie, I am disposed to think that from a very early period it met the fate of legislation which is too stringent, and that it was simply disregarded. However that may be, it is, I think, certain that both at the present day and as far back as the memory of man can carry, the offence prohibited by the Act is and was 'not only practised without being checked, but is no longer considered or dealt with in this country as an offence against the law.' I quote from the opinion of the Lord Justice-General (Inglis) in *Bute v. More*. It is not the practice for persons who intend to hold an open-air meeting within burgh to intimate the purpose of their meeting to the Magistrates and to obtain their licence. In the case of *Hutton v. Main*, already referred to, the Lord Justice-Clerk said,—'Street preaching is a familiar thing. Respectable persons gather, sing in order to attract the attention of those near, and thereafter preach to them.' Other meetings in the open-air within burgh are equally free and informal. No example was adduced of a case in which the Magistrates of Edinburgh, or of any other burgh, had either given or withheld a licence for a meeting. The defenders' counsel argued that as

¹ Dicey, *The Law of the Constitution*, (7th ed.) 277; *Reg. v. Cunningham Graham and Burns*, (1888) 16 Cox Criminal Cases, 420, Charles, J., at p. 431.

July 12, 1913. for a lawful purpose in a lawful manner. That right he derived from the common law rights of individual liberty of the person and liberty of speech.¹ Nor was he proposing to do any act that would produce unlawful acts by other persons.² Further, the Magistrates had no power to add to their proclamation the sanction of a penalty, and as the proclamation was vitiated by that addition it was vitiated altogether. It was further vitiated by the proposal to issue licences, because the Magistrates had no power, as they claimed here, to issue licences that would permit certain persons to obstruct the public streets. The Magistrates had, in point of fact, selected the wrong procedure. If their object was to prevent obstruction of the streets, they had powers defined in their municipal Acts whereby that object might be lawfully attained.³ They might attain it by an issue of bye-laws,⁴ provided they conformed to the conditions and qualifications affecting such an issue.⁵ The appeal to section 364 of the Edinburgh

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licences need not be in writing, it must be assumed that the Magistrates impliedly licensed all the meetings which have been held within burgh during the last century. This argument overlooks the whole end and object of the 'addition' to the Act of 1606, which was that previous intimation should be made to the Magistrates in order that they might consider and decide whether a particular meeting ought to be sanctioned. The defenders' counsel founded upon the Statute Law Revision (Scotland) Act, 1906 (6 Edw. VII. cap. 38), which schedules for repeal the three earlier statutes as to unlawful convocations, but does not schedule the Act 1606, c. 17. No inference one way or the other can be drawn from this omission. The object of the Act was to prepare the way for a revised edition of the statutes and not to solve legal difficulties or to effect any substantive change in the law. Accordingly, the Act repealed expressly and specifically certain enactments which had ceased to be in force or had become unnecessary. In view of the case of *Deakin*, it was for the Court and not for the Statute Law Revision Act to determine whether the Act of 1606 was or was not in desuetude.

"Apart from the Act of 1606 the Magistrates have no power to institute a licensing system in order to prevent 'annoyance, disorder, and obstruction' or even breach of the peace, consequent upon the holding of meetings upon the Mound. Any person convicted of causing an obstruction on a foot-pavement or thoroughfare, or of conduct, which, if continued, would produce reasonable apprehension of 'the breaking up of the social peace' may be fined or ordered to find security for his future good behaviour—*Ferguson v. Carnochan*, (1889) 16 R. (J.) 93; *Wise v. Dunning*, [1902] 1 K. B. 167; Edinburgh Act of 1879, sec. 246 (19) and (20), as amended by Act of 1891, sec. 80 (11); Summary Jurisdiction (Scotland) Act, 1908, secs. 43 and 50. The proclamation, if effectual, would dispense with the necessity of both trial and conviction, and would subject a citizen to disabilities merely because the Magistrates in their private room had come to the conclusion that his conduct was calculated to produce obstruction or breach of the peace. I can figure nothing more arbitrary or unconstitutional. For the purpose of preserving the public peace, the Magistrates of Edinburgh have, in addition to the powers pertaining to Magistrates, the powers of

¹ Dicey, *The Law of the Constitution*, (7th ed.) 267; *Burden v. Rigler*, [1911] 1 K. B. 337, Lord Alverstone, C.J., at p. 340.

² *Wise v. Dunning*, [1902] 1 K. B. 167, Lord Alverstone, C.J., at pp. 175-6.

³ Edinburgh Municipal and Police Acts, 1879, sec. 246, 1891, sec. 80 (11).

⁴ Act 1879, secs. 308, 309.

⁵ Lumley on By-Laws, 85.

Act of 1879 did not help the reclaimers, for that section only preserved their existing powers, and they had failed here to show that they had any such power as they now claimed, either at common law or under their charters or by statute.¹ It was true that Warning Notices might be issued for the guidance of law-abiding citizens, but there was no resemblance between such notices and proclamations that professed to make lawful acts unlawful. The pursuer had a good title to sue.² He had adopted the only course which was open to him by seeking declarator, not of a right of meeting, but of a right of freedom from arrest in a place where he might lawfully be.

At advising on 12th July 1913,—

LORD PRESIDENT.—On the 19th July 1912 the Magistrates of Edinburgh issued a proclamation which, after a certain preamble which I need not

Justices of the Peace and of Sheriffs—*Wright v. Bell*, (1905) 8 F. 291, pp. 310, 314. I assume that if they thought it necessary they might lawfully issue a proclamation prohibiting the holding of any meetings which in their opinion were likely to lead to a breach of the peace, and that they might warn the citizens that persons who disobeyed would be liable to prosecution for obstruction and breach of the peace. But they could not lawfully threaten the citizens with penalties for contravening their proclamation. I asked the defenders' counsel to explain what were the penalties referred to in the proclamation. He pointed to section 27 of the Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), which enacts that 'where any Court has power to take cognisance of offences, the penalties attached to which are not defined, the punishment for such offences shall be regulated by that applicable to common law offences in such Court.' It would follow that the punishment for breach of the proclamation if prosecuted in the Police or the Burgh Court would be a fine not exceeding £10, and failing payment, imprisonment not exceeding 60 days (sec. 7); and if prosecuted in the Sheriff Court, a fine not exceeding £25, and failing payment imprisonment not exceeding three months, or imprisonment for the same period without the option of a fine (sec. 11). These penalties are much more severe than those imposed by the Act of 1879 for municipal offences of a similar character. By sections 242 and 243 of the Edinburgh Act of 1879 the Magistrates have power to regulate the traffic in the streets; to prescribe the route for public processions, &c., and every person guilty of a breach of such order or regulation is liable to a penalty not exceeding forty shillings. The same penalty is imposed for obstructing a foot-pavement or thoroughfare (section 246 (19) and (20); Act of 1891, section 80 (11)). Again the Magistrates and Town-Council have power with the approval of the Sheriff to make bye-laws, *inter alia*, 'for preventing nuisances and annoyances in any street or court' (Act of 1879, sections 308 and 309 (1)) under the same penalty. The proclamation was a usurpation by the Magistrates of the right which belonged to the citizens of Edinburgh as represented by the Lord Provost, Magistrates, and Councillors to regulate the use of the streets so as to benefit so far as possible the community as a whole. At common law 'in matters of police, or of common concernment to the community, the Magistrates and Town-Council must concur, as the full representatives of the community. In this capacity they make bye-laws not repugnant to the laws of the realm or set of the borough' (Ersk. i. 4, 22).

¹ Thomson's Acts, i. Pref. 27, 34, 40, 54; Cosmo Innes, Scotland in the Middle Ages, 239.

² Rossi v. Magistrates of Edinburgh, (1903) 5 F. 480, (1904) 7 F. (H. L.) 85.

July 12, 1913. read, continued as follows: "Therefore the said magistrates do hereby order that persons shall not assemble or congregate or hold meetings on any part of the footpaths or roadways within the areas above described"—the area above described was a certain area at the Mound—"or in the neighbourhood thereof, from and after the date of this proclamation, unless they have previously applied for and obtained the licence of the said Magistrates thereto. All persons contravening this order are liable to the penalties set forth in the Summary Jurisdiction (Scotland) Act, 1908." The pursuer of the present action did proceed to hold a meeting without having obtained the licence of the Magistrates. He was apprehended, and was convicted of having contravened the terms of the proclamation. He was convicted, but he was only admonished; no penalty was imposed on him. He did not try to suspend the conviction in the High Court of Justiciary, but he brought this civil action in which he asked for certain declarators. I need not go through the declarators for which he asked, because I am only concerned now with the declarator which he got from the Lord Ordinary. The Lord Ordinary "finds and declares that the Magistrates of the city of Edinburgh were not empowered by the common law or by any statute to issue the proclamation mentioned in the summons, and that the pursuer was not at 19th or 21st July 1912, and is not now, bound to obey said proclamation, and decerns"; and then there are certain other parts of the decree which it is not necessary to mention. The whole question which was argued before your Lordships upon the reclaiming note has been whether that finding of the Lord Ordinary was right or was wrong. I am of opinion that the Lord Ordinary has come to a just conclusion, and he has accom-

As I have already mentioned, the Corporation of Edinburgh has not only delegated, with consent of Parliament, certain of its powers to the Magistrates, but has also subjected its common law power of making bye-laws to statutory regulation. It would be a fitting question for the consideration of the Town-Council whether those citizens who derive edification, instruction, or amusement from street preachers ought to be allowed to gratify this taste on the Mound, although other members of the community may object to the inevitable noise and crowd and to occasional coarse language. Even if the judgment of the Town-Council were adverse the pursuer would be entitled to be heard by his counsel or agent before the Sheriff allowed any bye-law prohibiting meetings on the Mound. The proclamation rides roughshod over these rights and liberties.

"I shall find and declare that the Magistrates were not empowered by the common law or by any statute to issue the proclamation mentioned in the summons, and that the pursuer is not bound to obey it. It is unnecessary to pronounce any further declarator or to grant interdict. As regards the conclusion for damages the pursuer has stated no relevant case against the Corporation, but he was entitled and bound to call them as parties interested in the other conclusions. I shall repel the first and second pleas stated for the Corporation. I shall sustain the third plea (irrelevancy) so far as regards the conclusion for damages, and to that extent I shall dismiss the action so far as directed against the Corporation. As regards the Magistrates I shall allow the pursuer to lodge an issue without pronouncing any decision as to the competency or relevancy of his claim of damages. The defenders' counsel cited the case of *Gilchrist v. Anderson*, 1 D. 37; but *Wood v. North British Railway Company*, 1 F. 562; *Wilson v. Bennett*, 6 F. 269; and *McCreadie*, 1907 S. C. 1176, seem more in point."

panied his judgment with a very careful and learned note, with nearly all July 12, 1913. of which I concur, the only two passages on which I shall have something ^{M'Ara v.} to say I shall mention presently. But I think it necessary to add a few ^{Magistrates} words, because I wish it to be most distinctly understood that, while I ^{of Edinburgh.} agree with the Lord Ordinary, I am not to be held as concurring with much ^{Ld. President.} of the argumentative statement which is to be found in the pleadings of the pursuer.

The justification for the proclamation was rested by the learned counsel for the defenders (first) upon the common law, and (second) upon the statute of 1606. I shall take these two points separately.

As regards the common law, I wish most distinctly to state it as my opinion that the primary and overruling object for which streets exist is passage. The streets are public, but they are public for passage, and there is no such thing as a right in the public to hold meetings as such in the streets. That brings me to one of the few points on which I think it necessary to say something as to what the Lord Ordinary has said, because in one view of what he has said I should not agree. The learned Lord Ordinary, after saying that if the pursuer had claimed an absolute legal right to hold a meeting on a road or street he would have assoilzied the defenders upon the ground that no such right existed—a proposition with which I agree—goes on to say this: “I merely say that I dissent from the view that the public have only a bare right of passage over a country highway or over the streets of a burgh.” Well, in one view of that I do not agree. On the other hand, I am not sure that there is really any difference between the views of the Lord Ordinary and my own. What I mean is this: streets are for passage, and passage is paramount to everything else. That does not necessarily mean that anyone is doing an illegal act if he is not at the moment passing along. It is quite clear that citizens may meet in the streets and may stop and speak to each other. The whole thing is a question of degree and nothing else, and it is a question of degree which the Magistrates are the proper persons to consider in each case, and it is for them to take such measures as are necessary to preserve to the citizens in general that use which is paramount to all other uses of the streets. I say this because there is a good deal in the pursuer's pleadings about what he calls “exercising his right of free speech in public places.” Now the right of free speech undoubtedly exists, and the right of free speech is to promulgate your opinions by speech so long as you do not utter what is treasonable or libellous, or make yourself obnoxious to the statutes that deal with blasphemy and obscenity. But the right of free speech is a perfectly separate thing from the question of the place where that right is to be exercised. You may say what you like provided it is not obnoxious in the ways I have indicated, but that does not mean that you may say it anywhere.

I am not going to deal with what may be the case in open spaces or public places. It seems to me that no general pronouncement upon that subject could be made, because, although for convenience sake one often speaks of open spaces or of public places, the truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have

July 12, 1913. to know the history of the particular place. For example, there may be certain places which are dedicated to certain uses, as was laid down in the well-known judgment of Lord Watson in the case of *Grahame v. Magistrates of Kirkcaldy*,¹ and things that otherwise were lawful might be restrained if they interfered with the purposes of that dedication. Each of those cases must be dealt with when it arises. Here we are dealing with a street proper, because this place at the Mound is just one of the streets of the city. It is a thoroughfare, although, probably, not a very much used thoroughfare at that particular corner. In such a place there is not the slightest right in anyone to hold a meeting as such. On the other hand, if a man chooses to stop on the street and speak, and the Magistrates, as the best judges of that matter, do not think he is doing any harm, there is no particular reason why he should be interfered with. But the Magistrates, as the proper conservators of the street, have got to consider two things: (first) whether what is going on in the streets is at all likely to interfere with what I have said is the paramount use of the streets—the right of passage; and (secondly) whether what is going on is likely to lead to a breach of the peace. In either of those cases it seems to me that they have an absolute right *via facti* by means of the police to move the people on who are causing the obstruction. They may move them on if the congeries of persons who have gathered round is such as to prevent an ordinary peaceable citizen getting along the street as he wishes to do. But I also think, if they find a person speaking in such a way as is calculated to incite other persons to commit a breach of the peace, they have a right to move him on, not because the right of free speech can be questioned, but because he is doing something which is likely to make a breach of the peace in the streets for the proper conduct of which the Magistrates are responsible. But I think their right is necessarily limited to dealing with him *via facti*. I am not speaking of the actual commission of breach of the peace. That is a common law crime which can be prosecuted in the ordinary way. But conduct which is such as to cause an apprehension of breach of the peace may be dealt with *via facti*. There are many cases which one can easily think of without going into any speculations as to what this particular pursuer may have been saying. There are certain allegations made on record about that; but as there has been no proof, I hold my mind a perfect blank as to what the subjects of discourse were, or how they were handled by the pursuer. But I certainly know this—and I am entitled to know it from the experience of public life—I know that there are certain districts in certain cities in which a very large majority of the population hold a certain faith, or a certain form of faith, and I know that if a person, lecturer or preacher, holding other views, went there and promulgated his opinions as regards that faith, although he has a perfect right to hold these opinions, and although, in a proper place, he has a right to express them, his doing so in that particular neighbourhood would certainly lead to a breach of the peace. Now that is a case where, if a man took up his stand and began his discourse on such lines, the Magistrates would, I think, be entitled at once to move him on.

¹ (1882) 9 R. (H. L.) 91.

While I have thought it necessary to say that—because I wish it to be July 12, 1913. very clearly understood that the Magistrates are the natural conservators of M'Ara v. our streets in this matter, and that the citizens are not to be harried by the Magistrates holding of meetings which interfere with their progress, or which lead or of Edinburgh. are likely to lead to breach of the peace—yet it does not seem to me in any Ld. President. way to justify this proclamation, because, although the Magistrates have the power of moving a person on, and although also they might issue what might, in one sense, be called a proclamation, but which would be really a notice to say that they found certain objections to meetings in such and such a place, and that they proposed to move on anyone who stood there, that does not give them the power of creating an offence and fencing it with a penalty. In doing that they seem to me to have taken upon themselves a power which only the Legislature can give. And the fatal blot of this proclamation, so far as sought to be based on the common law, seems to me to be that they created an offence, and proposed to impose penalties whenever the offence which they thereby created was committed.

So much for the common law. I only mention, to show that I have not forgotten it, that, of course, over and above what may be called the common law powers, there are certain powers which the Magistrates have by statute in connection with the framing of bye-laws. I need not go into that, because that is dealt with statutorily. There are certain safeguards before the bye-laws are passed, but admittedly this proclamation was not issued in respect of any bye-law.

Then I go to the Act of 1606. No doubt the Act of 1606, if you take it by itself, does authorise this proclamation; but I have myself no doubt whatsoever that the Act of 1606 is in desuetude. And here is the only other point on which I think it necessary to say I do not quite agree with one expression of the Lord Ordinary, although I agree in the result to which he has come. He considers that, without doubt, the statute is in desuetude as regards meetings within buildings, but that meetings in the open air are in a different category. Then he says that, in some of the opinions in *Bute v. More*,¹ “authority for the proposition that Scottish statutes may fall into partial desuetude will be found.” I am not quite sure that he agrees with that, but it is merely to make sure that there shall be no doubt about it that I venture to express my opinion to this effect. I think it is possible that a statute might be partly in desuetude and partly not, where portions of the statute were separable—that is to say, the statute might deal with two matters, and as regards one matter it might be in desuetude and as regards the other it might not. But I cannot conceive that a statute could be partially in desuetude in respect of its application. What is prohibited under the statute of 1606 is a meeting without the authority of the magistrates. Well, that statute must be either *in observantia* or in desuetude. I do not think it can be *in observantia* as regards one class of meeting and in desuetude as regards another. If that is so—if you cannot split the statute in its application—then it seems to me clear that it is in desuetude, because we all know that the habit of public meeting has existed now from time immemorial, certainly ever since the enhanced

¹ 9 Macph. 180, 1 Coup. 495.

July 12, 1913. political activity which may be said to have come in since the Reform Act of 1832 ; and with regard to all the meetings, on all the subjects, political and otherwise, that have been held since those days, no one ever heard of an application being made first to the magistrates for a licence to hold any one of them. Accordingly I hold that the statute of 1606 cannot form the basis for the proclamation.

M'Ara v.
Magistrates
of Edinburgh.

Ld. President.

Upon the whole matter I have come to the conclusion that the Lord Ordinary's decision is right, and should be adhered to.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD MACKENZIE.—I agree with the conclusion reached by the Lord Ordinary.

The proclamation of 12th July 1908 is said to be warranted by the Act 1606, cap. 17, and also by the common law.

The Act of 1606, cap. 17, is, in my opinion, in desuetude. To hold otherwise would be to affirm that no persons can assemble themselves together on any occasion within burgh without first going to the provost and bailies, intimating the lawful cause of their meeting, and obtaining their licence. No body of persons, and no meeting, whether in a private house or public building, in private grounds or public park, is exempt from the prohibition of the statute, which is universal in its terms. It is impossible to construe the statute in any but the widest sense. It was argued that although it would be impossible to apply the statute to meetings held within four walls, and that to this extent the statute must be held to be in desuetude, yet it is only in partial desuetude, and the case of *Bute v. More*¹ was referred to. Even assuming that when a statute prohibits A, B, and C, it may be in desuetude as regards A, and yet effective against B and C, that is not the nature of the prohibition here. The prohibition is not of different acts, but of one act, *i.e.*, assembling, under any conditions. For this reason it is impossible to distinguish between one kind of meeting and another. It applies to all or to none. This statute cannot be regarded as in partial desuetude only. The decision in the case of *Deakin*² founded on by the defenders did not involve a recognition of the Act of 1606. The appellants there had been guilty of a breach of the peace, and of breaking the terms of the proclamation which had been issued by the magistrates. The proclamation in that case was different from the one here, for it merely prohibited certain processions, on the ground that they were leading to riotous proceedings and were likely to cause a breach of the peace. The ground of judgment there was not the Act of 1606. If the proclamation here had been in these terms the case upon the common law aspect of it would have been different. There is no warrant, in my opinion, for the Magistrates in the exercise of their common law powers prohibiting all meetings in the places specified in the proclamation, until licences have been obtained. Still less could they attempt to adject penalties for the infringement of the proclamation.

I am, however, clearly of opinion that the powers of the Provost, Magistrates, and Council at common law are not limited, in the way suggested in the argument for the pursuer, merely to what is contained in the Municipal Acts.

¹ 9 Macph. 180, 1 Coup. 495.

² 10 R. (J.) 22.

They are vested with the administration of the public streets, both within the July 12, 1913. ancient and the extended royalty, including the space in question in the present action. They could, if they thought right, prohibit any meeting being held there; or they might issue a notice prohibiting the holding of certain meetings as likely to lead to a breach of the peace. It would be the duty of the police to enforce their orders, and if anyone obstructed the police in the execution of their duty he would be prosecuted for that. I am, however, unable to take the view that, if meetings are allowed at all, any meeting can be prohibited except upon the ground that it is calculated to cause obstruction or breach of the peace.

THE COURT adhered.

ROBERTSON & WALLACE, S.S.C.—Sir THOMAS HUNTER, W.S.—Agents.

ANNIE CHRISTIE, Pursuer (Respondent).—*Sol.-Gen. Anderson—Wark.* No. 151.

JAMES LYBURN, Defender (Appellant).—*D. Anderson, K.C.—*

C. H. Brown.

July 12, 1913.

Proof—Witnesses—Credibility—Opinion of Judge who heard witnesses—Duty of Court of appeal. Christie v. Lyburn.

Observations as to the duty of a Court of appeal to form an opinion for itself upon questions of fact submitted to review, and as to the weight to be attached to the opinion of the Judge who saw and heard the witnesses.

On 30th June 1911 Annie Christie brought an action of filiation and aliment in the Sheriff Court at Perth against James Lyburn. 1st DIVISION. Sheriff of Perth.

The Sheriff-substitute (Sym), after a proof, granted decree against the defender, and on appeal the Sheriff (Johnston) affirmed that interlocutor.

The defender thereupon appealed to the Court of Session, and the case was heard before the First Division (without Lord Johnston) on 18th and 19th June 1913.

At advising on 12th July 1913 the following observations were made with regard to the weight to be given to the opinion of the Judge of first instance,—

LORD MACKENZIE.—This action of affiliation and aliment comes up on appeal under unusual circumstances. The Sheriff-substitute, who saw and heard the witnesses, has held the pursuer's case proved. The Sheriff on appeal has affirmed this judgment, but states in his note:—"In affirming the Sheriff-substitute's interlocutor in this case, I am not to be taken as giving his finding, should the case go further, the weight which the Supreme Court is sometimes disposed to attach to the concurrent judgment of both Sheriffs. If it had fallen to me to decide the case in the first instance upon the evidence as recorded, my judgment would have been the other way." This course, as the Sheriff explains, he followed from his desire to give effect to recent decisions in the House of Lords as to the effect to be given to the opinion of the Judge of first instance in dealing with questions of evidence. The Act of Parliament does, however, give litigants a right of

July 12, 1913. appeal on questions of fact, and if, after giving all due weight to the impression produced by the witnesses on the Sheriff-substitute who took the proof, the Court to whom an appeal lies consider that the case is not proved their duty is to give effect to this opinion. [His Lordship then examined the evidence and stated his reasons for holding that the pursuer had failed to prove her case.]

Christie v.
Lyburn.

Lord Mac-
kenzie.

The LORD PRESIDENT concurred.

LORD KINNEAR.—I only wish to add that I agree with the view expressed by Lord Mackenzie as to the course which the learned Sheriff has thought it right to follow in this case. Whether an appeal should be allowed or not upon questions of fact is not for the Courts but for the Legislature to determine. And so long as an appeal on a matter of fact is allowed, it is the plain duty of the Judge of appeal to apply his own mind to all the materials of fact which may be brought before him, and to pronounce his own judgment. I do not think a Judge of appeal, before whom a question of fact is properly laid, is entitled to withhold the benefit which the law gives to the person aggrieved by the judgment below, and to refuse to give his own opinion upon the evidence. Of course, he may attach—as we always do attach—the greatest possible weight to the opinion of the Judge who has seen and heard the witnesses, and there may be particular facts upon which the Court of appeal may reasonably accept the opinion of the Judge simply because it is his; but that is only when it is apparent from the judgment that he has been moved by considerations which cannot be brought fully, if at all, before the Court of appeal. It is a totally different thing to say that the Judge of appeal is to suppress his own perception of the probabilities of conduct and results out of deference to the very judgment which it is his duty to review.

THE COURT recalled the interlocutors of the Sheriff and the Sheriff-substitute, and assoilized the defender.

MENZIES, BRUCE-LOW, & THOMSON, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 152.

July 15, 1913.

ADAM JOHNSTONE, Pursuer.—*G. Watt, K.C.—MacRobert.*
THE PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF
LOCHGELLY, Defenders.—*Constable, K.C.—Lowson.*

Johnstone v.
Magistrates
of Lochgelly.

Reparation—Negligence—Safety of the public—Dangerous article—Unfenced rubbish heap in field frequented by public—Injury to child—Liability of person using, but not owning, the field.

A father brought an action of damages against a burgh authority for the death of his daughter, under three years of age, who had received fatal injuries through her clothes becoming ignited at a fire burning upon a rubbish heap or "coup" where the burgh rubbish was deposited. He averred that this coup was situated in a grass field in the neighbourhood of his house and was not fenced off from the field, nor was the field sufficiently fenced to exclude the public, who in fact used it as a public park, and that children were in the habit of playing upon the coup, all of which was known to the defenders. He further averred that it was the practice of the defenders, or of those for whom they were responsible, to collect and burn inflammable material upon the

coup, and that this practice had been followed by rag-pickers, with the July 15, 1913. acquiescence of the defenders. He alleged fault on the part of the defenders, in respect that they had failed to fence the coup or field or to take other precautions to exclude the public therefrom, and had failed, the coup being unfenced, to watch and properly extinguish fires which might be lighted thereon.

Johnstone v.
Magistrates
of Lochgelly.

Held that these averments were irrelevant to found an issue against the defenders, in respect (1) that it appeared therefrom that the defenders were not the owners of the field or coup, and had therefore neither the right nor the duty to fence them; and (2) that the material which they put upon the ground was not dangerous in itself but only became so when ignited, and there was no averment that the defenders, or those for whom they were responsible, had kindled the fire in question.

Lowery v. Walker, [1911] A. C. 10, *distinguished*.

IN June 1912 Adam Johnstone, a miner residing at Launcherhead, 1st Division. Lochgelly, brought an action in the Sheriff Court of Fife and Kinross at Dunfermline against the Provost, Magistrates, and Councillors of the burgh of Lochgelly, in which he claimed the sum of £500 as damages for the death of his daughter, aged two years and nine months, which he alleged had been caused by the fault of the defenders.

Sheriff of Fife
and Kinross.

The pursuer averred that behind the house which he occupied at Launcherhead there was a large grass park, at the lower end of which was a considerable area which was used by the defenders as a "coup" for depositing the rubbish brought from the burgh of Lochgelly.

He further averred:—(Cond. 3) "Said grass park is accessible from the south by an entry about 20 feet wide, between two rows of houses in Launcherhead. There is no gate or other obstacle to prevent persons getting access to said park by said entry, and the entry is in fact habitually used by the public as an access to said park, which is treated as a public park. . . . There is no fence of any description to cut off the said coup or refuse depot from the other part of said park, which is all in grass. On the west side of said park, and extending from the pursuer's said dwelling-house, alongside of said grass park and coup, and bordering the road leading to the Cartmore Farm, there is a barbed-wire fence about 4 feet in height. Said fence is, and has been for at least five years past, in a very bad state of repair, and is so much broken down that it is possible to walk between most of the pairs of paling stobs without difficulty, and without being impeded by the wire of the fence. Further, there was originally a large wooden gate, such as is usual for the entry to a grass field, which opened on to the centre of said coup or refuse depot. Said gate, which would be about 15 feet long, has been for some years, and still is, lying broken flat on the ground, with the result that between the two paling stobs, which originally formed the support for said gate, there is an open entry of about 15 feet. There are many other breaks in said fence between said gate and the dwelling-house occupied by the pursuer, which are at least 5 feet in extent. . . ." (Cond. 4) "Amongst the other refuse which is daily deposited at said coup or refuse depot, there is always a large quantity of paper, rags, and other inflammable material got from the various dustbins which are emptied daily by the servants of the defenders, the Provost, Magistrates, and Councillors of the burgh of Lochgelly, or of those for whom they are responsible. In par-

July 15, 1913. **Johnstone v. Magistrates of Lochgelly.** ticular, the refuse from various shops in the lower part of the town of Lochgelly is deposited in said coup. As a consequence of the daily deposit of said refuse, the paper and other inflammable material becomes detached, and is blown about said park, along said footpath, until it reaches the houses fronting the Station Road of Lochgelly. It is also apt to be blown up to the houses occupied by the pursuer and others in Launcherhead. In order to obviate the trouble and annoyance to occupiers of said houses, it has been the practice of the defenders, or of those for whom they are responsible, and of those whom they permit to use the said coup or refuse depot, to collect the papers and other inflammable material together at any one point on said coup and to burn them. This has in particular been a regular practice by the rag-pickers, who have frequented said coup for many years. No objection has ever been offered by the defenders, or by those for whom they are responsible, to the burning of said rubbish, though they knew, or could not fail to be made aware of the fact, that said papers and other inflammable material were so burned at irregular intervals. Further, the pursuer believes and avers that the carters employed by the defenders for the collection and depositing of said refuse had, and still have, instructions to make a fire and burn the papers on the said coup whenever they had or have occasion to think that the papers and other refuse were or are blowing about and causing annoyance to the occupiers of the houses in the Station Road or in Launcherhead. Explained that on 27th March 1912, subsequent to the accident to pursuer's child afterwards condescended on, one of the defenders' carters named Paterson, acting upon instructions from defenders, or of those for whom they are responsible, set fire to some paper and other refuse on said coup and left it burning. Previous to the accident pursuer and his wife were unaware that burning refuse was ever left unattended on said coup." (Cond. 5) "Said grass park, which is open to all the occupiers of the houses in Launcherhead and in the Station Road of Lochgelly, is the usual playground for the children of the residents there, and as there are often articles deposited in said coup which the children make use of for playthings, they are induced to go on to the coup in search of such things as picture-books, pencils, rubbers, and other small articles. This practice of the children in the neighbourhood has been well known to the defenders, the Provost, Magistrates, and Councillors of the burgh of Lochgelly or their servants for many years, and no objection was ever made by them to the children or other members of the public frequenting said park or going to said coup or refuse depot until after the accident hereinafter condescended on. In particular, the police never attempted to warn the children away from said coup or refuse depot." (Cond. 7) "On Monday, 18th December 1911, and about 12 o'clock forenoon on that day, pursuer's child, Isabella, aged two years and nine months, was playing in pursuer's dwelling-house with another child of a like age. As it was a bright day, pursuer's wife gave the children some sweets and told them to go along to the house of her mother (the grandmother of the child Isabella), who resides at the other end of the row of four houses of which the pursuer's house forms one, and close to the opening leading to the south end of said grass park. As the children had often gone to the grandmother's house in similar fashion, the pursuer's wife did not watch to see that they went into her mother's house. After the children left the house pursuer's wife went on with her domestic

duties for another quarter of an hour or twenty minutes, and then shut the door of her own house and went along to her mother's house. She had just reached her mother's house, and had seen the children were not there, when another playmate of pursuer's child came running up from the coup, and shouted that Isa was burning. Pursuer's wife at once ran to the coup, where she discovered her child with most of her clothes in flames. She extinguished the flames, and brought the child to the house, and sent for the doctor. Dr Dickson arrived in a few minutes, but on examination he said there was no hope of recovery, and the child died about four hours later."

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The grounds on which the pursuer sought to fix liability on the defenders were stated as follows:—(Cond. 8) "Said accident occurred through the fault or negligence of the defenders, the Provost, Magistrates, and Councillors of the burgh of Lochgelly, or of those for whom they are responsible. The defenders or their servants were well aware that said coup was not fenced off from the other portion of the grass field of which it is a part on the south and east sides thereof, and they are also aware that the fence which originally bordered said grass park and coup on the west side thereof was in a ruinous condition, and also that the gate, which was originally put in said fence for the convenience of their carters in entering said coup, was at the time of the accident, and for some years previous thereto, lying broken, flat upon the ground. They were also aware that the children of the occupiers of the houses in Launcherhead and in the Station Road were, at the time of the accident and for years previous thereto, in the habit of going to the coup in search of playthings, and that said park was used as a thoroughfare between Station Road and Cartmore Farm Road. They were also aware that their servants had instructions to burn the papers and other inflammable material found among the refuse when these became so numerous as to cause annoyance to the householders in the district, and they knew, or ought to have known, that these instructions had been acted upon, and that their servants gathered the papers together and set fire to them as occasion required. They also knew, or ought to have known, that the rag-pickers, who frequented the coup, had been in the habit of burning papers and other material on said coup. If the defenders had taken reasonable precautions to avoid the occurrence of an accident, they would have seen that said coup was properly fenced off from the other portion of said park, and also that the children in the neighbourhood were warned away from the coup, and made aware that they had no right to play about it or to go there in search of playthings. No notice of any kind was exhibited at said coup. The defenders ought also to have taken precautions to ensure that, so long as said coup was not fenced or protected, any fires kindled thereon should have been properly watched while there was any material burning, and they ought to have instructed their servants to see that any fire was properly extinguished before they left the coup. The defenders, however, failed to take all or any of these reasonable precautions, and the accident, whereby the pursuer's said child, Isabella, lost her life was a direct and natural consequence of their negligence to take reasonable precautions for the safety of the children and others whom they knew to be in the habit of playing about the coup and frequenting said park." (Cond. 9) "In particular, said accident resulted from the fault or negligence of the defenders, the Provost, Magistrates, and Councillors of the burgh of Lochgelly, or their servants, in failing to see that a fire, which had

July 15, 1913. *Johnstone v. Magistrates of Lochgelly.* been lit on said coup on the morning of 18th December 1911, was properly extinguished by their servants, or those whom they permitted to light fires there. The defenders' said carter, Paterson, was aware that said fire was burning, and failed to see that it was extinguished. The death of pursuer's child was caused by her clothes catching fire from burning paper or other material on said coup. If the defenders had taken reasonable precautions such an accident could not have happened. Explained that said refuse coup was in itself dangerous, being strewn with broken earthenware, glass, and other materials liable to cause injury to persons walking thereon, and, in addition, said coup was dangerous to the public health."

The pursuer pleaded, *inter alia*;—(1) The defenders, the Provost, Magistrates, and Councillors of the burgh of Lochgelly, having been the authors and users of said coup or refuse depot, there was a duty upon them in the circumstances condescended on to take precautions to prevent danger to children and others frequenting said coup or refuse depot, which they negligently failed to take, and the death of pursuer's child having resulted from such failure, all as condescended on, they are liable to the pursuer in damages. (4) The accident, whereby the pursuer's child lost her life, being a direct result of the fault or negligence of the defenders, or of those for whom they are responsible, decree should be granted as craved, with expenses.

The defenders pleaded, *inter alia*, that the pursuer's averments were irrelevant.

By interlocutor, dated 8th November 1912, the Sheriff-substitute (Umpherston) sustained the defenders' plea of irrelevancy and dismissed the action.*

On 25th January 1913 the Sheriff (Morison) sustained an appeal against that interlocutor, and remitted to the Sheriff-substitute to allow a proof before answer.

After sundry procedure the Sheriff-substitute, on 6th May 1913, allowed a proof before answer, and on 12th May 1913 the pursuer required the cause to be remitted to the Court of Session.

The case came before the First Division (without the Lord President) on 24th June 1913, when the pursuer moved the Court for an issue in ordinary form for the trial of the cause before a jury. The defenders opposed the motion on the ground that the pursuer's averments were irrelevant.

Argued for the defenders;—It was not averred that the defenders were proprietors of the field or coup, indeed it was clear from the averments that they were mere licencees or users of them, and had therefore neither the right nor the duty to fence them. Nor had the pursuer made any relevant averment of circumstances which put upon the defenders a duty of protecting the public from the fire which had caused this accident. It was not a trap or dangerous attraction in the sense of the decisions on this point. Granted that the coup was an attraction, it did not become dangerous until the material deposited there by the defenders was interfered with by third parties. In this respect the case was clearly distinguishable from that of *Lowery v.*

* After the action was raised the pursuer was allowed to add as defenders thereto the proprietor and tenant respectively of the grass park in question, but the action, in so far as directed against these parties, was dismissed in the Sheriff Court, and the pursuer did not ask for an issue against either of them in the Court of Session.

Walker,¹ which was relied upon by the pursuer. The case of *Cooke* July 15, 1913. *v. Midland Great Western Railway of Ireland*² was that which most nearly resembled the present, but that case was also distinguishable in respect that the danger to be apprehended there was from the machine in the condition in which it was when put upon the ground by the defendants. The material which the defenders had put upon this field was innocuous, it was only when kindled that it became a source of danger, and there was no averment—indeed the pursuer had deliberately refrained from making any averment—which connected the defenders with the lighting of the fire in question or attributed to them knowledge of its existence. The grounds of decision in the numerous cases cited for the pursuer really told in favour of the defenders' contention.

Argued for the pursuer;—The defenders had brought the material in question on to the field in the knowledge that it was frequented by the public, including children; the coup and the material thereon were an attraction to children; further, part of the material had to be destroyed in order to avoid the creation of a nuisance, and the defenders were in the habit of destroying it by fire, and of acquiescing in this being done by others. They had therefore knowingly allowed a danger to remain in this field, which they knew was frequented by the public, and were liable for the results of the accident caused thereby³; or they had created or acquiesced in the creation of a danger in a place where none was before, and had a duty to protect the public from that danger, even though it was upon private property or the property of another.⁴ It was immaterial whether the public frequented the place in virtue of any right; it was sufficient if the fact of their frequenting the place was known to the defenders.⁵ Nor did it affect the liability of the defenders that the thing put by them upon the ground did not become a danger until tampered with by the injured party or by a third party.⁶ Persons who introduced dangers or dangerous material into public or semi-public places had a special duty with regard to children.⁷ As reasonable men, and also in the state of their knowledge, the defenders should have anticipated the presence of children and the attractiveness of the object and taken steps to guard against such an accident as occurred.⁸ Counsel also referred to the following cases, in which this special duty towards children had been considered:—*Innes v. Fife Coal Company, Limited*,⁹ *Hastie v. Magistrates of Edinburgh*,¹⁰ *Stevenson v. Corporation of Glas-*

¹ [1911] A. C. 10.

² [1909] A. C. 229.

³ *Lowery v. Walker*, [1911] A. C. 10, per Lord Loreburn, at p. 12, and Lord Shaw, at p. 15.

⁴ *Holland v. Lanarkshire Middle Ward District Committee*, 1909 S. C. 1142, per Lord President Dunedin, at p. 1149.

⁵ *Grand Trunk Railway of Canada v. Barnett*, [1911] A. C. 361, per Lord Robson, at p. 366.

⁶ *Cooke v. Midland Great Western Railway of Ireland*, [1909] A. C. 229; *Jackson v. London County Council and Chappell*, (1912) 28 T. L. R. 359.

⁷ *Cooke v. Midland Great Western Railway of Ireland*, [1909] A. C. 229, per Lord Denham, at p. 234; *Findlay v. Angus*, (1887) 14 R. 312; *Haughton v. North British Railway*, (1892) 20 R. 113; *Reilly v. Greenfield Coal and Brick Co., Limited*, 1909 S. C. 1328.

⁸ *Latham v. R. Johnson & Nephew, Limited*, [1913] 1 K. B. 398.

⁹ (1901) 3 F. 335.

¹⁰ 1907 S. C. 1102.

July 15, 1913. *Johnstone v. Magistrates of Lochgelly.* *gow*,¹ *Holland v. Lanarkshire Middle Ward District Committee*.² Reference was also made to the earlier cases of *Cummings v. Darnagavil Coal Company, Limited*,³ *Devlin v. Jeffray's Trustees*,⁴ *Sneddon v. Nimmo & Company, Limited*,⁵ which, it was argued, could not stand with more recent decisions of the House of Lords.

At advising on 15th July 1913,—

LORD KINNEAR.—This is an action of damages at the instance of a miner living at Lochgelly against the Provost, Magistrates, and Councillors of the burgh of Lochgelly for damages for the death of his infant child, which he alleges was due to the fault or negligence of the burgh authorities. The Sheriff-substitute has dismissed the action as irrelevant. The Sheriff-depute, on appeal, has recalled his substitute's interlocutor and allowed a proof. I am of opinion that the Sheriff-substitute was right and that no relevant case has been stated.

The case is that the defenders are in the habit of depositing town refuse upon a piece of waste ground where rubbish may be shot, which is described, in the language familiar to us all, as a "free coup." They are allowed by the proprietors to make use of this coup for depositing the rubbish, and they deposit their rubbish accordingly. They are not themselves proprietors of the ground, and they have no more right or control over it than any other person who is allowed by the owner to make certain uses of it. But then it is alleged that the free coup forms part of a grass field which is accessible to the public and which is treated as a public park. The expression is extremely vague, and I am not at all sure that it is intended to convey the ideas which would naturally occur to ordinary people as expressed by the term "public park." But I think what it does come to is this, that people are allowed to pass and repass over it, both adults and children, and children to play upon it, just as if it were public ground—that is to say, it is private ground to which the public is allowed to have access.

Now it is said that this field, although originally fenced, is so no longer; that there is a fence of stobs and wires which extends from the pursuer's dwelling-house alongside the grass park, but which has been, for some years, in a very bad state of repair, and is so much broken down that it is possible to walk between most pairs of the paling stobs without difficulty and without being impeded by the wire of the fence; it is said there is another access, because there had been originally a large wooden gate which had been broken down and is lying flat upon the ground; it is also said that there are many other breaks in the fence between the gate and the dwelling-house occupied by the pursuer. The practical result of the whole averments upon this matter is that the field, of which this free coup forms a part, is easily accessible by anybody who wants to go into it, whether adult or child.

Then it is averred that, amongst the refuse which the defenders are in the habit of depositing, there is generally, or always, a large quantity of paper and rags and other inflammable materials, which are got from the various dust bins of the burgh of Lochgelly and brought to be shot upon the waste ground; that as a consequence of the deposit of this rubbish the pieces of

¹ 1908 S. C. 1034.

² 1909 S. C. 1142.

³ (1903) 5 F. 513.

⁴ (1902) 5 F. 130.

⁵ (1903) 5 F. 1036.

paper become detached and are blown about the field and along the foot-^{July 15, 1913.} path, which is annoying to the people whose houses adjoin the footpath; ^{Johnstone v.} and that, in order to prevent the annoyance caused by this rubbish blowing ^{Magistrates} about, it has been the practice, permitted by the defenders, to collect the ^{of Lochgelly.} paper and other inflammable material together at one point in the coup and Lord Kinnear. to set fire to them.

Now such a fire was lighted here; and the pursuer goes on to aver that his daughter, a child about two years and nine months old, was playing in his dwelling-house with another child of the same age. The pursuer's wife sent the children along to the house of her mother, who resides at the end of a row of four houses, of which the pursuer's house forms one, and close to the opening to the south end of the grass park. The averment is that the children had often gone to the grandmother's house in similar circumstances, and that the mother saw no risk in letting them do so and did not watch to see that they went where they were sent to. Instead of going to the grandmother's house they went into the field, and shortly afterwards another child came running to the mother and said that the little child was burning. After the children started for their grandmother's house, all that the pursuer seems to know is this, that the child was found with her clothes on fire. Her playmate was too young to be able to give an intelligent account of what had happened. The obvious inference is that she had gone into the field, reached the fire, and somehow got burned. The poor child was so seriously injured that she did not recover but died of the burning, and the action is now brought against the Magistrates of the burgh for their alleged negligence in exposing her to that danger.

I think there are two very material points to be kept in view in considering that allegation; the first is that the ground upon which the defenders were allowed to shoot their rubbish did not belong to them, that they had therefore no power or control over it, and had no duty or right to fence it, but were simply in the position of being allowed, like others, to make use of it for a particular purpose. The second material point is that it is not averred that they themselves set fire to the deposit of rubbish which is said to have been in flames when the child was burned, or that they had ever directed it to be burned, or that it was in fact burned by anybody for whom they are responsible. I think it necessary that this should be distinctly noted, because it is evident from the course of proceedings that the pursuer is not merely in the position of omitting to make a relevant averment connecting the defenders with the lighting of the fire, if such an averment would have been true, but that he deliberately abstained from making any point—if any point could be made—of such a fact as that the defenders themselves had set fire to the refuse and left a burning heap of rubbish upon the ground, without taking precautions for extinguishing it, because when the case came into this Court your Lordships were asked to allow an amendment of record which would have embodied an averment that the heap of rubbish was lighted by the defenders' servants or persons in their employment, and that the lighting was expressly permitted by them, or that it was done by their servants. But after some discussion, and before the case was heard upon the merits, the pursuer withdrew that amendment; and we are therefore obliged to read the record as it stands,

July 15, 1913. with the averment that the rubbish was lighted by somebody, but with no
Johnstone v. averment that it was lighted by the defenders or by anybody for whom
Magistrates they are responsible. I take it therefore, upon the pursuer's case as stated,
of Lochgelly. that he must base the defenders' responsibility upon the fact that they had
Lord Kinnear. put rubbish upon this piece of waste ground, and not that they were in any
way responsible for its having been set on fire by somebody else.

But then it is said that, whether they lighted the rubbish themselves or not, the defenders knew that that was a thing that was likely to happen; they knew that, in ordinary practice, the inflammable parts of these rubbish heaps were set on fire to obviate a nuisance, and therefore must have known, when the rubbish was put on the field, that that was an incident likely to occur. The question therefore is whether, in these circumstances, there is any relevant averment of fault. The learned Sheriff sends the case to proof, because he says that he cannot determine that question at this stage and that it ought not to be decided without inquiry—that is to say, as I understand, without his having the exact facts conclusively proved before him. Now if the only question were that which ultimately arises upon a case of negligence—to wit, whether the persons accused of negligence have taken reasonable precautions or not—I should be very much disposed to agree with the Sheriff in thinking that that is always a case depending so much upon particular circumstances and not upon general doctrines of law that it is much safer to ascertain what the facts actually are beforehand than to decide upon law without proof. But then there is the preliminary question which, I think, the learned Sheriff has failed to consider. There is no responsibility for negligence—that is, for the neglect of some duty which the person charged with neglect owes to the person injured—until it has been first established that there is such a duty in law. The pursuer must aver facts out of which a duty of taking care arises; and I do not think it is at all sufficient to say, after setting out a history of an accident such as I have referred to in this case, that it was the duty of the defenders to take precautions to prevent injury to a child. It is necessary, further, to say what the precautions were which they were bound to take and which they failed to take; and therefore one looks to see whether there is any averment of a duty to take some precaution which the defenders are said to have omitted. I have not been able to find that there is any such averment relevant to be sent to trial.

The learned Sheriff founds upon the case of *Loverly v. Walker*.¹ But that belongs to a totally different category of law from that which we are considering. That was a case in which the question—as to which the House of Lords and the Court of Appeal in England differed—was concerning the liability of an owner of land, who permits the public, infant or grown-up, to pass and re-pass over the land, in the event of his exposing them to some unusual and unexpected danger. The actual case was that a person, who had habitually allowed his land to be used without objection as a right of way, was said to have put into a field through which the right of way passed a vicious horse which had, on previous occasions, attacked and bitten people, and which attacked the plaintiff in this case and bit him and stamped upon

¹ [1911] A. C. 10.

him and seriously injured him. What the House of Lords held was that, July 15, 1913. if a man allows people to enter his land, he owes them a duty not to expose them to injury, and, in particular, not to expose them to the attacks of a dangerous animal; and it is of no consequence that the person so exposed to injury is not expressly invited to go upon the land, provided the conduct of the owner is such as to show that he acquiesces in his land being so used by the public. That was the judgment in *Lowery*,¹ and the only point upon which the House of Lords was at variance with the Appeal Court was one with which we are not concerned, namely, whether the same duty was due to a trespasser as the House of Lords held was due to a person lawfully upon the ground with the permission of the owner. That is a matter with which we have no concern, and although there are some indications of opinion that even a trespasser is not to be purposely injured by the owner of land on whose ground he trespasses, there is no judgment of the House upon it and no opinion that can, in any way, affect the present question. But the point of distinction that seems to me to be conclusive is this, that the defenders here are not the persons by whose leave and licence the poor child who was injured got upon that ground. They had nothing to do with it. They had no more right to give leave to or to permit this child or other people to enter upon and pass over the ground than had these other people to give them a right to tip their rubbish upon it. They were all alike licencees of the owners. Therefore the defenders had no duty to take precautions which an owner of land, in such circumstances, is supposed to be bound to take, because they could not protect the ground against the invasion of the public, children or grown-up; they could not fence it, because it was not theirs.

Turning then to the particular precautions which it is said they were bound to take, it appears to me that what is set out in the eighth article of the condescendence—set out in great detail—is altogether irrelevant in so far as it refers to the supposed duty of the defenders or their servants to fence the ground. It is said that they knew that there was a fence and that it was in a ruinous condition. If it was, that was no fault of theirs, and they were neither bound nor entitled to repair it. Then it is said that the children of the occupiers of the houses in Station Road—the road in which the pursuer was living—were, at the time of the accident and for some years before it, in the habit of going to the coup in search of playthings. The duty alleged to take precaution to prevent their going there is the same duty to take precaution referred to in the previous part of the condescendence—that they should have fenced it and prevented anyone entering the field at all. The defenders have no duty and no right to do that. Therefore, it appears to me that all the cases of the class of which I think *Lowery*¹ is the latest instance and one of the most important are beside the present question. There is no question here of the liability of owners of ground to persons whom they allow to make use of it.

But then there is a totally different ground of liability alleged, and that, I think, requires most serious consideration, because there can be no question that no one, whether he is the owner of ground or not, is entitled to

¹ [1911] A. C. 10.

July 15, 1913. put upon a piece of ground, open to the public and habitually frequented by the public, any dangerous machine or dangerous animal without taking precautions against anyone getting hurt. There are many cases in our own books—and they are entirely in accordance with the English cases—of which Lord Kinnear. the case of *Campbell v. Ord & Maddison*¹ is a very good example. In that case it was held that persons, having put into a market-place an oilcake-crushing machine which would be dangerous if it were meddled with, and which they knew was very likely to be meddled with by children if they left it in the condition in which they did leave it and without anybody to look after it, were responsible for injury and damage done to children by a careless child having set it in motion. But then I think that that liability rests solely upon the ground that no person is entitled to put a thing in itself dangerous in the way of the public entitled to use the place where it is left. It makes no difference, to my mind, whether the public includes adults only, or adults and children, provided a thing is left there in such a position as to be dangerous to anybody. But I think the answer in this case is that the materials which the defendants left upon this waste ground or free coup are not in themselves dangerous to anybody. There is nothing dangerous in a collection of rubbish which is left in one corner of a field expressly devoted to the purpose of shooting rubbish by the persons to whom the field belongs. The danger arises only on the intervention of somebody else who has set the rubbish on fire.

I think the case which comes nearest to the question here, and which is a very valuable case, because of the extremely elaborate elucidation of the law of liability which is to be found in the judgment of the learned Judges of the Appeal Court, is *Latham v. Johnson*.² The only point of distinction between that case and the present is that the defendants were themselves owners of unfenced waste land and not, as in the present case, only persons permitted to use it. The unfenced land was accessible by a path leading from the house in which a child, between two and three years old, lived with its parents. The public were allowed by the defendants to traverse the land, and children of all ages were in the habit of playing in the heaps of sand and stone and other materials which were, from time to time, deposited there by the defendants. The injured child went upon the land unaccompanied by any older person and was shortly after found upon a heap of paving stones, one of which had fallen and injured her hand. The child was much too young to give any intelligible account of what had happened, and there was no evidence to show what had happened. But in an action for negligence, the jury found that the children played upon the land with the knowledge and permission of the defendants, that there was no invitation to the child to use the land unaccompanied, that the defendants ought to have known that there was a likelihood of children being injured by the stones, and that the defendants did not take reasonable care to prevent children being injured thereby. Now these being the facts, the Court held that there was no liability upon the defendants, because there was neither allurement, nor trap, nor invitation, nor dangerous object placed upon the land. And, upon the last point, which I think makes the case valuable for the pre-

¹ (1873) 1 R. 149.

² [1913] 1 K. B. 398.

sent, the learned Judges point out that stones of themselves are not dangerous July 15, 1913. things, it is because they are meddled with that they become dangerous, and that, having deposited them upon the ground, the defendants were not responsible for anything that might be done by children and others meddling with them. They distinguish the case from that which is so obviously different of depositing things in themselves dangerous—as, for example, lime—in a place which children are in the habit of frequenting. But the ground of judgment is expressed most clearly in the opinion of Lord Justice Hamilton, who asks what kind of chattel it is in respect of which it is thought its owner owes a duty of care towards strangers, equally whether it is in a public place or in his own premises, and equally whether the strangers are invited or are licencees. “There is only one answer: the chattel must be something highly dangerous in itself, inherently or from the state in which the owner suffers it to be.”

If that be sound law, I presume there would be no question that, if this action had been brought for injury to an adult person, it must have been held to be completely irrelevant. Does it make any difference that the injury was done to a child too young to take care of itself? I am not prepared to assent entirely to what is said by the learned Sheriff-substitute, that it is impossible to differentiate between liability to children and liability to adults, unless that means only that the fundamental basis of legal liability must be the same in both cases. You must either show against the person you propose to make liable some positive wrongful act—such as putting a dangerous thing into a public place—or you must show a neglect of some duty arising from a relation between him and the person injured; and so far the grounds in law are probably very much the same, whether the person injured is a child or an adult. But if a duty of care is once established, there may be a very material difference in the degree of care which is required for its due performance. Innumerable cases go to show that, if one is bound to take reasonable precautions for the safety of someone exposed to danger, it is very material to consider whether the person injured is capable of helping himself, because the duty is relative. The person charged with it is entitled to expect that the other will take reasonable care for his own safety; and if he knows that those who are exposed to danger are helpless either from infancy or infirmity, he is bound to a proportionate degree of watchfulness. Accordingly, in many of the cases which have happened arising out of liability for accidents to children, that has been found to be a material element. Again, there is a series of cases which show that there is a great distinction between the liability which arises against landowners for exposing people to what has been described as a trap in the case of children and in the case of grown-up people, because what is a trap to a child may be no trap at all to any reasonable adult. And therefore I am not prepared to say that it makes no difference in this case that the person injured was a child of two years old.

Still, I think, it comes back to the original question, as decided in the case of *Latham*,¹ whether the child's injury was caused by its being exposed to something which was in itself dangerous or not, and I think there is no averment that it was. What the pursuer complains of seems to me to be

¹ [1913] 1 K. B. 398.

July 15, 1913. an indirect consequence of the normal use of the ground which the defenders were quite entitled to make and which everybody knew they made. There was no trap, because the mother knew perfectly how the ground was occupied, and there was no danger necessarily connected with anything the defenders themselves did. The injured child was put in danger because the mother believed that children of very tender age, who were told to go from one house to another, might be trusted not to stray. If it was incumbent on anyone to be watchful so as to prevent their straying, I see no ground for holding that that duty was imposed on the defenders.

Johnstone v.
Magistrates
of Lochgelly.

Lord Kinnear.

On the whole matter, therefore, I am of opinion that the Sheriff's judgment should be recalled, and that of the Sheriff-substitute restored.

LORD JOHNSTON.—I entirely agree with your Lordship. The averments here appear to me to be what I should term rather of an indeterminate than of an irrelevant character. They are averments every one of which, although intended to infer liability upon the part of the defenders, is capable of resulting in their freedom from liability because of the indeterminateness with which it is stated.

I look then to the pleas to which these averments relate. The first is that "the defenders, the Provost, Magistrates, and Councillors of the burgh of Lochgelly, having been the authors and users of said coup or refuse depot, there was a duty upon them in the circumstances condescended on to take precautions to prevent danger to children and others frequenting said coup or refuse depot, which they negligently failed to take, and the death of the pursuer's child having resulted from such failure, all as condescended on, they are liable to the pursuer in damages." It makes clear what I mean by indefiniteness of statement when I point to the statement—whatever is meant by it—"the defenders, the Provost, Magistrates, and Councillors . . . having been the authors and users of said coup." The Provost and Magistrates were not the only users of the coup, and therefore there is nothing to make it impossible that the responsibility for all that has happened—if fault there was—was not the fault of the Provost and Magistrates. The other plea upon which alone the pursuer founds his claim is that "the accident whereby the pursuer's child lost her life, being a direct result of the fault or negligence of the defenders, or those for whom they are responsible, decree should be granted as craved, with expenses." That only differs from the previous plea by greater conciseness and by the introduction of the word "direct." But then when one goes to the condescendence one does not find any meaning or justification which can be applied to the word "direct" in explanation of the alteration of the terms of the plea.

In these circumstances I would only add further that when the case came into the Sheriff Court there was a judgment of the Sheriff-substitute finding the case irrelevant. The case was then appealed to the Sheriff, and at that stage a motion for amendment of the record was made and allowed. An amendment was made, leaving, however, the main plea identical, as far as I can see, with the plea as originally stated. That amendment was No. 12 of process. Then, there was another amendment proposed, under the minute No. 15 of process,—but apparently it was not dealt with by the Sheriff, I think it must have been lodged after the Sheriff had given his judgment.

When the case came here counsel for the pursuer were asked whether they July 15, 1913.
 desired that amendment to be made, and, as I understood, they, after con-
 sideration, declined to proceed with it. I do not assume for one moment ^{Johnstone v.}
 that the declinature was made because counsel for the pursuer anticipated ^{Magistrates}
 that the crave would not be granted without an award of expenses, but ^{of Lochgelly.}
 from a proper consideration, which is always present to counsel in this
 Court, that the amendment should not be made unless there were grounds
 of fact, capable of being proved, which would support it. In these circum-
 stances I should be very averse to encouraging litigation of this sort where
 it is made evident on the face of the process that the pursuer is merely
 endeavouring to build up a case for which he has really no justification in
 facts which can be laid before the Court. For these reasons I entirely
 agree with your Lordship. ^{Ld. Johnston.}

LORD MACKENZIE.—The question in this case is whether, assuming the
 facts averred by the pursuer to be proved, there would then be evidence of
 negligence on the part of the defenders fit to be submitted to a jury. It is
 said that the pursuer's child was burnt owing to the negligence of the de-
 fenders in allowing a rubbish heap, in which the refuse of the burgh of
 Lochgelly is deposited, to remain unfenced and unprotected, and in causing
 or permitting waste paper to be burnt there. The pursuer admits on record
 that the defenders have no right or interest in the park where the "free
 coup" is other than a permission by personal agreement with the tenant and
 proprietor to deposit rubbish in a certain part of it. The pursuer's aver-
 ment is that his daughter, aged two years and nine months, was sent by her
 mother from his house, which is close to an entry leading into the park, to
 her grandmother's house, and that she found her way to the coup and was
 burnt to death. The averment is that the entry is in fact habitually used
 by the public as an access to the park, which is treated as a public park.
 It is nowhere averred on record that the defenders or their servants lit the
 fire which caused the injuries. An amendment was proposed embodying a
 statement to this effect but was withdrawn. The only case made against
 the defenders is that they were in the habit of bringing waste paper to a
 place in a field frequented by the public, where they knew that children
 played; that what was brought was attractive to children; that it had to
 be burned; and that the defenders instructed their servants to burn the
 waste paper, and made no objection to others doing so. The pursuer says
 the defenders knew, or ought to have known, that the rag-pickers who
 frequented the coup had been in the habit of burning paper and other
 material on the coup. In these circumstances the pursuer avers there was
 a duty on the defenders, so long as the coup was not fenced or protected, to
 have taken precautions to ensure that any fires kindled should be properly
 watched, and that owing to the defenders' failure to discharge this duty
 they are responsible for the accident.

We were referred to several cases, among others to the two in respect of
 which the Sheriff allowed a proof before answer. None of them, however,
 supports the pursuer's theory. Take the case of *Lowery*,¹ where liability was

¹ [1911] A. C. 10.

July 15, 1913. **Johnstone v. Magistrates of Lochgelly.**
Lord Mac-kenzie. held to exist because a vicious horse was put into a field, and injury was done to the plaintiff, who was not a trespasser; or the case of *Cooke*,¹ where a turntable was left unlocked, a machine of which it might be said that the danger from it assailed the children whenever they saw it. The present case is quite different. There is nothing *per se* dangerous about putting down waste paper. The danger, on the pursuer's averments, was, or may have been, caused solely by the act of a third party, for whom the defenders were not responsible. There could be no duty on their part to have a watchman constantly on duty to see that all and sundry did not light the paper, or to see that, if they did, the fires were extinguished. Nor was there any duty on the defenders' carter, who, it is said, was aware that the fire was burning, if it had been lit by someone else not connected with the defenders.

This is taking the case on the footing which the pursuer has averred on record that the paper that went on fire was put on the heap by the defenders. This is to my mind by no means clear on the pursuer's averments. Refuse is deposited on the heap by persons other than the defenders. In cond. 6 the reason is explained why children were specially attracted to the coup. There is no statement in that article that the objects said to have attracted the children were put on the heap by the defenders.

I am of opinion that the pursuer has stated no relevant case.

THE COURT recalled the second interlocutor of the Sheriff-substitute dated 6th May 1913 and the interlocutor of the Sheriff dated 25th January 1913, reverted to the interlocutor of the Sheriff-substitute dated 8th November 1912, and of new dismissed the action.

D. R. TULLO, S.S.C.—ROBERT DAVIDSON, S.S.C.—Agents.

No. 153.

THE NORTH BRITISH RAILWAY COMPANY, First Parties.—

D.-F. Dickson—Macmillan, K.C.—E. O. Inglis.

July 15, 1913.

GEORGE WINGATE, Second Party.—*Cooper, K.C.—Gentles.*

North British Railway Co. v. Wingate.

Statute—Repeal—Effect of Public Act on rights created by previous Private Act—Railway—Dividend—Half-yearly or yearly calculation—North British Railway Act, 1888 (51 and 52 Vict. cap. clxiii.), sec. 47—Railway Companies (Accounts and Returns) Act, 1911 (1 and 2 Geo. V. cap. 34), sec. 4 (1).

The North British Railway Company, in exercise of powers conferred by a private Act of 1888, created certain preferred and deferred ordinary stocks, the terms of the Act providing that a non-cumulative dividend of 3 per cent should be payable out of the available profits of each half year to the preferred stockholders, and that the balance of such profits should go to the deferred stockholders.

By the Railway Companies (Accounts and Returns) Act, 1911, every railway company was relieved of any obligation to prepare or submit to their shareholders or auditors accounts or balance-sheets oftener than once a year.

Held that the later Act did not relieve the railway company of the duty of calculating the dividends due to the preferred and deferred stockholders on the basis of the profits of each half year.

¹ [1909] A. C. 229.

ON 20th May 1913 a special case was presented for the opinion and judgment of the Court with reference to the rights of holders of preferred ordinary stock and deferred ordinary stock of the North British Railway Company. July 15, 1913.
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The North British Railway Company were the *first parties* to the case, and George Wingate, a holder of deferred ordinary stock of the Company, was the *second party*. 1ST DIVISION.

The case set forth that prior to 1888 there were two ordinary stocks of the Company, North British Ordinary Stock and Edinburgh and Glasgow Ordinary Stock, and that in that year the North British Railway Act, 1888 (51 and 52 Vict. cap. clxiii.), received the royal assent, which provided, *inter alia*, as follows:—Sec. 47. "The directors may prepare a scheme for the consolidation division or conversion of North British Ordinary Stock and Edinburgh and Glasgow Ordinary Stock in the capital of the Company into one or more class or classes of new shares or stock hereinafter called 'new stock' of such name or names and amount or amounts respectively and bearing respectively such rate of dividend and having attached thereto respectively such preferences and priorities and other rights as shall be defined in such scheme Provided that the rate of dividend on the preferred portion of such new stock shall not exceed three per cent per annum and the Edinburgh and Glasgow Ordinary Stock shall be consolidated with and rank *pari passu* with the deferred portion thereof: Any preference share or preference stock which may be issued in pursuance of such scheme shall be entitled to the preferential dividend or interest assigned thereto out of the profits of each half year in priority only to the ordinary stock of the Company but if in any half year there are not profits available for the payment of the full amount of preferential dividend or interest for that half year no part of the deficiency shall be made good out of the profits of any subsequent half year or out of any other funds of the Company. For the purposes of this section the half year shall terminate on the thirty-first day of July and on the thirty-first day of January in each year."

In accordance with the Act of 1888 the directors of the first parties prepared a scheme which was duly approved by the shareholders, whereby the North British Ordinary Stock was divided into two parts, each of equal nominal amount with the stock so divided. To the first part called "North British Ordinary Preference Stock" a maximum dividend of £3 per centum per annum, payable out of the profit of each separate half year, was assigned. With the second part of such stock the nominal amount of the Edinburgh and Glasgow Ordinary Stock was consolidated under the name "North British Ordinary Stock," and there was assigned to the stock so consolidated the whole of the profit of each half year remaining after payment of the dividend provided for the North British Ordinary Preference Stock. The names of these stocks were subsequently changed to "Preferred Ordinary" and "Deferred Ordinary" respectively.

The case then referred to the terms of the Railway Companies (Accounts and Returns) Act, 1911, which provided for the preparation of annual accounts and returns by railway companies, and relieved them (except as therein provided) of any obligation to prepare or submit to their shareholders or auditors accounts or balance-sheets oftener than once a year. The material sections of that Act are quoted

July 15, 1913. *infra*.* The case further set forth that the accounts of the first parties were in use to close half yearly on 31st January and 31st July in common with the accounts of all the Scottish Railway Companies; but that, in virtue of the Act of 1911, these would now close yearly, except as therein provided, on 31st December.

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The contentions of the parties were stated as follows:—"The first parties maintain that in virtue of the provisions of the Act of 1911, and notwithstanding the terms of section 47 of the Act of 1888, and the scheme which followed thereon, they are not bound to ascertain and calculate dividend on the preferred ordinary stock out of the profits of each half year, but are entitled to ascertain, calculate, and pay such dividend out of the profits of each whole year, in priority to any dividend on the deferred ordinary stock for each whole year.

"The second party maintains that the Act of 1911 does not prejudice or affect the rights or interests of the deferred ordinary shareholders under the provisions of section 47 of the Act of 1888 and the scheme which followed thereon, and that the first parties are only entitled to pay the preferential dividend on the preferred ordinary stock out of the profits of each separate half year, and also that if, in any half year, there are not profits available for the payment of the full amount of the preferential dividend for that half year on the preferred ordinary stock, no part of the deficiency shall be made good

* The Railway Companies (Accounts and Returns) Act, 1911 (1 and 2 Geo. V. cap. 34), enacts:—

Sec. 1. (1) "Every railway company shall annually prepare accounts and returns in accordance with the form set out in the First Schedule to this Act, and shall submit their accounts to their auditors in that form."

(2) "The accounts and returns . . . shall be made up for the year ending the thirty-first day of December, or such other day as the Board of Trade may fix in the case of any company or class of companies to meet the special circumstances of that company or class of companies."

Sec. 4. (1) "A railway company shall not be under any obligation to prepare or to submit to their shareholders or auditors, statements of accounts or balance-sheets, or to hold ordinary general meetings more than once a year, and anything which under any special Act is authorised or required to be done at a general meeting of a railway company to be held at any specified time may be done at the annual general meeting of the company at whatever time held:

"Provided that nothing in this provision shall relieve a railway company of any obligation to prepare half-yearly accounts in cases where those accounts are required in connection with any guarantee of dividend under any such statutory provisions.

(2) "The directors of an incorporated railway company may, if it appears to them that the profits of the company are sufficient, declare and pay an interim dividend for the first half of any year, notwithstanding that the accounts are not audited for the half year, and that a statement of accounts and balance-sheet for the half year is not submitted to the shareholders, and may close their register and books of transfer before the date on which the interim dividend is declared in the same manner and for the same time and subject to the same provisions as they may close their register or books before the date on which their ordinary dividend is declared or before the date of their ordinary meeting.

(3) "Any statutory provisions affecting the railway company shall be read with the modifications necessary to bring them into conformity with this section."

out of the profits of the next or of any subsequent half year or out of July 15, 1913. any other funds of the first parties."

The questions of law were:—“(1) Are the first parties entitled to pay dividend on their preferred ordinary stock out of the profits of the whole year commencing 1st January 1913 and of each succeeding whole year? (2) Are the holders of the deferred ordinary stock of the first parties entitled to insist that the dividend upon the preferred ordinary stock shall be paid only out of the profits of each separate half year, and that, if in any half year there are not profits available for the payment in full of the preferential dividend for that half year, no part of the deficiency shall be made good out of the profits of the next or any subsequent half year or out of any other funds of the first parties? (3) In the event of the first question being answered in the affirmative and the second question in the negative, are the first parties entitled, should they for the first half of any year declare and pay an interim dividend on the preferred ordinary stock of less than three per cent per annum, to declare for the whole of such year a dividend on the preferred ordinary stock of three per cent and pay the same *less* the amount paid as interim dividend?”

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The case was heard before the First Division (without Lord Macenzie) on 8th and 9th July 1913.

Argued for the first parties;—Although the Railway Company would willingly continue to make up its accounts in the accustomed half-yearly simple form, that was no longer permissible. The Act of 1911 had imposed on railway companies the duty of preparing much more elaborate accounts than formerly, but in compensation it had relieved them from the duty of doing so oftener than once a year.¹ That benefit would be inoperative if they were still required to calculate and declare dividends half yearly, because the making up of accounts and the declaration and payment of dividends were interdependent. The declaration of a dividend could only be authorised by a general meeting, which again must have before it the certificate of the auditor, and that could only follow on the preparation and audit of accounts.² Nothing in the Act of 1911—although it had substituted yearly for half-yearly accounts—had done away with the necessity for these preliminaries. If then dividends were still required to be declared half yearly, the whole provisions of section 4 (1) would be rendered inept. The purpose of the Act of 1911 clearly was to bring into operation a uniform system of annual accounts for all the railway companies in the country, and a general Act with such a clearly expressed purpose as that must be held to derogate from all rights created by private Acts that were inconsistent with it, and to involve reading “yearly” for “half-yearly” in all statutory provisions relating to accounts.³ The terms, too, of section 4 (3) expressly confirmed that view, and it had been provided for by anticipation in section 64 of the North British Railway Act, 1888.³ Further, that the Act of 1911 was not confined

¹ Railway Companies (Accounts and Returns) Act, 1911 (1 and 2 Geo. V. cap. 34), secs. 1 and 4 (1).

² Regulation of Railways Act, 1868 (31 and 32 Vict. cap. 119), secs. 3, 4, and 5, Sched. I., Forms 10 and 11; Companies Clauses Consolidation (Scotland) Act, 1845 (8 Vict. cap. 17), secs. 69, 93, 94, and 118 to 123; Railway Companies Securities Act, 1866 (29 and 30 Vict. cap. 108), secs. 3 to 13; Railway Companies (Scotland) Act, 1867 (30 and 31 Vict. cap. 126), sec. 30 *et seq.*

³ 51 and 52 Vict. cap. clxiii.

July 15, 1913. to a mere question of accounting, but intended to alter the existing system of dividend paying, was clear from the other provisions of section 4. The proviso in subsection (1) expressly protected guaranteed dividends from any change, and thus implied that other dividends were affected with change, and subsection (2) and the relative Schedule¹ provided for the payment of a half-yearly interim dividend in circumstances and in terms which implied that the calculation of ordinary dividends was to proceed on an annual accounting only. Moreover, the exception contained in the proviso to section 4 (1) did not help the second party. There was no guarantee here in the sense of that section. The purpose of that section was to guard against any alteration of existing cautionary obligations, and to safeguard rights constituted by a statutory guarantee such as that of the North British Railway Company in favour of the Newburgh and North Fife Railway Company.² Nor could the second party found on the contractual aspect of his relationship with the first parties. The alteration in the law had rendered the conditions of the contract no longer binding.³

Argued for the second party;—The rights of deferred shareholders under their contract with the first parties, entered into in pursuance of the North British Railway Act, 1888, were not affected by the general Act of 1911, because that Act did not affect such matters of domestic concern as the ascertainment and apportionment of half-yearly profits. The Act dealt only with a question of accounting, with the accounts required for statistical purposes, and, in respect of the increased burden imposed upon railway companies in connection with the preparation of these accounts, they were relieved from the necessity for preparing them twice a year. All the same, the statutory provisions relating to the keeping of accounts and books,⁴ had not been repealed, and thus the rights of deferred shareholders were preserved independently of the proviso contained in subsection (1) of section 4 of the Act. All that the second party desired was that the dividends should be calculated on the basis of the half-yearly profits—independently of the time when the dividends were declared and paid—and for the mere purpose of calculation it was quite unnecessary to go through the elaborate process referred to by the first parties; the ordinary books of the Company would show all that was necessary. That the possibility of such calculation was contemplated by the Act of 1911 was clear from the provisions of subsection (2) of section 4 as to interim dividends. Moreover, a general Act dealing, not with dividends, but with the preparation of public accounts, could not by implication alter contractual obligations entered into in pursuance of a private Act.⁵ In any event the proviso contained in subsection (1) of section 4 of the Act operated to protect the deferred shareholders in the enjoyment of the rights conferred upon them, after due pay-

¹ First Schedule, Nos. 9 (a) and 18.

² Newburgh and North Fife Railway Act, 1897 (60 and 61 Vict. cap. ccxxi.), Sched. Art. 7.

³ Mayor of Berwick v. Oswald, (1854) 3 E. & B. 653, Pollock, C.B., at p. 678.

⁴ Companies Clauses Consolidation (Scotland) Act, 1845 (8 Vict. cap. 17), sec. 118 *et seq.*

⁵ Maxwell on the Interpretation of Statutes, (5th ed.) pp. 132 and 285; Lyn v. Wyn, (1662) Bridgeman, 122; Conservators of the Thames v. Hall, (1868) L. R., 3 C. P. 415, Byles, J., at p. 419, Smith, J., at p. 421; Thorpe v. Adama, (1871) L. R., 6 C. P. 125, Bovill, C.J., at p. 135.

ment had been made to the preferred shareholders.¹ The word July 15, 1918. "guarantee" in that proviso was not used in its strict legal sense of a cautionary obligation. It was used in its ordinary significance of an obligation to pay. Further, it was an unjustifiable straining of language to maintain that the extinction of the rights of deferred shareholders, which the proposals of the first parties involved, was a "modification" in the sense of subsection (3) of section 4 of the Act.

At advising on 15th July 1913,—

LORD PRESIDENT.—This is a special case brought by the North British Railway Company and by a gentleman who is a holder of deferred stock, and it asks for what are practically directions as to the rights of parties in connection with the declaration of dividend on this stock when the appropriate time arrives. The stock in question was issued under statutory powers which were given by the North British Railway Act of 1888. That Act, by the 47th section, authorised the directors of the North British Railway to "prepare a scheme for the consolidation division or conversion" of certain existing stocks, which were known by the name of North British Ordinary Stock and the Edinburgh and Glasgow Ordinary Stock. These were to be consolidated, divided, or converted "into one or more classes of new shares or stock hereinafter called 'new stock' of such name or names and amount or amounts respectively . . . and having attached thereto respectively such preferences and priorities and other rights as shall be defined in such scheme"; and then comes the proviso, "that the rate of dividend on the preferred portion of such new stock shall not exceed three per cent per annum and the Edinburgh and Glasgow Ordinary Stock shall be consolidated with and rank *pari passu* with the deferred portion thereof." And then comes this other statutory provision, "Any preference share or preference stock which may be issued in pursuance of such scheme shall be entitled to the preferential dividend or interest assigned thereto out of the profits of each half year in priority only to the ordinary stock of the Company but if in any half year there are not profits available for the payment of the full amount of preferential dividend or interest for that half year no part of the deficiency shall be made good out of the profits of any subsequent half year or out of any other funds of the Company"; and then there is a provision as to when the half year should commence and terminate.

The effect of that section of the Act which I have read is not doubtful; it gives power to the North British Railway Company, if they choose, to prepare a scheme (which has to be approved in a certain way); it gives them power to do what they otherwise could not possibly have done, namely, to alter certain stocks which existed, and, concurrently therewith, to alter the rights of the parties who hold those stocks, and it prescribes certain conditions which must be observed in exercising this power. Acting upon those powers the directors of the Company prepared a scheme, and at an extraordinary general meeting in August 1888 this scheme was approved.

¹ Midland Railway Act, 1897 (60 and 61 Vict. cap. clxxxiii.), sec. 59; North British and Edinburgh and Glasgow Railway Act, 1865 (28 and 29 Vict. cap. cccviii.), sec. 14.

July 15, 1913. I need not read the whole scheme. It divided the North British Ordinary Stock into two parts, each of equal nominal amount with the stock so divided. It provided that three per cent, being the maximum figure allowed by the Act of Parliament, should be the dividend of the new preference stock payable out of the profits of each separate half year, and it provided that there should be assigned to the ordinary stock the whole profit of each half year remaining after the payment of dividend provided for the preference stock. At the time when the scheme was passed the general Acts, which applied to the Railway Company, provided that railway companies should make up their accounts half-yearly, and, accordingly, this provision for striking the dividend at each half year was entirely in accordance with what might be called the general law of the land as regards railway companies.

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Ld. President.

Now, in 1911 a new General Act was passed, which entirely altered the duties and obligations of railway companies as to their accounts. It prescribed a very much more elaborate form for the accounts of railway companies than the form which obtained under the existing legislation, and by section 4 it provided as follows: "A railway company shall not be under any obligation to prepare or to submit to their shareholders or auditors, statements of accounts or balance-sheets, or to hold ordinary general meetings more than once a year, and anything which under any special Act is authorised or required to be done at a general meeting of a railway company to be held at any specified time may be done at the annual general meeting of the company at whatever time held." That is the leading provision of section 4. There are certain concomitant provisions which I shall presently notice, but it is upon that leading provision that this question has arisen, namely, Are matters to go on as they did before, a dividend being declared or at least calculated half-yearly, or does this general legislation so alter matters that a dividend is now to be declared only once a year and calculations made upon that basis?

That this raises a very practical question in which private persons' pecuniary rights are involved is quite obvious. It is probably best brought home by taking a very simple illustration. Let me suppose—the figures are entirely fanciful—that there were £10,000 preference and £10,000 ordinary stock. Let me suppose that in one particular year the railway company made £500 of divisible profits. Now, if that £500 was earned in two equal portions, namely, £250 in the first six months and £250 in the second six months, it would make no difference at all whether you calculated the dividend according to the half year or whether you calculated the dividend according to the whole year. If you calculated it according to the whole year £500 permits of payment of £300 to the preference shareholders, which is 3 per cent upon their holding, the capital being, as I say, £10,000, and £200 to the deferred shareholders, which is 2 per cent upon their holding. Precisely the same thing happens if you calculate half year by half year; £250 is made in the half year, of which £150 goes to the preference shareholders, the balance of £100 going to the deferred shareholders. The same thing happens in the second half year, and at the end of it the preference shareholders will have received two sums of £150, to wit £300, and the deferred shareholders will have received

two sums of £100, to wit £200. But let me suppose that, instead of the July 15, 1913. profits for division being made up of two moieties of £250 each, £100 of North British profit is made in the first six months and £400 in the second six months. Railway Co. In that case the result would be completely different. Calculated by the v. Wingate. full year the result is as before—the preferred shareholders get £300 and Ld. President. the deferred get £200; but calculated by the six months what happens is this—in the first six months there is £100 of profit that goes entirely to the preferred shareholders (whose full limit would be £150), and the deferred shareholders get nothing. When you come, on the other hand, to the second six months, there is £400 of divisible profit. Out of that the preferred shareholders get their full share of £150, making in all £250 for the year. The deferred shareholders get what remains, namely, £250, making in all £250. In other words the result now is, that instead of the preferred shareholders having had for the full year 3 per cent, and the deferred shareholders 2 per cent, the preferred shareholders get $2\frac{1}{2}$ per cent and the deferred shareholders $2\frac{1}{2}$ per cent. I have put that simple instance because it brings the question in a concrete form very clearly before our eyes. But it is not a mere imaginary case, because figures were quoted to us (I do not use them, as they were not made part of the special case), but figures were quoted to us which show that in the past history of these very stocks very large pecuniary differences would have arisen if the dividends had been calculated the one way instead of the other.

The deferred shareholder, who is a party to the special case, naturally wishes that the calculation should be upon the old lines, because it is quite evident that, put as a universal proposition, if a preference dividend is not a cumulative preference dividend, it is always in the interest of the person who holds the deferred shares that the periods or rests should be as frequent as possible, and therefore it is clearly for the interest of the deferred shareholder to say "I am entitled to have my dividend calculated each half year separately as in the past, because upon the other system I could not gain and I might possibly lose."

Now, the case has been very carefully argued before us. The general view with which I think your Lordships would approach the case would be this, that you would not expect that an Act of the class of the Act of 1911—which is obviously dealing with what I might call the duties of railway companies to the public (no doubt including their shareholders in the public), in publishing their accounts—you would not expect that such an Act would alter the contractual relations between a railway company and some of its shareholders. That the relations of the deferred shareholders and the railway company are contractual cannot admit of any doubt. Those shares were issued in virtue of the scheme, which had a statutory effect, and the deferred shareholder who bought his shares was entitled to say to himself, "These are my rights, and these will be continued to me." It is clear that it would be in the power of Parliament to alter those rights, but if it is necessary to make something that is clear more clear, certainly the 64th section of the Act of 1888 which allowed these shares to be created makes it amply clear. That section provides—"Nothing in this Act contained shall exempt the company and the railway by this Act authorised to be made from the provisions of any general Act

July 15, 1913. relating to railways or the better and more impartial audit of the accounts of railway companies now in force or which may hereafter pass." None the less I think the general view with which the Court is bound to approach an Act of this sort is that, unless it is absolutely necessary, private rights shall

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Ld. President. not be held to have been altered, and I do not think that this view is in any way weakened by a consideration of those provisions of section 4 of the Act of 1911 to which I said I should make a further allusion. The first of these is in subsection (1) "Provided that nothing in this provision shall relieve a railway company of any obligation to prepare half-yearly accounts in cases where those accounts are required in connection with any guarantee of dividend under any such statutory provisions." The word "such" there is obviously a drafting mistake, probably having crept in through a rearrangement of sections, and I think in any case it may be omitted for the sake of clearness. That proviso seems to me to show that the statute did not intend to alter private rights. Whether it applies to this particular case is another question which I shall presently discuss.

Now, that being the general view with which I approach the Act, I confess if there was nothing more to be said one would say at once that this is merely an Act for arranging the way in which accounts are to be stated. It has nothing to do with the principles upon which dividends are to be calculated. The terms of the contract on which dividends are to be calculated, to wit, the words of the section upon which the scheme proceeds, do not in any way associate the dividend with a particular statement of accounts. The dividend is to be taken out of the profits of each separate half year for the preferred shareholders. The deferred shareholders are to get the rest. But nothing is said about the particular statement of accounts for the public or anyone else.

If there was nothing more, that in itself would, I think, be conclusive. But we had a very ingenious argument from the first parties, the Railway Company. I may say in passing that of course in one sense the Railway Company have no interest in this matter. They are in a sense trustees. They are only anxious to pay the dividends to the persons who are entitled thereto, and therefore their only interest may be the very secondary one of having to avoid extra trouble in stating accounts. But for all that I do not think the case has been in any way prejudiced by allowing the Railway Company to take up for the moment a polemical attitude against the deferred shareholders, because they are just as able to argue the question as the preferred shareholders themselves, for whom in this case, so to speak, they have appeared, and I do not think that the deferred shareholders are in any way prejudiced by having argued it against the Company instead of against the preferred shareholders. Now the argument of the learned Dean was this—and it was a very forcible argument—he said if you look at the general body of railway statutes you will find that declaring a dividend is not a thing that the directors can do off-hand, but it is fenced with many statutory provisions. I do not need to go through all of these. They begin with—and really so far as that goes end with—the provisions which are to be found in the Companies Clauses Act of 1845. But the gist of them is this, that before you can declare a dividend you must get the authority of a general meeting to declare it, and before you get the authority of a general

meeting you must get the certificate of an auditor that you really have July 15, 1913.
 money out of which you can declare it, that is to say, that the dividend
 which you are proposing to declare can, in the state of the accounts of the North British
 Company, be properly declared out of profits made, and will not be declared v. Wingate.
 out of something that is truly capital or something that is for some reason Ld. President.
 not divisible as profit. All that is very true. Then comes the next step,
 which is that, inasmuch as the first subsection of section 4 entirely dispenses
 with the statutory duty to hold half-yearly meetings, and indeed prohibits
 railway companies from holding them, that puts an end to the possibility of
 a half-yearly account and a half-yearly declaration of dividend.

I confess when I first heard that argument I thought it a very formidable one; but upon further consideration I have come to the conclusion that it is not necessary that it should prevail and overbear what I have already mentioned as the general consideration with which one would approach this Act; and for this very good reason, that I see no difficulty in saying that for the future the declaration should be a yearly declaration, although the calculation of dividend which is then made should be based upon the profits which are *de facto* made in each half year. Nor do I see that that is inconsistent with publishing the accounts for the public in the yearly form required by the Act of 1911, because, as I have already pointed out, the calculation of the half-yearly profits, which is, so to speak, the charter of the deferred shareholder under the scheme and under the Act of 1888, is not in any way linked with the publication of an account; it depends on the actual fact of the profit having been made and being apparent from the books of the Company; and it is perfectly possible for the Company to show what that is and to satisfy the auditor that that profit was actually made without necessarily showing it to the auditor in that elaborate form which they are bound to use with regard to the general accounts of the Company at the end of the year in a question with the public. In other words, to go back to my illustration, and supposing that profit had been made to the amount of £100 in one half year, and to the amount of £400 in the other, I see no reason why at the end of that year a dividend should not be declared in this form, viz., 2½ per cent to the preference shareholders, being at the rate of 2 per cent for the first half year, and 3 per cent for the second half year (which is exactly what it would be because they get £100 for the first half year, and they get £150 for the second half year) and a dividend of 2½ per cent to the deferred shareholders, being the balance that is over after payment in each half year of the preferential dividend. That would seem to me a perfectly good declaration of dividend, and would be entirely in accordance with the contractual rights of parties.

If I am right there, that ends the matter. But there is another matter that I ought to refer to, because there was considerable argument upon it, and if this case goes farther it is as well that our views should be expressed upon it. I have already read the proviso that nothing in this provision should relieve the Railway Company of any obligation to prepare half-yearly accounts in cases where those accounts are required in connection with any guarantee of dividend under any statutory provisions. Now the deferred shareholder argued that, even if he was not right upon the lines that I have already indicated, he was still saved by that proviso; to which it was

July 15, 1913. answered that this is not a case of guarantee at all. If guarantee is read in the strict legal sense of the word, this clearly is not a case of guarantee, because guarantee in strict law always assumes three parties. There is the principal debtor and the creditor and the third person who guarantees to the creditor that portion of the debt which the principal debtor may not be able to pay. Now there is nothing of that sort here, because there is no interposition of a third party at all. On the other hand, in popular language it would not be very far wide of the mark to say that here there was a guarantee by the Railway Company to the deferred shareholder that he would get all that was over after paying a 3 per cent dividend, if possible, upon the half year's profit, the word "guarantee" there being used no longer in its strict sense but in the absolutely general sense of promise or acknowledgment. As I have already said, I do not think it is necessary to decide that question. If it were, I should be inclined to hold that "guarantee" was used in an inaccurate and popular sense rather than a legal sense, because I should always strive to come to the conclusion that this Act, which was passed for public purposes, was not meant to alter private rights, if I could find any interpretation of it which would be consistent with that general idea.

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Ld. President.

There is this other little difficulty that the proviso speaks of the obligation to prepare half-yearly accounts. Now, as I have already pointed out, the strength of the argument against the deferred shareholder is not upon the preparation of the accounts, but is upon the question of having the general meeting and getting the sanction of the auditor to the dividend that is to be declared, and the proviso does not deal with any of these things, but only with the preparation of the accounts. The only way in which that might be got over is by section 4 (3) which was used in argument by both parties, viz., "Any statutory provisions affecting the railway company shall be read with the modifications necessary to bring them into conformity with this section." It may be that, if the Railway Company were told to prepare half-yearly accounts, that would practically modify subsection (1), which says that a general meeting need only be held once a year. I do not know, because in the view I have taken it is not necessary to go into these things. I only say, as I am dealing with the third subsection, that I do not think it will avail to upset a general rule to show that the modification that here is necessary to allow the statutory provisions to work is a modification which will destroy private rights. If my first argument is right, that is not so, because, as I have already shown, the statute will work perfectly well as it is. It does not matter that the state of affairs will be a little altered in this sense, that the eventual outcome of the deferred shareholders' rights will only be known at the end of the year instead of at the end of each half year. It was put to us that there might have been a change in the holder of the stock during the currency of the year. But there is nothing in that. The right to a dividend effeirs to the particular portion of stock. As to who holds that stock, whether it is A or B, that is of no importance to the Company declaring the dividend, and all those things, as one knows in practice, are settled by making Stock Exchange transactions either *ex* dividend or *cum* dividend.

Upon the whole matter, I have come to the conclusion that we should

answer the second question that is put to us in the affirmative, and it is July 15, 1913. unnecessary to answer the first and third questions.

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LORD KINNEAR concurred.

LORD JOHNSTON.—I also agree in the opinion which your Lordship has delivered. I was disposed at the hearing of the case to think that the proviso at the end of section 4 (1) of the Act of 1911 might be so interpreted as to make the present case an exception to the general application of the Act, on the footing that in the sense of that proviso the preferred shareholders might be held to have a guarantee of a preferable dividend from the deferred shareholders. I have come to be quite satisfied that that is not the case, and that that subsection and its proviso does not apply to their position.

Section 4 (2), on the other hand, is entirely applicable and, I think, clears the ground of all difficulty. If the directors, in the exercise of their discretion, choose to declare an interim dividend on the preferred shares on the first half year's working, they will do so as an interim dividend only. When accounts are made up at the end of the year, it will be necessary to include in the accounting such a balance at the end of the first half year as will determine what the preferred shareholders would have received, had the Act of 1911 not passed, under their contract rights. This will not prevent the Act having its full effect. There will be one proper balance of the Company's accounts, one audit, one meeting, and one declaration of a dividend. But there will be a subsidiary calculation required in order to ascertain whether the interim dividend of the first half year to the preferred shareholders has to be supplemented for that half year, or whether those shareholders require to be surcharged in crediting them their dividend for the second half year.

THE COURT answered the second question of law in the affirmative, and found it unnecessary to answer the other questions.

JAMES WATSON, S.S.C.—W. & J. BURNES, W.S.—Agents.

ROBERT M'DIARMID, Pursuer (Respondent).—*Wark*—*T. G. Robertson*. No. 154.

OGILVY BROTHERS, Defenders (Appellants).—*Sandeman, K.C.*—*A. R. Brown*.

July 16, 1913.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—*M'Diarmid v. Accident arising out of and in the course of the employment—Prohibited act outwith employment—Cleaning machinery in motion.* *Ogilvy Brothers.*

A workman was employed in a factory as underman at a mangle. His duties were to carry the cloth to and from the mangle and to assist the headman in putting it on to the rollers. It was no part of his duty to be inside the rail fencing the mangle or to interfere with the mangle while working. Cleaning machinery while in motion was prohibited, but on two days in each week the machinery was stopped in the early morning for cleaning, and it was the duty of the workman to assist the headman to clean the mangle at these times.

While the machinery was in motion, and in the absence of the headman, the workman, without orders, went inside the rail and attempted to clean a part of the mangle, and was injured.

Held that the accident did not arise out of and in the course of his employment.

July 16, 1913. IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Forfar, in which Robert M'Diarmid claimed compensation from Ogilvy Brothers in respect of injuries sustained while in their employment, the Sheriff-substitute (Taylor) awarded compensation, and at the request of the employers stated a case for appeal.

M'Diarmid v.
Ogilvy
Brothers.

1st DIVISION,
Sheriff of
Forfarshire.

The case set forth :—

"The following facts were admitted or proved:—(1) That the respondent was in the employment of the appellants at a weekly wage of 19s. He entered their employment on 2nd December 1912. (2) That the respondent worked at a mangle as underman or beamer along with and under William Burnett as headman. (3) That the mangle at which they worked has three rollers. (4) That at a distance of four feet from the mangle there are rails. (5) That the middle roller, called the beamer-roller, moves on slides, and is moved out for the cloth to be passed over the rails and rolled on to it. (6) That while the process of mangling the cloth is going on there is no motion on the slides. (7) That after the cloth is on the beamer-roller it is moved back between the two other rollers. (8) That the cloth is then mangled by an alternate forward and reverse motion of the mangle. (9) That after it is mangled the cloth is rolled on to a fourth roller, called the stripper-roller, which is fixed above the mangle, and this is then unfixed and carried away to a rack with the cloth on it. (10) That part of the beamer's duties is to bring the cloth to the machine, to help to put it on the beamer-roller, to help to take it off on to the stripper-roller, and to carry the latter to the rack with the assistance of the headman. In addition he is under the general orders of the headman. (11) That it is no part of the beamer's duty to be inside the rails while the machine is working. (12) That it is no part of the beamer's duty to interfere with the machine while the cloth is in it. (13) That it was part of the respondent's duty to assist Burnett in cleaning the machinery of the mangle at certain fixed times, viz., Tuesday 4.30 to 5.30 A.M., and Friday 4.30 to 5.30 A.M., when the machinery was stopped for the purpose. (14) That there are also fixed times during the day-shift on Wednesdays and Saturdays, when the machinery is stopped for the purpose of having it cleaned. Respondent was engaged during the night. (15) That when engaged on 2nd December 1912 the respondent was told by the foreman, John Farquhar, who engaged him, on no account to clean anything while the machinery was in motion. The respondent had no previous experience of factory work. (16) That there was a notice opposite the mangle at which respondent worked in the following terms:—'Cleaning machinery in motion and cleaning or any other work (except by specially engaged sweepers) during meal hours strictly prohibited.' (17) That on 23rd January 1913, while Burnett was out of his sight on the other side of the mangle, the respondent, acting without any orders from Burnett, placed himself within the rails and attempted to clean the slide of the mangle with a piece of waste, whereupon the loose waste was caught by the roller and his right hand was drawn into the machine by the motion of the rollers. (18) That the respondent's right hand was severely injured by the accident, and after treatment, required to be amputated, as a result of the accident, and was amputated on 26th January 1913.

"On these facts as proved I found that the accident to the respondent was one arising out of and in the course of his employment

with the appellants, and awarded compensation to the respondent July 16, 1913. accordingly."

The question of law for the opinion of the Court was:—"Whether ^{M'Diarmid v. Ogilvy Brothers.} I was right in holding that the respondent was injured by accident arising out of and in the course of his employment?"

The case was heard before the First Division on 10th and 11th June 1913.

Argued for the appellants;—The workman was not acting within the sphere of his employment when the accident occurred. At that time he had no duty to be within the rails or to attempt to clean the machine. He was arrogating to himself duties which he was neither engaged nor entitled to perform, and the risk he thereby exposed himself to was not a risk incidental to his employment.¹ The cases where mere disobedience to an order had been held not sufficient to take a workman out of the scope of his employment² had no bearing here. The appellants' case did not rest on mere disobedience. It rested on the fact that the workman had no general employment to clean the machine, his employment with regard to cleaning being confined to giving assistance to the headman at two specified hours in each week.

Argued for the respondent;—Part of the work for which the respondent was employed was to act as assistant cleaner. Therefore it could not be said that he was acting outwith the scope of his employment in cleaning the machine—even though he attempted to do so at an unauthorised time. It was absurd to contend that his employment could be split up so as to make him a cleaner at one time and not a cleaner at others. Nor could it be urged that he was excluded from compensation on the ground that he was doing work of a different kind from that for which he was employed,³ or that he was in any territory in which he was not entitled to be,⁴ or that he was engaged in doing anything for his own purposes.⁵ If he was within the scope of his employment, it was immaterial that he was carrying out the work in a forbidden way.⁶

¹ O'Brien v. Star Line, Limited, 1908 S. C. 1258; Lowe v. Pearson, [1899] 1 Q. B. 261; Furniss v. Gartside & Co. (of Manchester), Limited, (1910) 3 Butterworth's W. C. C. 411; Barnes v. Nunnery Colliery Co., Limited, [1912] A. C. 44; Smith v. Fife Coal Co., Limited, *supra*, p. 662; Naylor v. Musgrave Spinning Co., Limited, [1911] 4 Butterworth's W. C. C. 286; Revie v. Cumming, 1911 S. C. 1032; Kerr v. William Baird & Co., Limited, 1911 S. C. 701; Burns v. Summerlee Iron Co., Limited, *supra*, p. 227.

² Harding v. The Brynddu Colliery Co., Limited, [1911] 2 K. B. 747; Mawdsley v. West Leigh Colliery Co., Limited, (1911) 5 Butterworth's W. C. C. 80; Conway v. Pumpherston Oil Co., Limited, 1911 S. C. 660.

³ Lowe v. Pearson, [1899] 1 Q. B. 261; Kerr v. William Baird & Co., Limited, 1911 S. C. 701.

⁴ Conway v. Pumpherston Oil Co., Limited, 1911 S. C. 660.

⁵ Furniss v. Gartside & Co., Limited, 3 Butterworth's W. C. C. 411; Naylor v. Musgrave Spinning Co., Limited, 4 Butterworth's W. C. C. 286; Barnes v. Nunnery Colliery Co., Limited [1912] A. C. 44.

⁶ Mawdsley v. West Leigh Colliery Co., Limited, 5 Butterworth's W. C. C. 80; Harding v. The Brynddu Colliery Co., Limited, [1911] 2 K. B. 747, Kennedy, L.J., at p. 755; Conway v. Pumpherston Oil Co., Limited, 1911 S. C. 660.

July 16, 1913. At advising on 16th July 1913,—

M'Diarmid v.
Ogilvy
Brothers.

LORD PRESIDENT.—The facts here are exceedingly clearly set forth by the learned Sheriff who acted as arbitrator. The respondent worked at a mangle as an underman or beamer. The duties of the underman or beamer are set forth, and are "to bring cloth to the machine, to help to put it on the beamer-roller, to help to take it off on to the stripper-roller, and to carry the latter to the rack with the assistance of the headman." And then the learned Sheriff adds: "It is no part of the beamer's duty to be inside the rails while the machine is working. It is no part of the beamer's duty to interfere with the machine while the cloth is in it." Now what happened was that, while the machine was working and the cloth was in it, the respondent, without any orders from his superior, placed himself within the rails and attempted to clean the slide of the mangle with a piece of waste, whereupon his hand was caught by the roller and was injured.

In these circumstances I am very clearly of opinion that the respondent was acting outside the scope of his employment, and that there is no liability. There are various other things said which it is necessary that I should advert to. There was a notice put up beside the mangle that cleaning of machinery in motion was strictly prohibited. The respondent had also been told that he was never to clean the machinery when in motion. I do not think that the disregard of those prohibitions would have taken away the liability if it had existed. It has often been held that mere disobedience is not enough. The point is, Was the workman within the scope of his employment? Now it was no part of the respondent's duty—it is so found by the arbitrator—to clean the machine at all except that, upon certain days, namely, on Tuesday from 4.30 to 5.30 A.M. and on Friday from 4.30 to 5.30 A.M., it was his duty to help somebody else to clean it, the machinery being stopped for that purpose. Now the time when he was hurt was not at one of those times; it was a different time altogether.

I think that that is what distinguishes this case entirely from the case which, not unnaturally, was cited by the learned counsel for the respondent, namely, the case of *Mawdsley v. West Leigh Colliery Company*.¹ There the deceased workman was employed to oil a mortar mill, but was told not to oil it while it was in motion. He did oil it while it was in motion, and he was hurt. The point of the case was put by Lord Justice Fletcher Moulton, and their Lordships held that it was a mere disobedience of an order. Now in this case the respondent had no general employment to clean the machine, but a special employment to clean the machine for an hour early on the morning of Tuesday and an hour early on the morning of Friday, when special preparations were made. What I wish to say is this, that the respondent could be under no mistake as to whether he was doing his duty. He could not think he was doing the duty of a Tuesday or a Friday morning; he was doing something on another day which he knew was not his duty.

As to the test that has often been put, I do not know that I need say much more, because I have said everything that I could say about it in the two cases of *Conway v. Pumpherson Oil Company, Limited*,² and *Kerr v.*

¹ 5 Butterworth's W. C. C. 80.

² 1911 S. C. 660.

*William Baird & Company, Limited.*¹ In *Kerr's case*¹ I expressed it in July 16, 1913. this way—whether the man was arrogating to himself duties which he was neither engaged nor entitled to perform. The matter is put still more briefly by Lord Moulton, then Lord Justice Fletcher Moulton, in the case of *Barnes v. The Nunnery Colliery Company, Limited.*² His Lordship says this: "The boy was only guilty of disobedience. Was this out of the scope of his employment, or only a piece of misconduct in his employment?" Now I think that is the test, and taking that test I have no doubt whatsoever upon the facts here that this was not a piece of misconduct in the employment, but that the respondent was doing something which he knew perfectly well he was not engaged to do and that he was not entitled to do. I am of opinion that the appeal here must be allowed.

LORD KINNEAR concurred.

LORD JOHNSTON.—The Sheriff as arbitrator found in the circumstances which your Lordship has fully narrated that the accident which occasioned the injury to the respondent in this case was one arising out of and in the course of M'Diarmid's employment, and awarded compensation accordingly.

I do not think that this award can be supported. As the respondent deliberately engaged in work which he was not employed to do, but on the contrary was forbidden to do, and which there was no emerging necessity for his doing, notwithstanding that the accident may have occurred in the course of his employment, it cannot be said to have arisen out of his employment. By his own unauthorised act he created a risk which was not incidental to his employment. The case is *a fortiori* of *Smith v. Fife Coal Company*.³

LORD MACKENZIE.—I agree with your Lordship in the chair. As I read the facts stated in the case, this is not a case where the workman doing his own work made a mistake, but the case of a workman doing what was not his own work.

THE COURT answered the question of law in the negative.

J. & J. GALLETTY, S.S.C.—FRANCIS G. SUTHERLAND, W.S.—Agents.

STEEL & BENNIE, LIMITED (Owners of Tug "Cruiser"), Pursuers
(Reclaimers).—*Horne, K.C.—D. Jamieson.*
TITO JOSÉ EVANGELISTA (Master of s.s. "Taquary"), Defender
(Respondent).—*D.-F. Dickson—James Stevenson.*

No. 155.

July 10, 1913.

Ship—Salvage—Measure of award.—Alteration of award of Judge of first instance.

Steel &
Bennie,
Limited, v.
Evangelista.

A steamship, valued at £27,837, went aground on a rocky shore, and was saved by a tug from a position where she was in imminent danger of becoming a total wreck. The Lord Ordinary (Hunter) awarded £700 in respect of the salvage services.

Circumstances in which the Court increased the award to £1200.

Observations on the circumstances in which the Court will interfere with the award of the Judge of first instance.

"Cruiser" v.
"Taquary."

¹ 1911 S. C. 701.

² 4 Butterworth's W. C. C. 43, at p. 48.

³ *Supra*, p. 662.

July 10, 1913. ON 12th March 1912 Steel & Bennie, Limited, shipowners, Glasgow, as owners of the tug "Cruiser" of Glasgow, and as representing the master and crew, brought an action against Tito José Evangelista, master of, and as such representing the owners of, the steamship "Taquary" of Rio de Janeiro, concluding for payment of £2500 in respect of salvage services rendered by the "Cruiser" to the "Taquary."

2D DIVISION.
Lord Hunter.

It was not disputed that salvage services had been rendered, and the only question was as to their value, the defender pleading that the sum sued for was excessive, and tendering £700 in full of the conclusions of the summons.

Proof was allowed and led, and the facts as ultimately held established by the Court were to the following effect.

On 25th February 1912, at high tide about 1 A.M., the "Taquary," of 1175 tons net register, went aground on the west side of Ailsa Craig. There was only a slight breeze and practically no sea, but the vessel lay almost broadside on to a rocky shore, and if she had remained there till low water her whole weight would have rested on the boulders beneath her, with the result that her side would have burst in and she would probably have become a total wreck. The "Cruiser," a tug engaged in towing vessels up the Clyde, sighted the "Taquary" about 7.30 A.M., some hours before low water, and offered her services which were accepted. There were other tugs in the vicinity, but they were engaged in helping another vessel and could not have come to the assistance of the "Taquary" before the tide was low. The "Cruiser" at once swung the stern of the "Taquary" away from the rocks and kept it there, standing by till about 3 P.M. when, with the assistance of the "Setter," another vessel which had come up about 1.20 P.M., she got the "Taquary" afloat and towed her to the Tail of the Bank, a distance of about 47 miles, and from there, with the assistance of another tug, to Glasgow. Shortly after she was floated off the wind rose to nearly a gale. In rendering her services to the "Taquary" the "Cruiser" was exposed to no risk. The value of the "Taquary" as salvaged was admitted to be £27,837, and that of the "Cruiser" £5500. The "Setter" was offered and accepted £450 for her services to the "Taquary."

On 20th February 1913 the Lord Ordinary (Hunter) decreed against the defender for payment to the pursuers of £700.*

* "OPINION.—The pursuers are the registered owners of the tug 'Cruiser' of Glasgow. They sue for themselves, and also as representing the master and crew of the said tug, to recover from the defender, who is the master, and, as such, represents the owners of the Brazilian steamship 'Taquary,' a sum in respect of salvage services rendered by the said tug to the said steamship. It is not disputed that the services rendered were in the nature of salvage services. The only question that I have to determine is the amount of the award.

"On 25th February 1912, being a Sunday, about 1 A.M., the 'Taquary,' which is a new twin screw steamer of 1942 tons gross and 1175 net register, went aground on the west side of Ailsa Craig. There is considerable conflict in the testimony of the different witnesses as to the exact position where she lay. The point does not appear to me to be of great materiality. I think that she was less to the south than was represented by the witnesses for the pursuers, and not so much to the north as represented by the witnesses for the defender. Her position may be taken as somewhat to the north of the point called the Boating Stone on the chart of the Craig. I do not think

The pursuers reclaimed, and the case was heard before the Second Division (sitting with a Nautical Assessor) on 8th, 9th, and 10th July 1913.

Argued for the reclaimers;—The Lord Ordinary had misapprehended the evidence and had given an unreasonable award, and in such circumstances his judgment was open to review.¹ He had failed to appreciate the risk to the "Taquary" from the position in which she lay, especially if the weather had become worse,² and the consequent value of the services rendered to her by the "Cruiser." It was also a consideration that the "Cruiser" was the first to help the "Taquary,"³ and that she was a vessel maintained for the purpose of assisting other ships⁴—both of which facts entitled her to specially liberal treatment. The amount fixed by the Lord Ordinary was far below the percentage of the value of the salvaged vessel which had been awarded by the Court in other similar cases.⁵

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that at any time she was broadside on to the beach, but undoubtedly the position in which she lay exposed her to great risk of destruction, in the event of a strong wind or sea from the south-west. At the time when she grounded there was practically no sea, and the wind, which was only a slight breeze, was blowing from the north. She was not therefore in imminent danger of breaking up. In the course of the early morning two steamers, the 'St Catherine' and the 'Woodcock,' communicated with her. The defender did not request either vessel to give him assistance in the way of attempting to get the 'Taquary' off. He was content to entrust them with the sending of telegrams to the managing owners and to the insurance company. This course may to some extent have been dictated by a dread lest the vessel, on being pulled off the rocks, might sink. At the same time I do not think he would have refused assistance, had the state of the wind or sea given him cause for immediate anxiety.

"The 'Cruiser,' which is a tug engaged in towing vessels up the Clyde to Glasgow, was, on the morning of the 25th, engaged in 'seeking' or looking for work, when she sighted the 'Taquary.' She is said at the time to have been in attendance upon the 'Hyltonia,' and expected to be engaged in towing that vessel. On sighting the 'Taquary' she went and offered her assistance, which was accepted. This was about 7.30 A.M., and from that time she remained in attendance until 3 or 3.30 P.M., when, with the assistance of the 'Setter,' a vessel which came up about 1.20, she succeeded in floating the 'Taquary.' The 'Cruiser' and the 'Setter' towed the 'Taquary' from Ailea Craig to the Tail of the Bank, a distance of about 47 miles. The

¹ "Star of Asia," (1887) 6 Asp. 220; "Port Hunter," [1910] P. 343.

² "Kenmure Castle," (1882) 7 P. D. 47, at p. 49.

³ "Santipore," (1854) 1 Spink's E. & A. 231; "Anna," Shipping Gazette, May 30, 1905; "Maasdam," (1893) 7 Asp. 400; Kennedy on Civil Salvage, (2nd ed.) p. 185.

⁴ "Glengyle," [1898] P. 97; "Envoy," Shipping Gazette, Feb. 28, 1888; Kennedy on Civil Salvage, p. 131.

⁵ *Pust (Owner of "Greif") v. White Star Steam Fishing Co. of Aberdeen (Owners of "Loch Kildonan")*, 1909 1 S. L. T. 275; "Ben Alder" v. "Acacia," (1901) 3 F. 491; *Liverpool Steam Tug Co., Limited, v. Cornfoot ("Gantock Rock")*, (1900) 2 F. 1060; *Walker Steam Trawl Fishing Co., Limited, v. Mitre Shipping Co., Limited*, 1913 1 S. L. T. 67; "Bute-shire," [1909] P. 170; "Fairport," [1912] P. 168; "Kilmorack," Shipping Gazette, March 6, 1912; "Adriatico," Shipping Gazette, July 20, 1912; "Campbell," Shipping Gazette, Nov. 16, 1912; "Dungeness," Shipping Gazette, Nov. 28, 1912; *Duncan v. Dundee, Perth, and London Shipping Co.*, (1878) 5 R. 742.

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Argued for the respondent;—The Court would not interfere with the award of the Judge of first instance, unless it was manifestly an unreasonable one and the amount given was grossly out of proportion.¹ This could not be said in the present case. On the evidence the "Taquary" was not in any imminent danger of settling on the rocks, and there were other vessels which could have come to her assistance. The labour and risk of the salving vessel were negligible, and the time occupied in the salvage operations was so short that only a trifling loss of earnings could be pleaded. These were all elements to be taken into consideration.² The principle of giving a percentage of the value of the salved vessel had never been recognised, and was rejected in the case of *The Greenock Towing Co. v. The Anchor Line (Henderson Brothers), Limited*.³ In so far as the value of the salved vessel entered into the question, the awards in "*The Werra*"⁴ and *Owners of "Vulcan" v. Owners of "Berlin"*⁵ were a better guide than the cases relied on by the reclaimers.

towing operations lasted about twelve hours. From the Tail of the Bank the 'Cruiser,' with the assistance of another of the pursuers' tugs, towed the 'Taquary' to Glasgow; but payment for this latter service has been made, and therefore does not enter into the present calculation.

"In rendering her services to the 'Taquary' the 'Cruiser' was exposed to no risk, and the lives of none of her crew were ever in danger. The work done was not difficult, and did not call for the exercise of any special skill in seamanship. The services were, however, certainly useful. In the first place, the 'Cruiser' had slewed the 'Taquary' round to some extent, so as to put her in a more favourable position to the shore. This seems to have been done in the early morning before low water. Thereafter she maintained her in position, acting for some time in conjunction with the 'Setter.' At high water the 'Cruiser' and 'Setter' succeeded, by towing, in pulling the 'Taquary' off the shore. When they started towing from the Craig to the Tail of the Bank the 'Setter' was in front of and the 'Cruiser' behind the 'Taquary.' The towing vessels, however, soon changed position, and the 'Cruiser' went ahead. For some miles the 'Taquary' was towed with her bow first; but she was so much down by the head that she had to be towed stern first. The two vessels experienced no difficulty in so towing her, but, as Captain Abram explained in his evidence, it would have been dangerous for passing vessels for the 'Cruiser' alone to have towed the 'Taquary' stern first. I think the services rendered by the 'Cruiser' were more valuable than those rendered by the 'Setter.' The latter vessel was not constructed for tug work, and was not so handy, or able to keep her position so well as the former vessel.

"If the 'Cruiser' had not rendered the services which she did, I think that the 'Taquary' might have got other assistance. I have already referred to the 'Woodcock' and the 'St Catherine.' About 11 o'clock the 'Tweed' also offered assistance; but the master of the 'Cruiser' refused the offer, as he thought he would manage to get the 'Taquary' off himself. Another vessel called the 'Copeland' had gone ashore on the north or north-east side of the Craig about the same time that the 'Taquary' did. Two tugs,

¹ "Accomac," [1891] P. 349, *per* Esher, M.R., at p. 354; *Liverpool Steam Tug Co., Limited, v. Cornfoot*, 2 F. 1060, *per* Lord Trayner, at p. 1065; *Master and Owners of s.s. "Baku Standard" v. Master and Owners of s.s. "Angèle"*, [1901] A. C. 549, *per* Sir Ford North, at p. 553.

² "Sunniside," (1883) 8 P. D. 137; "City of Chester," (1884) 9 P. D. 182.

³ (1901) 9 S. L. T. 221.

⁴ (1886) 12 P. D. 52.

⁵ (1882) 9 R. 1057.

LORD JUSTICE-CLERK.—This is an action in which salvage is claimed by July 10, 1913. the owners of the tug "Cruiser" for services rendered to the "Taquary," which went aground on Ailsa Craig on 25th February 1912. We have had the assistance of a Nautical Assessor, and his views have been expressed to us with great care, and, so far as I am able to judge, and I think your Lordships will agree with me, with great acumen.

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I do not think that the exact place where the vessel struck is of great importance, though in that matter I am inclined to prefer the evidence of the pursuers' witnesses. We are advised by the Assessor that she was equally exposed to danger from the south-west wind in whichever position she was lying. As to the angle at which she struck the shore, if she was not broadside on, she was at least in such a position that her stern had a very short distance to drift before the vessel would be on the rocks throughout her whole length. If the wind rose—and we know that shortly after she was taken off the wind did rise to nearly a gale—she would have been carried on to the rocks. Apart from the risk from wind, she was in a very dangerous position. When she went ashore her bottom was scored and dented by the rocks for a considerable distance aft. This was at high tide, and if she had remained there till the tide was low, the whole weight of the vessel would have rested on the boulders which made these dents, with the result that her side would have burst in. In that event, as we are advised by the Assessor, she might have become a total loss, or at any rate her salvage would have been a very difficult task, requiring special apparatus and involving great expense.

This was the danger, the imminent danger, from which she was rescued by the "Cruiser," and, practically speaking, by the "Cruiser" alone, for in

the 'Flying Serpent' and the 'Flying Scotsman,' were sent to her assistance. The 'Taquary' passed these tugs as she was being towed to the Tail of the Bank. Looking to the state of wind and weather at the time, I think that these vessels would have been in a position to save the 'Taquary' had she not been floated with the assistance of the 'Cruiser' and 'Setter.'

"It is admitted that the value of the 'Cruiser' was £5500, and that the value of the 'Taquary' as salvaged was £27,837.

"For the services rendered in the salvage operations the 'Setter' received the sum of £450. As I have already indicated, I think that the 'Cruiser's' services were more valuable than the 'Setter's' services. On the other hand, the 'Setter' sacrificed more in going to the assistance of the 'Taquary.' I did not, however, allow evidence as to the value of the 'Setter,' as it does not appear to me that the record raises a case for my estimating the amount to be awarded for the joint salvage services and allocating to the pursuers their proper proportion.

"A number of cases illustrative of the different awards given in different cases were cited to me. Each case must depend on its own circumstances, and I do not think it would serve any good purpose to refer in detail to these decisions. Keeping in view the different elements that appear to have weighed with the Court in arriving at the awards given, so far as they are present in this case—and I have endeavoured briefly to indicate them—I reach the conclusion that the sum of £700 is a fair award to make to the pursuers for the services rendered by them. As that amount was tendered before the action was raised, and was refused, I think that the defenders are entitled to expenses."

July 10, 1913. the work of getting and keeping her stern away from the shore, the "Setter" gave little, if any, assistance; though, at a later stage, when the "Taquary" was being towed to the Tail of the Bank, the "Setter" was of great use.

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The Lord Ordinary states, as I think erroneously, that the services rendered by the "Cruiser" could have been obtained elsewhere. It must be remembered that these services would have been of no avail if they had not been rendered at the time they were given. If her stern had not been pulled out before low tide, and before the wind rose, the probability is that she would never have been salvaged at all. The Lord Ordinary refers to the tugs which had gone to the assistance of the "Copeland." I am sure they could have done nothing. They could not leave the "Copeland" to come to the "Taquary," and by the time they were free to come, it would have been too late.

In these circumstances the question is, what is a fair salvage allowance to the "Cruiser" for what she did. That her services were immeasurably superior to any services rendered by the "Setter" I do not think there can be the slightest doubt. Estimating these services as well as I can, with the aid I have received in consultation with your Lordships, and without going into details, I think that the "Cruiser" is reasonably entitled to the sum of £1200, and I move your Lordships to alter the interlocutor of the Lord Ordinary and to grant decree for that sum.

LORD DUNDAS.—I am of the same opinion. I think the Lord Ordinary has greatly undervalued the salvage services rendered by the "Cruiser," and that an award of £1200 would be reasonable and moderate.

LORD SALVESEN.—I agree. We have had the advantage of the advice of a Nautical Assessor—an advantage which the Lord Ordinary did not possess—and this has enabled us to look at the evidence from a more enlightened point of view than an ordinary layman is likely to have in dealing with nautical matters.

The first question is, what was the degree of danger to which the "Taquary" was exposed? The Lord Ordinary seems to think that the "Taquary" might have remained in the position in which she was stranded without incurring further damage, unless in the event of a strong wind or sea from the south-west. I think that is a misapprehension of the facts. On the course on which the vessel was, as described in her log, assuming her bow went ashore near the Boating Stone, she would be almost parallel with the beach, and her stern at no great distance from it. Even if the point laid down by Captain Griffiths, who was on board the "Taquary," be taken as the point on which she struck, her angle with the beach would only be, according to the Nautical Assessor, some 25 degrees, and her quarter would not be more than 90 feet from the beach at low-water mark. I agree with your Lordship in thinking that the position assigned to her by the "Cruiser" more nearly corresponds with the actual position in which she went ashore than that assigned to her by Captain Griffiths, and that she may be taken as having lain almost broadside on to an extremely rocky beach. In such a position, the action of the tide alone would tend to set her stern shorewards, quite irrespective of wind.

But there is a piece of real evidence to which the Lord Ordinary makes July 10, 1913. no allusion, which seems to me to demonstrate that the "Taquary" was in imminent danger of becoming a total wreck unless she had been salved by the "Cruiser" at the time she first offered her services. I refer to the marks on the vessel's bottom, to which our attention has been specially directed by the Nautical Assessor. These marks must either have been made at the time the vessel went on to the beach, or they must have been made at some subsequent time before the "Cruiser" arrived. I agree with your Lordship in the chair that in all probability they were made at the time that the vessel stranded, because the scoring on the bottom of the vessel as far aft as 60 feet on the port side, indicated that the vessel had been moving at the time the indentations were made. Now, these indentations show that there was some irregularity in the ground on which the vessel had stranded. The tide was then rising, and no further damage would be done until the water fell materially below the level at which the indentations were produced. If, however, the water fell away further, these indentations were extremely likely to be converted into holes, with the result that the vessel would have been absolutely lost. If, on the other hand, the indentations were made after she first struck, they are conclusive evidence of her having swung round closer to the beach, and in that case it was equally inevitable that, as she settled down on the stones as the water receded, her bottom would have been pierced aft of the forward bulkhead.

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Now, the "Cruiser" arrived before eight o'clock, some hours before low water, and her first care was to take the stern of the vessel further out by swinging her stern round towards the west, and I think it is in accordance with the bulk of the evidence that she succeeded in doing so. Even Captain Griffiths admits that she was swung between two and three points, although he seems to suggest that was merely for the purpose of lessening the hold that she had on the rocks, and that her position remained unchanged, a qualification which I do not accept. If so, the "Cruiser," entirely unaided, rendered a distinct and most valuable service, without which the subsequent operations would in all probability have proved futile.

The Lord Ordinary has also, in my judgment, over-estimated the prospective assistance which might have been obtained from the other tugs that were sent down to the "Copeland." These tugs did not arrive at the "Copeland" until 5.30, after the "Taquary" had fortunately been salved; but in any case they could not have got the "Taquary" off until the next high water, which was about four o'clock in the morning, and their operations during the whole time would have been rendered difficult by darkness. As I have already said, however, I believe they would have been too late to render effective assistance.

We do not require to assess the salvage remuneration due to the "Setter," but I agree with your Lordship that her services were very much less valuable to the "Taquary" than the services of the "Cruiser." Indeed, I doubt whether they were of any value except in so far as the "Setter" acted as a rudder during the tow between Ailsa Craig and the Tail of the Bank.

Under such circumstances, where we think that the Lord Ordinary has misapprehended the evidence, or has seriously under-estimated the value of

July 10, 1913. the services which were rendered, we are at liberty to review the salvage award at which he has arrived with greater freedom than if we thought he had correctly stated the facts of the case, in which event it would only be where we thought there would be substantial injustice if we adhered to the award that we would review it at all. Even under the circumstances as they stand there must be some considerable and substantial difference in our estimate of the services from that which the Lord Ordinary has reduced to money. I think that such a difference is to be found in this case, and that the award which your Lordship in the chair has proposed is more in harmony with previous decisions than that of the Lord Ordinary.

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The only two decisions of the Scottish Courts that have a direct bearing on this case are the decisions in the cases of *Duncan*¹ and the "*Gantock Rock*."² In the case of *Duncan*¹ the vessel had been deprived of her rudder and sternpost by a collision with a rock. The salvor obtained an award of £1500 on a valuation of the salvaged property of £31,000. In the case of the "*Gantock Rock*"² an award of £1550 was given on a valuation of £40,000. In neither of these cases was the peril so imminent as in the present case. In the "*Gantock Rock*" case² the vessel was uninjured. She was riding at anchor on a lee-shore and had safely ridden out a very violent gale. If the gale increased, as in point of fact it did, there was great risk of her driving upon the rocks; but her position was not so serious as the position of a vessel which is already on the rocks and which, if my view is sound, could not have safely lain there for another tide. In the case of *Duncan*¹ the vessel was afloat and was able to use her own engines, and therefore was not in the helpless condition of the vessel with which we are here dealing.

Having in view the greater danger of the salvaged vessel in this case, I think we are amply justified in giving the award your Lordship proposes; and indeed if the assessment of the salvage services had taken place in England I am disposed to think that a somewhat higher sum might have been considered appropriate, looking to the awards in the recent cases in the Admiralty Court to which our attention was called.

We were also referred to the case of the "*Vulcan*,"³ where an award of £500 was made on a salvaged value of £21,000, although the circumstances were entirely different and the danger to the salvaged vessel not at all imminent. I think it has always been recognised in the profession that that award represents the judicial low-water mark of salvage remuneration. Reliance was also placed on an Outer House decision of Lord Stormonth-Darling (the *Greenock Towing Company*⁴), where the extremely small sum of £350 was awarded in respect of salvage services rendered to a stranded vessel valued at £43,000. I can only account for that on the footing that his Lordship thought that the services, although of the nature of salvage services, were not much different from towage, and that the steamer would have floated off without assistance at the next tide, and as she had the use of her own engines and rudder could have been navigated safely into port; in short, that the services rendered by the tug consisted in merely pulling

¹ 5 R. 742.

² 2 F. 1060.

³ 9 R. 1057.

⁴ 9 S. L. T. 221.

the ship round into a position in which she was less likely to take further July 10, 1913.
 damage. On any other view of the facts the award in that case is quite
 irreconcilable with the whole trend of decisions both here and in England.

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LORD GUTHRIE.—I am of the same opinion. The Court is always
 unwilling to disturb an amount found due by the Judge who heard the
 witnesses. We do not do so unless the amount found due is substantially
 either inadequate or excessive—so excessive or inadequate as in our opinion
 necessarily to involve misapprehension of essential facts. Your Lordships
 have incidentally dealt with the points on which we all think the Lord
 Ordinary has erred. I content myself with tabulating them. First, as to
 the position of the vessel. Captain Griffiths says that the “Taquary” was
 nearly at right angles to the shore. The defenders do not go so far as this,
 nor, on the other hand, do the pursuers maintain that she was exactly broad-
 side on. The question is whether she was not substantially broadside on.
 Apparently the Lord Ordinary thinks she was not, a view which the evi-
 dence seems to me to negative. Then the Lord Ordinary says that the
 “Taquary” was not “in imminent danger.” It seems to me, whether we
 take the pursuers’ or the defender’s views of the place where she went
 ashore and the position in which she was, that she was in imminent danger.
 In the third place, the Lord Ordinary says that the “Cruiser’s” services
 were certainly useful. It seems to me that that is a quite inadequate way
 of describing what she did. It would be more proper to say that her
 services were absolutely essential. Then the Lord Ordinary, in the fourth
 place, says that the “Flying Serpent” and the “Flying Scotsman,” looking
 to the state of the weather at the time, would have been in a position to
 save the “Taquary” had she not been floated by the “Cruiser.” As your
 Lordships have pointed out, these vessels were sent for a purpose which
 excluded the notion that they would be available for the “Taquary”; in
 any case, even if they might have been available ultimately, the evidence
 shows, and we are advised by the Nautical Assessor, that by that time the
 “Taquary” would have been beyond salvage.

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Lastly, the Lord Ordinary says:—“It does not appear to me that
 the record raises a case for my estimating the amount to be awarded
 for the joint salvage services, and allocating to the pursuers their proper
 proportion.” Although, no doubt, we must confine our consideration to
 the particular services of the salvor now before us, it seems necessary to
 form an opinion of the total amount that should be paid. Considering the
 “Cruiser” only, and taking into view, first, the risk to the “Taquary”
 from which she was saved by the “Cruiser,” second, the value of the salvaged
 vessel, third, the nature of the “Cruiser’s” services, and fourth, the time
 taken, I concur in thinking that £1200 is a reasonable sum, certainly not
 out of line with the cases quoted to us, particularly those dealing with
 stranded vessels.

THE COURT recalled the interlocutor of the Lord Ordinary, and
 decerned against the defender for payment to the pursuers of
 the sum of £1200.

No. 156.

WILLIAM STRUTHERS, Pursuer (Appellant).—*Chisholm, K.C.—
A. A. Fraser.*

July 16, 1913.

JAMES SMITH, Defender (Respondent).—*Sandeman, K.C.—
Hon. W. Watson.*Struthers v.
Smith.

Accounting—Fitted accounts—Discharge—Implied discharge—Agent and Principal—House factor—Accounts between agent and principal discharged half-yearly—Subsequent action for disbursements affecting the period covered by discharges.

A firm of house factors rendered to their principal half-yearly statements setting forth the rents received and disbursements made for properties managed by them on his behalf, and bringing out balances in his favour. On receipt of these balances the principal discharged the factors of all claims in respect of the half year's rents. The factory having come to an end, an assignee of the factors brought an action against the principal for recovery of the amount of certain tradesmen's accounts, alleged to have been incurred in connection with the properties during the period covered by the statements, and paid by the factors.

The Court allowed a proof, *holding* that the effect of the doctrine of fitted accounts was not to exclude the action, but to place a heavy onus on the pursuer of showing that the disbursements sued for were not in fact covered by the half-yearly statements and consequently discharged.

1st DIVISION.
Sheriff of
Lanarkshire.

IN October 1911 William Struthers, a commission agent in London, assignee of William Barnetson & Sons, house agents in Edinburgh, brought an action in the Sheriff-Court of Lanarkshire at Glasgow, against James Smith, residing there, in which he claimed the sum of £85, 16s. 3d., alleged to be due by the defender to William Barnetson & Sons.

The circumstances in which the action was brought as disclosed in the averments appear from the following findings in fact pronounced by the Sheriff:—“(1) That the defender is owner of a property in Edinburgh, for which Messrs William Barnetson & Sons were appointed house factors in the year 1904, and that it was the duty of Messrs Barnetson & Sons to collect the rents, to pay all disbursements, including tradesmen's accounts, and to remit the balance to the defender; (2) that at each half-yearly term from 1904 to 1910, the Messrs Barnetson sent the defender a stamped account, signed by themselves, setting forth the rents received, the disbursements made, and the balance due to the defender; (3) that upon the receipt of the final balance due, the defender discharged Messrs Barnetson of all claims he had against them in respect of the half year's rents, and received from them the vouchers for the disbursements made; (4) that shortly after Martinmas 1910, Messrs Barnetson sent the defender a cheque for £100, as an interim payment for the rents then due, and that, on being pressed for settlement of the balance in January 1911, they resigned the factorship, and shortly after intimated to the defender that he was due them the sum of £69, 19s., being money which they had overpaid to him; (5) that shortly thereafter Messrs Barnetson assigned their claim against defender to John Robertson, solicitor, Edinburgh, and ten days thereafter became bankrupt; (6) that Mr Robertson re-assigned Messrs Barnetson's claim against defender to William Struthers, commission agent, London, the pursuer in this action; (7) that the sum sued for, according to the account lodged by the pursuer, is partly made up of tradesmen's

accounts which were incurred in connection with the property in the July 16, 1913. years 1907 and 1908, and that, if these be deducted from the account, there is no balance due by the defender to Messrs Barnetson, or to the pursuer, as assignee of their claim." Struthers v. Smith.

The pursuer's further averments, so far as material to this report, are referred to in the Sheriff's note, quoted in footnote, *infra*.

The defenders pleaded, *inter alia*;—(4) The accounts between the said William Barnetson & Sons and the defender having been periodically settled each half year for six years regularly, cannot now be opened up. (4a) The said Barnetson & Sons having accounted each half year for their intromissions, delivered up signed statements and vouchers, and received final receipts and discharges from defender, the pursuer is barred from this action.

By interlocutor dated 1st February 1912 the Sheriff-substitute (Craigie), before answer, allowed the parties a proof of their averments.

On 26th June 1912 the Sheriff (Millar), on appeal, recalled this interlocutor and pronounced one in which, after the findings in fact quoted above, he found in law as follows:—"That the parties having settled their accounts at each half-yearly term, and granted each other mutual discharges during each half year, from 1908 to 1910, they are not entitled to go back upon these, and sue for disbursements which should have been included in these accounts: Therefore assoilzies the defender from the conclusions of the action, and decerns."*

* "NOTE.—So far as the facts that are found in the interlocutor are concerned, they were admitted at the bar, and are set out at length in article 7 of the defender's statement of facts. The statements and vouchers referred to are produced. The only answer the pursuer makes is 'Denied as stated, and reference is made to answer 1 hereof.' There is no explanation of this denial, although the particulars are given, but I understand it to refer to the averment in answer 1: 'Denied as stated, and explained and averred that it was quite understood by the defender that the half-yearly statements rendered by the said William Barnetson & Sons did not contain the whole expenditure incurred by the said William Barnetson & Sons on his behalf at the dates on which said statements were rendered.' As that was the only matter of fact in dispute between the parties, I should have remitted it to probation if the pursuer had made a sufficiently specific averment of the agreement, but it is much too vague and general in its terms. It is not said when or where it was made, or whether it was in writing or made at a personal interview, or what the terms of the agreement were. There is no reference in any of the statements to any such agreement, such as we would expect in sending the balance of the money due at each half year. The pursuer had opportunity of amending his record on this point, but refused to avail himself of it. Accordingly, I think there is no necessity for proof on this matter.

"On the law, I think there is sufficient justification for the view that, according to Scotch law, where the parties have met and settled accounts, and, after payment, have discharged each other of their obligations, it is not competent for one of the parties to go back and open the account, unless on the ground of fraud or error in fact, not due to any carelessness on the part of the person seeking redress. I think that is especially true with regard to a factor. If he did not correctly set forth the disbursements, the proprietor might find it very difficult, years afterwards, to check the accounts rendered to him. For instance, one of the largest accounts claimed in this case is for house painting, and it might be very difficult, years after this work had been done, for the defender to say that the account had been

July 16, 1913. Against this interlocutor the pursuer appealed to the Court of Session, and the case was heard before the First Division on 16th July 1913.

Struthers v.
Smith.

Argued for the appellant;—The Sheriff was wrong in holding that there was anything in the terms of the accounts and discharges passing between the parties which barred the pursuer from prosecuting this claim. Such was not the effect of the doctrine of "fitted accounts." The finality of each half-yearly transaction was not necessarily to be inferred from the course of dealing between the parties, and unless the defender could show that such an inference was necessary he could not resist the pursuer's demand for a proof. At the highest there was only a presumption of finality which the pursuer was entitled to rebut.¹ In two of the Scots cases cited by the Sheriff proof had been allowed,² the third, *Stewart v. Maconochie*,³ had been decided in very special circumstances and was no authority for the general proposition he sought to apply to this case.

Argued for the respondent;—The accounts were *prima facie* evidence of the financial relation of the parties, and there was accordingly a presumption that each settlement was a final settlement up to date.⁴ No doubt it was open to either party to come forward subsequently and to show that there had been a mistake, but in order to rebut the presumption he must found his case on much more substantial averments than were contained in the present record.⁵

LORD PRESIDENT.—In this case the assignee of the assignee of a firm of house factors (William Barnetson & Sons) sues the principal who employed that firm for a sum said to be due upon a true accounting between the parties. The firm was employed to manage certain properties which were situated in Edinburgh and which belonged to the principal who dwelt elsewhere, and the management consisted in the usual work of a house factor, namely, collecting the rents and also seeing to the upkeep of the property, so far as that upkeep of the property devolved upon the landlord in accordance with the

properly incurred. Again, it would deprive the owner of the property of the opportunity of considering whether the administration of the factor was such that he should retain him or dispense with his services. Further, a person of limited income derived from property might be encouraged to spend money which, if he were called upon afterwards to repay, might place him in very straitened circumstances. As to the authorities, I would refer to paragraph 585 of Bell's Principles, and the cases quoted there, and also to the case of *Cameron v. Henderson and Others*, 18 R. 728, and the cases there quoted, especially those of *Stewart v. Maconochie*, 14 S. 412, and *Russell's Trustees v. Russell*, 13 R. 331. In the English law the doctrine of settled accounts is well established—*Cave v. Mills*, (1862) 31 L. J., Ct. of Ex. 265; *Hunter v. Belcher*, 2 De Gex, Jones, & Smith's Reps. 194; *Attorney-General v. Brooksbank*, 2 Young & Jervis' Reps. 37; and the case referred to in II. Smith's Leading Cases, 433 to 436.

"Upon the admitted facts, I think the defender is entitled to absolvitor in this case."

¹ *Laing v. Laing*, (1862) 24 D. 1362; *Glasgow Royal Infirmary v. Caldwell*, (1857) 20 D. 1.

² *Cameron v. Pantoun's Trustees*, (1891) 18 R. 728; *Russell's Trustees v. Russell*, (1885) 13 R. 331.

³ (1836) 14 S. 412.

⁴ Bell's Prins., sec. 585.

⁵ *Parkinson v. Hanbury*, (1867) L. R., 2 H. L. 1, *per* Lord Westbury, at p. 19.

rules of law governing these matters. Accordingly, in each statement which July 16, 1913. the factors made to their principal they begin by debiting themselves with the sums received from the tenants and taking credit for the tradesmen's accounts and other disbursements made by them during the period covered by the statement. The relationship between the parties seems to have lasted for seven years, during which period statements were rendered by the factors to their principal half yearly, but in January 1911 the factors resigned their position. The sum of £100 had been paid by the factors to their principal at Martinmas 1910, and when the factors resigned they rendered a half-yearly statement for the period ending Martinmas 1910 showing a balance of £69, 19s. due to them. Soon after the factors rendered an amended statement showing £85, 16s. 3d. as due to them. This is the claim that is made by the assignee of the house factors, who is the pursuer in the action.

Struthers v.
Smith.

Ld. President.

The learned Sheriff-substitute before whom the case came to depend allowed a proof. Contrary to what one would have expected the pursuer appealed to the Sheriff, and he seems to have maintained before the Sheriff, and indeed in no other view is the fact of the appeal at all explicable, that in respect that he produced vouchers for the payments which he says were made by the factors on behalf of the defender he was entitled to decree *de plano*. The learned Sheriff took a different view of the case from his substitute, and held that, as these half-yearly accounts had been rendered, the principle of fitted accounts applied, and that the defender was accordingly entitled to immediate absolvitor.

I am sorry I cannot agree with the learned Sheriff, but I do not think that is the principle of what is called fitted accounts. I have always understood that there are two possible situations. On the one hand you might have an absolute discharge by A in favour of B, in which case the matter is ended, unless that discharge can be reduced on the appropriate averments of fraud, essential error, or something of that sort. On the other hand, there is the case where you have what are known as "fitted accounts," which do not constitute a discharge, but which raise a presumption that there has been a final settlement between the parties. The law on this question was laid down in the well-known case of *Laing v. Laing*¹ by Lord President Inglis, at that time Lord Justice-Clerk, who pointed out that the effect of a docquet was to reverse the onus and was not to exclude inquiry altogether, and that he who avers that the account is wrong must be put to explicit proof of that fact. Now, in this case, although in the strict sense of the word there was no docquet on the accounts, there was something which was exactly equivalent to a docquet. The accounts were rendered half yearly, and it was the duty of the house factors to put down the whole disbursements made by them during the period covered by the statement. No doubt two things might have happened to prevent them from doing so. Tradesmen's accounts are not always rendered with absolute punctuality, and sometimes the period at which they are rendered does not correspond to the period for which the factors' statement is rendered. If a tradesman's account has not been rendered in time to be included in the factors' statement, it is quite clear that the factors' right to recover would not on that account be excluded; or

¹ (1862) 24 D. 1362.

July 16, 1913. again, if there had been a case of mere *incuria*, it would have been in the power of the factors to say, "Here is an account which we have omitted to charge against you in our previous statement, and we are entitled to claim payment of it now." I think all that is clear, but I also think that it is always to be presumed that the factors would not omit from their statements any account that had been paid by them, and that the onus is very strong against the person who alleges that there has been such an omission. From the nature of the case here there can only have been one discharge in the proper sense of the word. It was always the factors who had to give money to the principal, and it would be the principal who had to discharge the accounts. But I think that the fact that the factors put in a certain sum as disbursements has the same effect in law as if they had docqueted the accounts, "these are our disbursements during the period."

That being so, it seems to be impossible to hold the case absolutely concluded. There must be a proof as the Sheriff-substitute has said, but in taking that proof he must bear in mind that the effect of these accounts is just the same as if they had been docqueted, and that the onus is upon the pursuer to show that they do not include all the disbursements that have been made, for, unless he clearly shows that the money is still due to him, then the docquet, so to speak, will prevail.

In view of the fact that the whole trouble and expense since the judgment of the Sheriff-substitute has been caused by the pursuer, and that he is now only getting what the Sheriff-substitute allowed him, I think the pursuer should bear the whole expenses of the process since the date of the Sheriff-substitute's interlocutor.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

THE COURT recalled the interlocutor appealed against, and allowed a proof.

JOHN ROBERTSON, Solicitor—M. & M. M'CALL, S.S.C.—Agents.

No. 157.

JOHN PATON, Appellant.—*Moncrieff, K.C.—Keith.*

WILLIAM DIXON, LIMITED, Respondents.—*Horne, K.C.—Strain.*

July 16, 1913.

Paton v.
William
Dixon,
Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule, (1) (b)—Where incapacity "results" from the injury—Return to work after the accident—Supervening aneurism.

A miner strained his back on 7th December 1911, and in consequence became incapacitated for work. On 1st May 1912 a medical referee certified that he would be able to resume his usual work in three weeks, and he returned to work on 27th May. He continued to work, doing a full shift at the coal face, until 15th August, when he became totally incapacitated, and was found to be suffering from dilatation of the heart caused by an aneurism of the aorta. He did not feel pain in the cardiac region until July, and the doctors who had attended him previously, including the medical referee, had not noticed any symptoms of heart trouble. In a claim for compensation the arbitrator was of opinion that the aneurism was caused by the miner being engaged between May and August at work which was beyond his physical powers, and found that his present incapacity was not due to the accident of 7th December.

Held that the arbitrator was entitled to arrive at that decision.

In an arbitration under the Workmen's Compensation Act, 1906, July 16, 1913. in the Sheriff Court at Hamilton, in which John Paton claimed compensation from William Dixon, Limited, the Sheriff-substitute (Shennan) refused compensation, and at the request of the workman stated a case for appeal.

Paton v.
William
Dixon,
Limited.

The case set forth :—

1st Division.
Sheriff of
Lanarkshire.

"(1) The appellant, who is forty-two years of age, was on 7th December 1911 a workman in the respondents' employment at No. 3 Pit, Blantyre Colliery. He was employed as a miner at the coal face. (2) On that day when he was throwing out lumps of coal he twisted his back and racked himself. (3) He went out to his work the following day, but his back became so painful that he took to his bed. (4) The respondents paid him compensation of 16s. 3d. per week in respect of total incapacity until 17th February 1912, and thereafter in respect of partial incapacity 10s. per week, until 3rd March 1912, when the amount was reduced to 8s. 3d. per week. (5) A dispute having arisen between the parties as to the appellant's capacity for work, they agreed to refer the matter to a medical referee. On 1st May 1912 the medical referee certified that the appellant was then able for light work, and that if he could obtain this he would be ready for his usual work in three weeks. (6) The respondents stopped payment of compensation on 22nd May 1912, and the appellant makes no claim for compensation for the period between that date and 15th August 1912. (7) The appellant resumed his old work on 27th May 1912, and worked on until 15th August 1912. During that period he was being paid the full shift rate, and from the middle of June he worked with great regularity and gave satisfaction to his employers. He may have found the work harder, but the usual output of coal was obtained and no complaints were made at the time that he did less than his share of the work. (8) On 15th August the appellant again became totally incapacitated for work. It was then discovered that he was suffering from symptoms of cardiac dilatation. This was subsequently diagnosed as due to an aneurism of the aorta which will permanently incapacitate him for work. (9) The appellant was not troubled with pain in the cardiac region until July 1912, nor did any of the medical men (including the medical referee) who examined him at or before 1st May 1912, find any reason to suspect cardiac trouble.

"In my opinion the aneurism from which the appellant suffers resulted from the continuous strain put on his heart muscles while he was working between 27th May 1912 and 15th August 1912. He was then doing work beyond his physical powers. I held that the incapacity from which he has suffered since 15th August 1912, was not proved to be due to the accident of 7th December 1911."

The question of law for the opinion of the Court was :—"On the foregoing facts was the arbiter wrong in holding that the appellant's incapacity since 15th August 1912, is not due to the accident of 7th December 1911?"

The case was heard before the First Division on 12th June 1913.

Argued for the appellant ;—The enfeebled condition in which the appellant had returned to his work was due to the accident of 7th December 1911, and what had formerly been his usual work had become overwork in consequence of that enfeebled condition. The chain of causation between the accident and his present incapacity

July 16, 1913. was therefore unbroken.¹ It could not be said here that the workman had been guilty of any unreasonable conduct which amounted to a new element introduced into the chain of causation. His conduct, on the contrary, had been entirely reasonable, for he had followed competent medical advice in returning to work when he did.² Nor was the workman's claim here barred by a conclusive finding of a medical referee that he had completely recovered in May—the referee's report here did not amount to any such finding.³ Moreover, although the payment of compensation had *de facto* ceased, it had not been formally determined, and therefore the original claim was still a continuing process.⁴

Paton v.
William
Dixon,
Limited.

Argued for the respondents ;—No cardiac trouble had been found to follow upon the appellant's strain on 7th December 1911, and the incapacity which subsequently developed could not be attributed to the strain except as a mere matter of speculation. But speculation was not sufficient; the applicant was bound to prove that his incapacity was, as a matter of fact, the result of the accident.⁵ That he had failed to do here. Such an inference of fact as the Court were asked to draw would never be drawn where the arbitrator, who was the judge of fact, had taken an opposite view. The applicant had failed to prove that he could never have had heart trouble in August unless he had met with the accident in December. He had in fact himself introduced a new cause by undertaking work he was not fit for, and had thus effectually broken any chain of causation between the accident and his subsequent incapacity. In that state of the facts the arbitrator was amply justified in arriving at the conclusion he had reached. Moreover, there was no process before the arbitrator until February 1913, at which date the claim in respect of the accident of December 1911 was barred.

At advising on 16th July 1913,—

LORD PRESIDENT.—[After narrating the facts and the finding of the arbitrator]—Now the question before your Lordships is, Can that finding of the learned arbitrator be supported on the evidence or can it not? I do not consider the case easy, but upon the whole, giving it the best consideration I can, I do not see my way to say that that finding cannot be supported upon the evidence. The whole point is, Is there a chain of causation between the accident which happened on 7th December 1911 and the state of incapacity in which the man is found in August 1912?—because I take it that it could not be said that there was an accident in August. I do not mean to say for one moment—I should be going very much against the cases if I

¹ Dunham v. Clare, [1902] 2 K. B. 292, Collins, M.R., at p. 296; Walton v. South Kirkby, &c., Colliery, Limited, (1912) 5 Butterworth's W. C. C. 640, Cozens-Hardy, M.R., at p. 643.

² Shirt v. Calico Printers Association, Limited, [1909] 2 K. B. 51.

³ Gray v. Shotts Iron Co., Limited, 1912 S. C. 1267.

⁴ King v. United Collieries, Limited, 1910 S. C. 42.

⁵ Beaumont v. Underground Electric Railways Company of London, Limited, (1912) 5 Butterworth's W. C. C. 247; Hawkins v. Powells Tillery Steam Coal Co., Limited, [1911] 1 K. B. 988, Cozens-Hardy, M.R., at p. 992; Barnabas v. Bersham Colliery Co., (1910) 3 Butterworth's W. C. C. 216; Perry v. Ocean Coal Co., Limited, (1912) 5 Butterworth's W. C. C. 421; Noden v. Galloways, Limited, [1912] 1 K. B. 46.

did—that an aneurism of the aorta may not be in itself an accident. But, July 16, 1918. in the circumstances of this case, naturally that could not be said: that is to say, supposing you excised all reference to the accident in December, no one, I think, could have said that here the man suffered from an accident. There was nothing like the tightening of the nut in the spanner case; there was nothing like the over-exertion that was shown in the other cases owing to pushing something heavy or doing some particular act. So far this case would have been upon all-fours with the case of *Coe v. Fife Coal Company*.¹ I venture to quote, as really leaving nothing more to be said, what was said there by my brother, Lord Kinnear. Discussing the word “accident” in the light of the House of Lords’ judgment in the well-known case of *Fenton v. Thorley*,² he said: “It seems to me that all these interpretations of the word point to some particular event or occurrence which may happen at an ascertainable time, and which is to be distinguished from the necessary and ordinary effect upon a man’s constitution of the work in which he is engaged day by day. So defined, the word ‘accident’ seems to me to exclude the anticipated and necessary consequence of continuous labour.” The same view has been taken by the English Courts in a set of cases which I need not quote, where they held that there must be something in the nature of a definite event. In the case before your Lordships the workman need never have suffered from aneurism—upon the view of the learned arbitrator, who is the judge of the facts—had he not put himself to work for which he was physically unfit. In other words, the true cause of the disease was not the original accident in December, which, being a rick in the back, had, so far as the learned arbitrator finds, no connection with the disease at all, but his putting himself to and persisting in work for which he was physically unfit.

Paton v.
William
Dixon,
Limited.
—
Ld. President.

It was argued—and that is just the novel point in the case—that the condition of physical unfitness was a result of the accident in December. My first remark upon that is that, although that may be so, it is not found to be so. We have not got a finding in fact that the man’s impaired physical condition was due to the rick in the back. But even supposing it was, I do not think, on the best consideration I can give it, that the result would be different, and I think a fair test would be this:—As a matter of fact, the man’s second period of labour was with the same employers as he had been with when he met with the accident in December. But suppose it had been with some other employer. Suppose the accident in December had happened under employer A and the heart dilatation under employer B. In that case it is quite clear that he could not have made any claim against employer B, because, if what I have said about the case is sound, the employer B would have said, “Oh, this is caused by your work pure and simple.” Well, then, could he have gone back to employer A and said, “I claim in respect of my accident in December 1911.” (I assume that the compensation had not been ended in such a way as prevented him making a new application.) Would not the employer A then have said: “It is quite true that you ricked your back, and if you could have shown that the effects of that rick in your back were still with you, I should have

¹ 1909 S. C. 393.

² [1903] A. C. 443.

July 16, 1913. paid you modified compensation ; but you are not to saddle me with full compensation because you choose to put yourself to work for which you are entirely unfit." I think that is a useful test.

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Dixon,
Limited.

Ld. President.

As I say, I do not think the case is free from difficulty. But in a case which is not free from difficulty I think we always take the view, which has prevailed in the cases in the House of Lords, that when there is a case of doubt we are not entitled to interfere with the decision of the arbitrator upon a question which really is not a question of law but a question of fact, because the principal question of fact which decides the matter is whether there exists a chain of causation between the accident of December 1911 and the aneurism of the aorta in August 1912? I am of opinion that there is not, and I think the appeal should be refused.

LORD KINNEAR.—I am of the same opinion. I agree with your Lordship that the question is one of considerable difficulty. I think we must be satisfied, from the statement of the arbitrator, that there was no new accident between 7th December and 15th August 1912—I mean nothing had happened between those two dates which, in any reasonable sense of the word, could be called an accident. And therefore the question raised by the workman's application must be whether the incapacity which became apparent at 15th August can be traced, as a remote or indirect consequence, to the accident on 7th December or whether it cannot. I apprehend that is a question of fact, and that we are bound to accept the decision of the Sheriff upon that question of fact unless, upon his own statement of the specific facts which he says were proved to him, we can see that he had no evidence before him which could justify his conclusion.

Now I am quite unable to say that the Sheriff had not evidence upon which he was able to decide one way or the other. I think he had a difficult question to decide, and it appears to me that there might be two points of view from which he required to consider it. He might have to consider, in the first place, whether there was anything to show that the original cause of the dilatation of the heart, from which the man ultimately suffered, was the accident on the 7th December, because it may have been shown that the accident that then happened started the evil which developed later as the man was working. Or, again, it might be shown that he began work in such a defective physical condition, caused by the accident, as to expose him to the injury from which he actually suffered. Both of these are, in the first place, questions of fact, and I think the Sheriff negatives both. I am therefore unable to see any sufficient ground for disturbing his decision.

LORD JOHNSTON.—The learned Sheriff-substitute has, in my opinion, come to a sound conclusion. But it is not a question for this Court, as the Sheriff puts it in the case before us, whether the arbitrator was wrong in holding that the appellant's incapacity since 15th August 1912 was not due to the original accident of 7th December 1911, but whether there was before him evidence from which he could reasonably and therefore competently come to that conclusion.

A miner at the face on 7th December 1911, when throwing out lumps of coal, twisted his back and racked himself. He was off work till 17th Feb-

ruary 1912, and received full compensation. He received reduced com- July 16, 1913.
pensation, as partially incapacitated, to 3rd March, and still further reduced
till 22nd May 1912. But on 1st May 1912 a reference was made to a William Paton v.
medical referee, who pronounced that the injured man was then able for Dixon,
light work, and that if he could obtain it in the interim he would be fit for Limited.
his usual work in three weeks. We are not told whether he got or accepted Ld. Johnston.
light work in May 1912. But on the 27th of that month he returned to
his ordinary work. Down to July 1912 he worked regularly and full time,
and had nothing to complain of. But in July he began to feel pain in the
cardiac region, and on 15th August 1912 he became totally incapacitated,
and was found to be suffering from aneurism of the heart. While the Sheriff
found that the aneurism resulted from the continuous strain put on his heart
muscles from 27th May to 15th August 1912 by work beyond his physical
powers, he also found that there was no evidence to connect the aneurism
as the cause of his present incapacity with the accident of 7th December
1911.

The appellant did not found his claim upon anything occurring during
his period of work from May to August 1912. Had he done so, there would
have been a case for consideration akin to *Hawkins v. Powells Tillery
Steam Coal Company*,¹ though I think that there would then have been
possible reason for excepting to the Sheriff's statement that the aneurism
then discovered resulted from continuous strain when "doing work beyond
his physical powers." That appears to be a pure inference from the presence
of the aneurism, and not, as far as I can see, established by any evidence as
to the development of the aneurism.

But the appellant based his claim on the accident of 7th December 1911.
That he met with an accident on that date is true. But he must prove
that the injury of which he complains was an injury by or, in other words,
resulting from this accident. I think the Sheriff was justified, on the evi-
dence, in holding that he had failed to prove any connection between the
two, and that, therefore, there is no ground for disturbing his judgment.

LORD MACKENZIE.—I am of the same opinion. There may or may not
have been a chain of causation between the accident the workman met with
on 7th December 1911 and his condition on the 15th August 1912. It was
for the arbitrator to say, and I am unable to come to the conclusion that the
arbitrator was not entitled to make the finding that he has made.

THE COURT answered the question of law in the negative.

SIMPSON & MARWICK, W.S.—W. & J. BURNES, W.S.—Agents.

¹ [1911] 1 K. B. 988.

No. 158. THE TRUSTEES OF THE LATE WILLIAM COTTON, Appellants.—

Cooper, K.C.—Maitland.

July 16, 1913. RICHARD FARMER (Surveyor of Taxes, Edinburgh), Respondent.—

Sol.-Gen. Anderson—J. A. T. Robertson.

Cotton's
Trustees v.
Inland
Revenue.

Revenue—Inhabited House Duty—Separate tenements—Customs and Inland Revenue Act, 1878 (41 and 42 Vict. cap. 15), sec. 13 (1).

A large building, once occupied as an hotel, was let to a number of tenants, each tenant occupying premises consisting of one or more rooms. These premises all entered from a central staircase or from passages leading therefrom. All the premises were occupied for business purposes with the exception of two—a caretaker's house on the top flat, and an eight-roomed dwelling-house which entered from a passage on the second floor leading from the central staircase.

Held that the premises were "divided into and let in different tenements" in the sense of section 13 (1) of the Customs and Inland Revenue Act, 1878, and that each separate tenement had to be considered by itself for the purpose of inhabited house duty.

1st Division. ON 31st May 1913 a case was stated for the opinion of the Court by the Commissioners for executing the Acts relating to inhabited house duties for the county of Edinburgh, at the request of the trustees of the late William Cotton.

The case set forth:—

"The trustees of the late William Cotton (hereinafter referred to as the appellants) appealed against an assessment made upon them for the year ending 23rd May 1911 of £31, 16s. 9d., being inhabited house duty at the rate of 9d. per £ on the sum of £849, the annual value of the premises situated at No. 100 Princes Street, Edinburgh, of which they are owners. The assessment for inhabited house duty was made under 14 and 15 Vict. cap. 36, and the provisions of Rule 6 of Schedule B of 48 Geo. III. cap. 55.

"I. The following facts were admitted or proved:—(1) The premises, with the exception of that part of them occupied by Robert Smith, were originally built for and were occupied as an hotel, but after having been structurally adapted for use as in the year of assessment they have been for some years past, and during the year of assessment, so far as not occupied by the appellants' caretaker, let to a number of tenants who occupy the subjects let to them in some cases as offices, warehouses, or other non-residential purposes, and, in one case, as a dwelling-house. No part of the premises is occupied by the appellants personally, but their caretaker inhabits a house in the premises as hereinafter stated. (2) The premises consist of a basement, ground floor, and five upper floors. Part of the ground floor of the building consists of four shops structurally separated from the remainder of the building. The part of the basement beneath these shops is also structurally separated from the remainder of the building. Neither this portion of the basement nor these shops are included in the assessment appealed against. There is an entrance to the ground floor from Princes Street through an outer and an inner door opening into a large hall. In the hall there is a staircase and lift by which access is obtained to the upper floors; and there is also a staircase leading to the basement. Each tenant has a key of the outer door which is locked at night. The inner door is a swing door which is never fastened. (3) The basement is divided into two por-

tions. Of these one consists of a washing-house and drying room July 16, 1913. used by the appellants' caretaker, off the latter of which a w.-c. opens, and of a lobby which leads to a coal cellar used by the appellants' care-^{Cotton's} taker, and from which lobby a staircase gives access to the hall on the ^{Trustees v.} ground floor. From the wash-house a door gives access to a passage, off ^{Inland} which there open two coal cellars belonging to and used by George Cotton & Son, tobaccoists, Princes Street. There also opens from the passage a door by which access is obtained to a flight of steps leading to a lane which communicates with Rose Street Lane. At the end of the said passage there is a door giving access to an open court; and from that court a door gives access to the other portion of the basement. This other portion is occupied by Messrs Oliphant, Anderson, & Ferrier as a warehouse; and from it a stair gives access to that part of the ground floor which is occupied by the said firm as a warehouse and office. (4) The ground floor consists of the hall mentioned above in article 2, and of three rooms occupied by Messrs Oliphant, Anderson, & Ferrier, as a warehouse and office. There is also a lavatory. Access to these rooms is obtained by a door opening into one of them from the hall above mentioned. There is also an access to one of them by large doors opening upon Rose Street Lane. The said firm also occupies a portion of the first and second floors, and the only access to this portion is by a staircase from one of the three rooms on the ground floor occupied by the firm. (5) The first floor consists of rooms occupied by Messrs Oliphant, Anderson, & Ferrier, as stated in article 4, of three rooms occupied by F. E. G. Hopp as an office, between two of which there is internal communication, of a single room occupied as an office by the World Missionary Conference, and of two rooms, between which there is internal communication, occupied as an office by the Empire Insurance Corporation. Each of these rooms has a door opening upon the passage which communicates with the staircase and lift. From the said passage there is a door opening on to a small lobby. Access is obtained from this lobby by a door to a room occupied as a warehouse by A. Brown, by a second door to the office of the Conservative Women's Franchise Association, and by a third door to two rooms occupied as an office by Messrs Ashford, Thomson, & Heaton. From the passage above mentioned there is a door opening into a small lobby from which access is obtained to a coal closet and to two rooms occupied by the World Missionary Conference between which rooms there is internal communication. There are also a ladies' lavatory and w.-c., access to which is obtained from a passage communicating with the staircase. (6) The second floor consists of rooms occupied by Messrs Oliphant, Anderson, & Ferrier, as stated in article 4, of a room occupied by Miss Fairley as an artist's studio, of two single rooms occupied by Mrs Feely and Mrs Fletcher respectively for business purposes, and of three rooms, between all of which there is internal communication, occupied as an office by Mr M'Crow. There is also a coal closet. Each of these rooms has a door opening upon the passage which communicates with the staircase and lift. There is also a large lavatory communicating with the said passage. From the said passage there is a door which gives access to the rooms occupied by Mr Robert Smith as his dwelling-house. This house, which formerly was a separate house with its own access from the street, is held on a separate title and consists of a lobby and four rooms entering therefrom on the second floor used as dining-room, drawing-room, bedroom, and kitchen, and

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four rooms used as bedrooms and a bathroom on the third floor. The only access to these last-mentioned rooms is by a staircase from the said lobby. (7) The third floor consists of the said four rooms and a bathroom, occupied by Mr Robert Smith, and of five rooms and a lavatory occupied by Cadbury Brothers, Limited. A door from the stair landing gives access to a passage with which each of the rooms occupied by Cadbury Brothers, Limited, communicates by means of a door. The door to the lift also opens upon this passage. (8) The fourth floor consists of six rooms let to tenants and occupied for business purposes and a lavatory. . . . Each room has a door opening from a passage which communicates with the staircase and lift. Off this passage at the west end there is a door which gives access to a stair which communicates with the house of the appellants' caretaker on the fifth floor. At the east end of the passage there is a door by which access is obtained to a stair leading to the fifth floor. (9) The fifth floor consists of four rooms and a bedroom, occupied by the appellants' caretaker, which all communicate with the landing of the stair leading from the fourth floor to the caretaker's house; of three rooms, two of which are let and one is vacant; and of a place for the cistern and lift machinery. The only communication between the caretaker's house and the rest of the building is by means of a door on, and a stair leading from, the fourth floor. Each of the said three rooms has a door opening on to the landing of the stair leading from the fourth floor to them. The caretaker's house is structurally separate from these three rooms. . . . (10) The various occupiers above named are entered in the Valuation-roll as tenants and occupiers of the premises held by them respectively, and they are separately rated on the rents paid by them.

" II. For the appellants it was contended that the only part of the said premises in respect of which inhabited house duty is leviable is the house occupied by Mr Robert Smith at a rent of £75, and that in terms of section 1 of 57 Geo. III. cap. 25, section 25 of 30 and 31 Vict. cap. 90, and section 13 of the Customs and Inland Revenue Act, 1878. They further contended that in any event the said duty was not leviable in respect of the part of the premises which is unlet. They further maintained that as they were not liable in payment of the said duty on the remainder of the said premises, and as the house occupied by Robert Smith was the only house therein on which the duty was leviable, they were not liable to be assessed for the duty upon the said house, and that the duty was recoverable under 48 Geo. III. cap. 55, Schedule B (1), from Robert Smith. They further maintained that the premises, so far as they are used as a dwelling-house, are used for the sole purpose of providing separate dwellings, and that by virtue of section 11 (1) (a) of the Revenue Act, 1903, the value of the caretaker's house being £12 falls to be excluded from the annual value of the premises for the purposes of the said duty.

" III. The surveyor of taxes (Mr Richard Farmer) contended that the building is correctly assessed as one subject under the 6th rule of Schedule B of 48 Geo. III. cap. 55. That as the building is neither structurally divided into and let in different tenements nor occupied solely for the purpose of any trade or business, there is no exemption under either subsection (1) or subsection (2) of section 13 of the Customs and Inland Revenue Act, 1878.* That section 11 of the

* The Customs and Inland Revenue Act, 1878 (41 and 42 Vict. cap. 15),

Revenue Act, 1903, has no application in that the building is not used for the purpose of providing separate dwellings within the meaning of that section, and, alternatively, that if it were so used relief could only be granted to the extent of £12 in respect of the caretaker's house, which is the only dwelling-house of an annual value not exceeding £60. July 16, 1913.
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"IV. The Commissioners having considered the facts and arguments submitted to them, held that the premises were not divided into and let in tenements within the meaning of the Customs and Inland Revenue Act, 1878, section 13 (1), and that section 11 of the Revenue Act, 1903, had no application, and they refused the appeal."

The case was heard before the First Division (without Lord Johnston) on 18th June 1913.

Argued for the appellants;—The premises were "divided into and let in different tenements," within the meaning of subsection 1 of section 13 of the Customs and Inland Revenue Act, 1878,¹ and of these different tenements all, excepting two, were "occupied solely for the purposes" of a "trade or business" within the meaning of the same subsection, and accordingly under subsection 2 of the same section, and also section 1 of the House Taxes Act, 1817,² which fell to be read along with the Act of 1878, the tenements occupied as business premises were exempted from inhabited house duty. With regard to the tenement leased as a residence by Mr Smith the appellants were not chargeable with duty, because it was the occupier who was chargeable, and it was Mr Smith and not the appellants who occupied the tenement.³ It was obvious that it was a separate tenement.⁴ The only distinction between it and the house in *Corke v.*

enacts:—Sec. 13. "(1) Where any house, being one property, shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing, at any time during the year of assessment, to the surveyor of taxes for the parish or place in which the house is situate, stating therein the facts; and after the receipt of such notice by the surveyor, the Commissioners acting in the execution of the Acts relating to the inhabited house duties shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed, if it had been a house comprising only the tenements other than such as are occupied as aforesaid, or are unoccupied. (2) Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said Commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof."

¹ 41 and 42 Vict. cap. 15; *Russell v. Coutts*, (1881) 9 R. 261, Lord President Inglis, at p. 265; *Grant v. Langston*, (1900) 2 F. (H. L.) 49, Lord Macnaghten, at p. 52, Lord Davey, at p. 53.

² 57 Geo. III. cap. 25.

³ House Tax Act, 1808 (48 Geo. III. cap. 55), Sched. B, Rule 14; *Scottish Widows' Fund v. Solicitor of Inland Revenue*, (1880) 7 R. 491; *Glasgow and South-Western Railway Co. v. Banks*, (1880) 7 R. 1161; *Inland Revenue v. Grant*, (1898) 25 R. 1040.

⁴ *Corke v. Brims*, (1883) 10 R. 1128, Lord President Inglis, at p. 1130; *Nisbet v. M'Innes, Mackenzie, & Lochhead*, (1884) 11 R. 1095.

July 16, 1913. *Brims*¹ was that Mr Smith had to go upstairs and along a passage in order to enter his house, and the Act could not reasonably be interpreted as meaning that no tenement was a separate tenement unless it and the access to it were on the ground floor. With regard to the caretaker's house, it was not assessable for inhabited house duty, being of an annual value of less than £20,² and it was also exempt under subsection 2 of section 13 of the Act of 1878.

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Argued for the respondent;—The onus was on the appellants, who were seeking relief from assessment, to prove that the subjects were divided into different tenements within the meaning of section 13 of the Act of 1878, and they had failed to discharge the onus.³ A "tenement" within the meaning of the Act of 1878, or the Act of 1817, was, in the words of Lord President Inglis,⁴ "a part of a house so divided and separated as to be capable of being a distinct property or a distinct subject of lease." The various parts of the premises in question in the present case did not comply with this definition, and accordingly the building had been properly treated as a *unum quid*, and not being used solely for the purposes of trade was not exempt from inhabited house duty under section 1 of the Act of 1817, or section 13, subsection 2, of the Act of 1878. Even if Mr Smith's house was a separate tenement, the rest of the building could not be exempt from inhabited house duty unless it also was, as it was not, constructed as a separate tenement.⁵ The case of *Grant v. Langston*⁶ was distinguishable, because in that case the only access to the dwelling-house was by a door upon the street. With regard to the caretaker's house the provisions of the Revenue Act, 1903, section 11, relied on by the appellants, had no bearing whatsoever, as that section only applied "where a house, so far as it is used as a dwelling-house, is used for the sole purpose of providing separate dwellings," and the provision in subsection 2 of section 13 of the Act of 1878, relied upon by the appellants, did not apply where a property was divided into separate tenements as the appellants contended was the case here.

At advising on 16th July 1913,—

LORD PRESIDENT.—This is an appeal against a finding of the Commissioners of Inland Revenue, and has to do with an assessment for inhabited house duty made upon the premises situated at No. 100 Princes Street, commonly known as the Windsor Building. It seems to me that the question is one of fact, and fact entirely. The history of this legislation, as your Lordships know, is long, and has been illustrated by many cases. Originally, under the operation of the Act 48 Geo. III. cap. 55, and of the 6th Rule of Schedule B of that Act, if there was any dwelling-house in a

¹ 10 R. 1128.

² Revenue Act, 1903 (3 Edw. VII. cap. 46), sec. 11 (1) (a).

³ House Taxes Act, 1817, sec. 1; Customs and Inland Revenue Act, 1878, sec. 13 (1).

⁴ *Russell v. Coutts*, 9 R. 261, Lord President Inglis, at p. 265; *Corke v. Brims*, 10 R. 1128, Lord President Inglis, at p. 1130.

⁵ *Clerk v. British Linen Co.*, (1885) 12 R. 1133, Lord President Inglis, at p. 1135; *London and Westminster Bank v. Smith*, (1902) 87 L. T. 244; *Chapman v. Royal Bank of Scotland*, (1881) 7 Q. B. D. 136.

⁶ 2 F. (H. L.) 49.

July 16, 1913. *British Linen Company*,¹ when he says, "Is this case to be regulated by the judgment in the case of *Coutts*,² or by that in the case of *Corke v. Brims*?³" Cotton's Trustees v. Inland Revenue. I do not read what his Lordship said. I think, if you put it in that way, this case resembles *Corke v. Brims*³ and not *Coutts*.² I put my judgment in this way: I think that all those various tenements into which the whole building is divided are separate tenements. It is quite clear that, if you had the ordinary case of a semi-exterior common stair and a set of flats opening off it, there would be no question about that. Now, does it make any difference that, instead of having what I have called a semi-exterior common stair, you have a prolongation of the common stair by an interior passage? I think it does not.

Ld. President.

I quite agree that, if all you can say in fact is that there are various rooms in the house to which any person in the house has access, then the house has not been divided into separate premises such as I find in this house. My judgment upon the fact, as a jurymen, is that each of those tenements is separately let to a separate person who has a separate front door key to his own premises, with which nobody else has anything to do; and, in particular, that the one person who is a house occupier is entirely separate from all the rest, being entirely self-contained and kept by himself and having nothing to do with the rest of the house, except, I agree, that he has not only to come down the stair, but, in order to reach the head of the stair, he has to pass along a landing. I do not think that makes any difference. I think this house is truly divided into separate tenements, that the judgment of the Commissioners is wrong, and that relief ought to be granted.

LORD KINNEAR concurred.

LORD MACKENZIE.—I also agree with your Lordship. I think the question to be decided now is merely a question of fact, and I certainly agree with the observations made by your Lordship as to its not being useful to lay the plans which have been made the ground of judgment in one case alongside the plans which have been produced in the case under consideration in order to see whether there is any analogy between the one case and the other. The principles to be applied have been clearly defined. They were laid down by the Lord President in *Russell v. Coutts*,² and quoted by the Lord Chancellor in the case of *Grant v. Langston*.⁴ He only advocated the application of those principles, and made no comment.

It was pointed out in the case of the *London and Westminster Bank*,⁵ to which we were referred, that each case must be decided on its own circumstances; and it is, I think, apparent that the development of building, and the erection of large tenements divided into flats, or subdivided into different subjects, each capable of being made the subject of a separate lease, show how little use it is to go back to cases which were dealing respectively with a house in Banff and a house in Wick. In the present case we are dealing with a large building in Princes Street, Edinburgh, which had been converted, on account of the exigencies of the time, into different tenements.

¹ 12 R. 1133.

² 9 R. 261.

³ 10 R. 1128.

⁴ 2 F. (H. L.) 49.

⁵ 87 L. T. 244.

It is quite apparent, in regard to the dwelling-house occupied by Robert Smith, that it is entirely shut off and therefore satisfies all the canons that were laid down in such a judgment as that of Lord Brampton in the case of the *London and Westminster Bank*.¹ This house was formerly a separate house with a separate entrance from the street, and with a separate title, and the mere fact that in order to get access to it now one requires to go along a common passage, does not make it any different from flats to which access is got from a common stair. It is, of course, obvious that one cannot subdivide by contract merely. There must be more than that. I think that the description given of the subjects shows clearly, when the provisions of the Act of 1878 are applied, that the building is divided into, and let in, different tenements, and that the bulk of those are occupied solely for the purposes of trade or business.

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kenzie.

THE COURT pronounced the following interlocutor:—"Reverse the determination of the Commissioners, and remit to them to discharge the assessment: Order repayment of the inhabited house duty paid on the sum of £849."

HENDERSON & MUNRO, W.S.—SIR PHILIP J. HAMILTON GRIERSON,
Solicitor of Inland Revenue—Agents.

WILLIAM WATSON AND ANOTHER (William Stewart Watson's
Trustees), First Parties.—*W. L. Mitchell*.
JAMES WATSON, Second Party.—*Fenton*.

No. 159.

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Succession—Testament—Construction—Fee or liferent—Gift of fee—Direction that fee should be alimentary—Repugnancy.

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By his settlement a testator directed his trustees to realise his whole estate, "and thereafter (subject always to the discretionary power vested in my trustees hereinafter mentioned) to divide" the proceeds thereof equally among his children and the issue of predeceasing children. There followed a declaration that, "notwithstanding the power of division above mentioned," the trustees should have the most absolute discretionary power to retain any of these shares instead of paying them over, and to pay over the annual income only, derived from the share or shares so retained, or to pay the capital thereof by such instalments, and at such times, as they might determine; and a further special declaration "that the whole provisions hereunder in favour of my son J. W. are purely and strictly alimentary, and the same shall not be attachable by the debts or deeds of the said J. W., nor attachable by the diligence of his creditors," and that any share retained by the trustees under their discretionary power should be subject to this declaration. There was no ulterior destination of the shares of residue.

In a special case, in which the trustees stated that they saw no occasion to exercise their discretionary power, and were prepared to hand over J. W.'s share to him, if they had power to do so,—

Held (1) (*diss.* Lord Johnston) that under the direction to divide the estate among the truster's children a right of fee was conferred on J. W., which was not withdrawn by the subsequent declarations; (2) that, this being so, the declaration that the provision to J. W. should be alimentary was ineffectual; and, accordingly, that the trustees were entitled to pay over to him his share of residue.

¹ 87 L. T. 244.

July 17, 1913. ON 15th October 1912 a special case was presented to the Court by the testamentary trustees of the late William S. Watson, pawnbroker. Dundee, *first parties*, and by James Watson, his youngest son, *second party*, for the determination of certain questions which had arisen as to the share of residue of the trust-estate bequeathed to the second party under his father's trust-disposition and settlement.

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The truster died in 1904. He was married three times, and was survived by his widow and by two children of each marriage. The second party, who attained majority in 1911, was the youngest child of the truster's third marriage.

By his settlement the truster conveyed his whole estate to the trustees therein nominated, and after making certain provisions for his widow and for certain of his children, directed his trustees (by the tenth purpose) to retain a certain house property and to apply the income therefrom on behalf of the second party during his life as a special bequest to him; and on his death to sell the property and divide the proceeds among his issue, or, if he predeceased or left no issue, among the whole of the truster's children.

The eleventh purpose of the settlement was in the following terms:—
“Eleventh. Upon the youngest of my children of my present marriage attaining twenty-one years complete, I direct and appoint my said trustees to realise and convert into money my whole estates (so far as that may not have been already done by them), and thereafter (subject always to the discretionary power vested in my trustees hereinafter mentioned) divide the whole free proceeds thereof equally, share and share alike, amongst my whole children of my former marriages and the children procreated to me of my present marriage: Declaring that in the event of any of my children predeceasing leaving lawful issue, such issue shall succeed equally, share and share alike, to the share which their deceasing parent would have got if alive: But notwithstanding the power of division above mentioned, I hereby confer upon my said trustees the most absolute discretionary power to retain the share or shares falling to any of my children instead of paying the same over to them, and my said trustees may, in their discretion, only pay over the annual income derived from the share so retained, or may, from time to time, pay the capital of such share or shares by such instalments, and at such times as they may determine. Further, I hereby specially provide and declare that the whole provisions hereunder in favour of the said James Watson are purely and strictly alimentary, and the same shall not be attachable by the debts or deeds of the said James Watson, nor attachable by the diligence of his creditors. And any shares or share which may be retained by my trustees in terms of powers above conferred shall be subject to the same declaration in every respect.”

It was stated in the case:—“When the second party attained majority in March 1911 the first parties proceeded, in terms of the direction in the settlement, to make an interim division of the residue of the estate. The second party's share in this division amounted to £1557, which the first parties still retain, and the income from which they have regularly paid over to him. The second party has now called upon the first parties to make over to him his share absolutely. The first parties have passed no resolution to retain the share of the second party, or of any of the other beneficiaries in terms of the discretionary powers conferred upon them by the eleventh clause of the settlement, nor do they see any occasion to do so, and, if they have

the power, they are prepared to hand over the second party's share July 17, 1913. to him."

The first parties stated that they had been advised "that, by the terms of his settlement, the truster intended to treat the second party differently from his other children and not as in their case to confer on him a fee, subject to the exercise of the first parties' power to retain for his alimentary use, but to restrict his right to a liferent alimentary, and that the settlement implies a direction to retain his share." Watson's
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The contention of the second party was stated as follows:—"The second party, on the other hand, maintains that on a sound construction of the terms of the trust-disposition and settlement a fee of one-sixth part or share of the residue of the estate was conferred upon him upon his attaining majority, subject only to the condition that the first parties in the exercise of the discretionary powers given to them might retain said share for his alimentary liferent, or pay him such portions of capital as they might determine. As the first parties have not considered it necessary or advisable to exercise this discretionary power, or to impose any conditions as to the manner in which the gift is to be enjoyed, the second party maintains that he is entitled to payment of his said share. In any event, the second party maintains that he is entitled to dispose of the fee of said share by *mortis causa* deed of settlement."

The questions submitted for the opinion and judgment of the Court were:—" (1) Are the first parties entitled to pay over to the second party his share of the residue of his father's estate, if they are of opinion that it is advisable to do so? or (2) Are the first parties bound to retain said share of residue for behoof of the second party in liferent for his alimentary use? (3) In the event of the first question being answered in the negative, has the second party power to dispose of the fee of the said share of residue by *mortis causa* settlement?"

The case was heard before the First Division (consisting of Lord Kinnear, Lord Dundas, and Lord Johnston) on 5th July 1913.

Argued for the second party;—The initial direction to the trustees to divide was equivalent to a gift to the second party of his share of residue. The subsequent declaration that his interest was to be alimentary was ineffectual to limit the right already given. An alimentary fee was a legal impossibility.¹ As regarded the power of retention given to the trustees, and the declaration that shares so retained should be alimentary, it was not necessary to consider whether this declaration would have been effectual had the trustees elected to retain any share of the estate, as the trustees had intimated that they did not intend to exercise their power to do so. But it was clear that the discretionary power to retain, following upon the direct gift of fee, must be disregarded as repugnant to that gift, there being no interest, beyond that of the second party, which the trustees could protect by keeping up the trust.²

¹ Allan's Trustees v. Allan, (1872) 11 Macph. 216; Auld v. Anderson, (1876) 4 R. 211; Wilkie's Trustees v. Wight's Trustees, (1893) 21 R. 199; Young's Trustees v. M'Nab, (1883) 10 R. 1165.

² Miller's Trustees v. Miller, (1890) 18 R. 301; Greenlees' Trustees v. Greenlees, (1894) 22 R. 136; Yuill's Trustees v. Thomson, (1902) 4 F. 815; Macculloch v. M'Culloch's Trustees, (1903) 6 F. (H. L.) 3, per Lord Davey, at p. 6; Tweeddale's Trustees v. Tweeddale, (1905) 8 F. 264; Wilkie's Trustees v. Wight's Trustees, 21 R. 199.

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Counsel for the first parties intimated that these parties did not wish to throw any obstacle in the way of immediate payment if, in the opinion of the Court, this might safely be made. He submitted, however, that it was clearly the intention of the truster to treat the second party differently from his brothers and sisters, and to make the whole of the provisions in his favour alimentary; and that this intention might be, and ought to be, given effect to.

At advising on 17th July 1913,—

LORD DUNDAS.—[In his Lordship's absence his opinion was read by Lord Kinnear]—The principal question in this case depends for its solution upon the proper construction to be put upon the language of the eleventh purpose of the testator's settlement. The clause is unfortunately expressed. But it seems to me that its provisions fall under three separate heads: first, a substantive direction that the residue shall, at a prescribed date, be equally divided among all the children then alive; second, a discretionary power conferred on the trustees to withhold payment of any share so long as they think proper; and third, an express declaration that James's provisions shall be alimentary, and incapable of attachment by his creditors—a condition which is also declared to be applicable to any shares which may be retained by the trustees in virtue of their discretionary power. Now, under the first of these heads, the words of bequest give to the children alive at the prescribed date an absolute vested right of fee in their respective shares; and James undoubtedly has that right unless it has been taken from him by the subsequent provisions of the settlement. No question arises under the second head, for the trustees inform us in the case that they do not see any occasion to exercise their discretionary power to withhold payment of any of the shares, and that "if they have the power, they are prepared to hand over the second party's share to him." The whole question, then, comes to turn upon the construction and the legal effect of the third head. The testator's complete intention with regard to James's share is not made very clear by the words he has used. But it is at least quite plain that he did intend that share to stand in a different position from the shares of the other children. He declared it to be purely and strictly alimentary, and evidently intended to protect it in some way against the diligence of James's creditors. The question remains, whether he has effectually done so. I think he has not. It was, of course, quite open to him to have given James a mere alimentary life interest in his share of residue, with or without the power to dispose of the capital by will. Or he could if he so pleased, in addition to the alimentary life interest, and subject thereto, have given James a vested right in the fee, which would then have been at the son's own disposal, *inter vivos* or *mortis causa*, subject always to the alimentary life interest. But the testator has not done any of these things. He has begun by using words which give to James a right of fee like the other children; and he has nowhere declared that that right shall be limited to a mere life interest, or to anything less than a right of fee; nor has he made any destination of the fee itself, except in the words of the direction to divide among his children. It is not open to us to speculate as to what he thought he had done, or what he would have

wished to have done, in order to limit James's rights and to exclude his creditors. We cannot construct machinery for carrying into effect wishes or intentions which are, at best, only matter of conjecture. We can but look at what the truster has done; and that is to direct the division of the residue among his children; to confer upon the trustees a discretionary power (which they see no occasion to exercise) of withholding or delaying payment; and to declare that the whole provisions in James's favour are to be alimentary, and incapable of attachment by his creditors. But such a declaration as this last does not, in my judgment, reduce the right of the second party to anything less than one of fee; and a right of fee cannot be limited, as a right of annuity or of liferent can, by a declaration, however emphatic, that it is to be alimentary. Such a declaration is a mere attempt to restrain the fiar in the use of his own property, and is, by our law, ineffectual to do so.

If the construction of this settlement which I have indicated is the correct one, it becomes easy to answer the questions put to us, and I do not know that one need go for direct assistance to any of the decided cases; but I should like to add a few words in regard to one or two of these. The second party's counsel founded strongly upon the series of decisions in this Court of which the *Manderston* case,¹ and the Whole Court case of *Yuill's Trustees v. Thomson*² are prominent examples, and argued that if, as he contended, the fee of the capital of James's share was vested in him and no ulterior interests or purposes were involved, any attempt to hamper or restrict his right as fiar must be disregarded. In *M'Culloch's Trustees*³ Lord Davey expressed his opinion that the cases of *Miller's Trustees*¹ and *Yuill's Trustees*² were decided upon a sound principle, and "that principle is this, that where a man gives an estate in fee, he cannot fetter or restrict the fiar's enjoyment of it by any provision which is repugnant to the idea of an estate in fee." In neither of these cases, however, was there any room for the suggestion here made, that the effect of the trust-deed was to create and protect an alimentary liferent in the person of the beneficiary. The present case is much more like that of *Wilkie's Trustees*.⁴ A right of fee was there given by the testator's settlement to his daughters; but there was an attempt by a subsequent codicil to limit them in the use of it. The codicil directed the trustees to hold the residue in their own hands for the benefit and alimentary use of the daughters equally, and to apply the same for their behoof respectively in such manner as the trustees might consider proper, and to pay them the capital and interest, or only the interest, at such times and in such sums as the trustees might deem proper and expedient, the said provisions being purely alimentary, and not to be arrestable or attachable by the debts and deeds of the daughters or the legal diligence of their creditors. But there was no express declaration that the daughters' right should be limited to a liferent, nor any destination of the fee to some other person. It was held that the share of one of the daughters, who was a party to the case, vested in her in fee, and that she was entitled to immediate payment of it. Lord Rutherford Clark said: "I hold her to be a

¹ *Miller's Trustees v. Miller*, 18 R. 301.

² 6 F. (H. L.) 3.

³ 4 F. 815.

⁴ 21 R. 199.

July 17, 1913. *fiar*, and I do not think that the rights of a *fiar* can be restricted by the limitations contained in this deed. These limitations do not reduce the right of the legatees to anything less than a fee. They are mere attempts to restrain the rights of the *fiar* in the use of her own property. It cannot, Lord Dundas. I think, be doubted that creditors would not be excluded, and though a *lifereint* may be declared alimentary, such a declaration has no effect on a right of fee. Following the case of *Miller*,¹ I think that there is a repugnancy between these limitations and the right of fee, and that the rights of the *fiar* must prevail." These words seem to me to be applicable to the present case, if the construction I have put upon the testator's settlement is sound.

For the reasons thus summarised I think we should answer the first question in the affirmative and the second in the negative. The third question is, in my view, superseded, for its postulate is that the first question be answered in the negative.

LORD KINNEAR.—I agree in the opinion which I have just read, and I only add a few words for the purpose of expressing my own reasons. I think it clear, upon the construction of the eleventh clause of the settlement, that the testator gives, as Lord Dundas has pointed out, a right of fee to all his children on the arrival of the date which he has fixed for distribution, for he appoints his trustees to realise and convert into money his whole assets, and thereafter, subject to a discretionary power, to divide the whole proceeds, share and share alike, among the whole children. There is no destination in favour of any other person. There is a direct and absolute right of fee given by these words to the testator's whole children, each to his own share; and so far as I can find, on any reasonable construction of the subsequent part of the clause, there is absolutely nothing to limit the right of fee so given or to give any of the children less than a right of fee.

I assent to the doctrine which Lord Dundas's opinion also assumes, that a testator, having given a right of fee to certain beneficiaries, may nevertheless go on to divest them of that right, if he does so in clear and sufficiently effectual terms. An extremely good illustration is the well-known case of *Smith v. Chambers' Trustees*,² where the testator undoubtedly began by giving a fee to his children but went on to authorise his trustees to make certain restrictions upon the deeds which they were to execute for the purpose of giving effect to that right, so as in effect to reduce the children's interest to a *lifereint*. The principle is very clearly explained by Lord President Inglis, and although the judgment of this Court was reversed in the House of Lords, there is nothing said by any of the noble Lords that at all affects the soundness of the Lord President's exposition—indeed I think the passage to which I mainly refer is cited in the House of Lords as the best exposition of the doctrine. And what he says is this:—Having explained that the effect of the clause then under discussion was to give an absolute vested right at the testator's death, he says, in reference to the clauses which followed: "It would be strange if the effect of that modifica-

¹ 18 R. 301.

² (1878) 5 R. (H. L.) 151.

tion were that in certain events the shares should not vest at death. That July 17, 1913. would simply undo what has immediately preceded. . . . But it is quite possible that a provision may vest and yet in certain events be subject to defeasance." And then he goes on to say that, if the clauses that follow the vesting clause are resolute and not suspensive, vesting takes place as fully as if there had been no condition, subject always to the provisions operating the divestiture. And, accordingly, the ground of judgment was that the trustees were entitled to divest the children to a certain extent by giving them an alimentary liferent instead of the fee. But a condition of that being done is that the trustees should be entitled to do something which would take away the fee previously, according to the form of the language of the deed, vested in the beneficiaries. And there is nothing in this clause which enables the trustees to do anything of that kind. There is no power in them to reduce the interest of any of the children to a liferent and to give the fee to anybody else; but whatever they do in the exercise of their power must be consistent with the gift of the fee and in no way modified by what follows.

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But there is, undoubtedly, discretion given to the trustees to retain the shares falling to any of the children instead of paying them over, and to pay over only the annual income derived from the shares or "from time to time pay the capital of such share or shares by such instalments and at such times as they may determine." That now raises the question, which Lord Dundas has considered, whether a discretionary power of that description is or is not repugnant to the right of fee and so objectionable under the principle established in *Miller's Trustees*.¹ I do not repeat what Lord Dundas has said upon that point, but I do not think it necessary that that question should be decided in this case, for the following reason:—All that the testator does is to give to his trustees a discretion either to pay over the whole of the income or a part of the share to each of his children, and that discretion applies to the share of the only child with whom we are concerned, James, exactly in the same way as to any of the others. Now the trustees have exercised that discretion. They tell us that they have considered the question and that they are prepared, so far as their judgment goes, to pay over James's share to him. He has, under his father's will, the gift of a certain share subject to a discretionary power in the trustees to withhold it if they think fit. But that power must be determined sometime, and it is, to my mind, completely determined when the trustees say "We have considered the matter and do not think it necessary to withhold any part of his share and are ready to pay it over."

Well, then, that leaves only one question, which is that which the trustees themselves say they have brought this case for the purpose of raising. It is argued that the position of James's share is totally different from that of the other children, and that, although they might be entitled to pay over the shares to the others, a question has been raised as to whether they are entitled to pay over James's share, because his interest is restricted to an alimentary right. Upon that I think the distinction between James's share and the other shares is not very material, but it is quite clearly expressed.

¹ 18 R. 301.

July 17, 1913. After explaining the discretion which he gives to his trustees as to all the children, he goes on to say: "I hereby specially provide and declare that the whole provisions hereunder in favour of the said James Watson are purely and strictly alimentary, and the same shall not be attachable by the debts or deeds of the said James Watson, nor attachable by the diligence of his creditors. And any shares or share which may be retained by my trustees in terms of powers above conferred shall be subject to the same declaration in every respect." Now the only distinction which that seems to me to make between James's share and that of the other children is plain enough. He says if the trustees resolve to retain any part of the shares of the other children, the part so retained shall be strictly alimentary; but the provisions in favour of James shall be strictly alimentary and not attachable by the debts or deeds of his creditors, that is to say, whether you retain a part of James's share or not, it is to remain subject to a restriction that it is for his alimentary use and subject to the exclusion of his creditors. I think that the question which arises there is whether that plainly expressed purpose is good or bad in law.

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I cannot quite agree with one observation of Lord Dundas in which he seems to put it as if it was for the Court to make machinery for the working out of a provision which was not clearly expressed. I do not see that there is need to provide any machinery at all. I think the testator meant to give his son the fee and, notwithstanding he had given his son the fee, to declare that it should be alimentary only, and that his creditors should not have power to reach it. I think that is totally ineffectual in law. The law is quite clearly settled that, although you may make a liferent or an annuity alimentary, you cannot make a fee alimentary so as to exclude creditors. It is open to the donor to provide that his donee shall only have the proceeds of the estate settled upon him so that these proceeds shall be secured for his alimentary use, and therefore to put the estate into the hands of trustees with such directions that they should be entitled only to apply the annual proceeds directly to his aliment and to meet the claims of such creditors only as are alimentary creditors. But, subject to that qualification, the law is that no man can have a right of fee in money or property and at the same time exempt his property from the diligence of his creditors. You cannot give a fee to a man and say to his creditors "Do not attach it." That is what I think the testator here intended to do, and he has done it ineffectually. That is a condition of the gift which the Court cannot sustain.

I agree that the questions should be answered in the way proposed by Lord Dundas.

LORD JOHNSTON.—The question in this case concerns the provision out of residue, so far as made for the testator's youngest son, James Watson, whether it is absolute or effectively restricted. Mr Watson was married three times and left six children, two by each marriage. James Watson his youngest child was born in 1890, was seven years old when his father executed his settlement, and fourteen when his father died. He attained majority in 1911. He was singled out by his father—evidently it could only be by reason of his comparative youth—for somewhat special treatment under his settlement. Mr Watson carried on business as a pawnbroker in

two different localities in Dundee. He gave two of his elder children the July 17, 1913. option of each taking over at valuation one of these businesses. Then, ^{Watson's} fifth, he directed his trustees to convey absolutely to his son William ^{Trustees v.} Watson junior, "as a special bequest" to him, a shop, store, and two ^{Watson.} dwelling-houses in the Hilltown of Dundee. He, sixth, directed his trus-Ld. Johnston. tees as soon as convenient to convert into money the whole of his other heritable estate and invest the free proceeds in good heritable securities. The seventh, eighth, and ninth purposes contain provisions for maintaining his children during minority and for his widow, the latter of a liferent nature. The tenth purpose contains a provision "as a special bequest to him" for James Watson, the youngest son, out of the rents of a particular heritable property. The ultimate destination of this subject was for sale after James's death and division among his issue, whom failing among the testator's whole children and the issue of predeceasing.

The eleventh purpose is the residue clause, the structure of which is involved and awkward. By it the testator directed his trustees, on the youngest child of his last marriage attaining majority, to convert, so far as not already done, his whole estates into money "and thereafter (subject always to the discretionary power vested in my trustees hereinafter mentioned) divide the whole free proceeds thereof equally, share and share alike," among his whole children, with a destination over "in the event of any of my children predeceasing leaving lawful issue" to such issue of their parents' share. So far the provision presents no difficulty. The difficulty is created by the discretionary power above referred to. The clause in a confused way deals specially with the case of James Watson, the youngest child, and generally with the case of the rest of the children, more or less by reference only to what was provided in the case of James. But it creates further confusion by the impression it gives—at present I do not say more—that as regards James its directions were intended to be imperative, as regards the rest of the children discretionary. To quote the clause *verbatim* would be to waste time. It is necessary to marshall its details in such a way as to present the testator's ideas in less involved, and I hope more intelligible, sequence.

I exclude in the first place any direct reference to James, the youngest son. What then the testator does is to confer upon his trustees the most absolute discretionary powers to retain the share or shares of any of his children instead of paying the same over to them. I pause to notice that up to this point there is only expressed a direction to convert and divide, and the direction to divide is immediately, and not remotely or by reference, subjected to the discretionary powers vested in the trustees thereafter mentioned. Nothing is said about payment. The testator then adds "and my said trustees may, in their discretion, only pay over the annual income derived from the share so retained, or may, from time to time, pay the capital of such share or shares by such instalments, and at such times as they may determine." Accordingly the direction to the trustees is in effect to convert and divide, and to pay or retain in their discretion. Had the provision ended there, I think that there can be no doubt that the case would fall under the rule of *Miller's Trustees*,¹ and that there would have been no

¹ 18 R. 301.

July 17, 1913. good answer to the demand of any child for immediate payment of his or her share. But there must be held to be annexed, though only by reference, to this direction a declaration to the following effect, "and I hereby specially provide and declare that the shares or share provided to any of my children, Watson's Trustees v. Watson.
Ld. Johnston. or such part thereof as may be retained by my trustees in terms of the powers above conferred, are purely and strictly alimentary, and the same shall not be attachable by the debts or deeds of such children nor attachable by the diligence of their or his creditors."

It is necessary here, and before proceeding to the special case of James Watson, to determine the effect of these provisions in the event of the trustees resolving, which, as it happens, they declare in the special case that they see no reason to do, to retain the share of any of the other children. Two things are clear: first, that it is in law impossible to attach an alimentary condition to a capital provision, and second, that without the interposition of a trust, even a life interest cannot be made alimentary. Now we have here the interposition of a trust. We have also a discretionary power to the trustees to reduce the immediate beneficial interest to a liferent, although there is none the less a vested fee coupled with a declaration that the provision so far as retained shall be alimentary. That the alimentary condition cannot attach to the fee or capital sum is clear. But the question remains, can a liferent of a capital sum be rendered alimentary, a trust being interposed, where the fee is in the liferenter and not carried past him to his issue or other institutes. I see no good reason why a clearly expressed intention, the machinery being provided, should not be given effect to so far as is possible, merely because the intention was to carry the protection to a further point than is possible at law. I think that it is recognised that a gift of capital to be retained in trust in liferent alimentary, with a power of disposal of the fee, is good to protect the liferent¹ though the power of disposal of the fee may be made available for behoof of creditors. And I do not find that the situation which would be created here, were the trustees to exercise their discretion, is in any different situation. Hence I conclude that so long as the trustees retain the share of any child, that share as regards the income is protected, and that, as in *Chambers' case*,² no interposition of creditors can prevent them freely exercising their discretion. That in the last-mentioned case the trustees had also a power not merely to reduce the beneficiary to a liferent, but to give the fee over to his issue, does not, in my opinion, affect the question. In fact if Dr Chambers' trustees had chosen they might have retained for an alimentary liferent, without affecting the fee by any further exercise of their discretionary powers.

But we are concerned specially with James Watson's share of residue. It is with regard to this share, but in words which cover the whole provisions in his favour under the settlement, that the declaration which is imported by reference into the general clause distributing residue occurs. "Further I hereby specially provide and declare that the whole provisions hereunder

¹ Adam and Forsyth v. Forsyth's Trustees, (1867) 6 Macph. 31; Elliot v. Bowhill, (1873) 11 Macph. 735.

² 5 R. (H. L.) 151.

in favour of the said James Watson are purely and strictly alimentary." July 17, 1913. The word "are" I read as equivalent to "shall be," and as indicating the fixed intention of the testator that, in all events, the provision in favour of James Watson should be alimentary. His intention is clearly effectual as regards the special bequest of the Hilltown property, which is a proper life interest with a fee to others, the property being retained in trust. Is it ineffectual as regards residue? I think not. For the intention is clearly manifested, and the means are in the trustees' hands to render it effectual. What is discretionary in the case of the remaining children becomes, I think, by necessary implication, imperative in the case of the share of James.

Your Lordships take a different view, and consider that the judgment I would propose here runs counter to the case of *Wilkie's Trustees*.¹ It is not therefore without grave hesitation that I adhere to the opinion which I had independently formed. But I do not think that the circumstances of *Wilkie's* case,¹ however weighty the authority, are so far the same as those of the present as to compel to the same conclusion. I am particularly impressed by the close collocation between the direction to divide and its rider, the discretionary power to retain. I think the wish of the testator manifest, and that "the right of the beneficiary must be subordinated to the will of the testator"² so far as the law can give effect to that will.

Accordingly I am for answering the first query in the negative, the second in the affirmative, and the third in the affirmative with the rider "so as not to disappoint his creditors."

LORD MACKENZIE, who did not hear the case, delivered no opinion.

THE COURT answered the first question of law in the affirmative and the second in the negative.

MACPHERSON & MACKAY, S.S.C.—WALLACE & BEGG, W.S.—Agents.

JOHN KENNEDY, Pursuer (Respondent).—*Moncrieff, K.C.*—*J. A. Christie.*

No. 160.

THE SHOTTS IRON COMPANY, LIMITED, Defenders (Reclaimers).—*Horne, K.C.*—*D. P. Fleming.*

July 17, 1913.

JAMES STEEL AND OTHERS (Robert Inglis's Trustees), Defenders (Respondents).—*McClure, K.C.*—*J. R. Christie.*

Kennedy v. Shotts Iron Co., Limited.

Reparation—Negligence—Property—Common stair—Duty to repair—Possession and control—Individual houses of tenement sublet by lessee of whole tenement—Question of liability between lessee and proprietor.

A tenement of eight houses was let by the proprietor to a company, and the individual houses were sublet by the company to their employees. A pupil child visiting one of the houses, which was approached by an outside stair common to that and to another house, fell from the stair in consequence of a concealed defect in the railing, and was injured.

Circumstances in which, in an action of damages at the instance of the child's father against the proprietor and the company, the latter were held to be alone liable, on the ground that they had possession

¹ 21 R. 199.

² 18 R., at p. 305.

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and control of the stair and railing, and that, in consequence of their contract with their tenant, the child was to be regarded as being on the stair on their invitation.

Expenses—Several defenders—Liability of unsuccessful defender for expenses of successful defender.

A tenement of houses was let by its proprietor to a company, and the individual houses of the tenement were sublet by the company to various subtenants. In an action originally brought against the company for damages in respect of an accident alleged to have been caused by a defect in the railings of an outside common stair, the pursuer afterwards called the proprietor as an additional defender, in consequence of a statement in the company's defences that the proprietor was the person responsible for the condition of the outside portions of the premises. The Court having found the company liable in damages and having assoilzied the proprietor,

Held that the company were liable in expenses both to the pursuer and to the proprietor.

1st DIVISION. ON 28th September 1910 John Kennedy, a miner residing at Shotts, as tutor and administrator-in-law of his pupil daughter, Jane Kennedy, brought an action against the Shotts Iron Company, Limited, for £250 as damages for personal injuries sustained by her.

The Shotts Iron Company were the lessees from the trustees of the late Robert Inglis of a tenement consisting of eight houses, and had sublet these houses to different subtenants. The pursuer averred that on the 9th of August 1910 his daughter, in the company of her mother, paid a visit to one of these houses, which was let to a Mrs O'Hara, and fell from the outside stair which led to that house and the house adjoining it, the accident being caused by one of the railings of the stair giving way owing to a concealed defect.

The Shotts Iron Company in their defences averred, *inter alia*, that the duty of inspecting and repairing the outside portions of the subjects lay, under the terms of their lease, upon the proprietors, and in consequence of this averment the pursuer called as additional defenders the trustees of the late Robert Inglis, and an amended record was thereafter made up.

The pursuer pleaded, *inter alia*;—(2) The pursuer's said child having been injured through the fault of the defenders the Shotts Iron Company, the said defenders are liable to make reparation to the pursuer. (3) The pursuer's said child having been injured through the fault of the defenders Inglis's trustees, the said defenders are liable to make reparation to the pursuer.

The Shotts Iron Company pleaded, *inter alia*;—(3) The pursuer's daughter not having suffered any loss or damage through the fault of the defenders, the latter are entitled to absolvitor, with expenses.

The trustees of the late Robert Inglis pleaded, *inter alia*;—(3) The pursuer's said child not having been injured by the fault or negligence of these defenders, or of anyone for whom they are responsible, the said defenders should be assoilzied, with expenses. (4) These defenders being divested by a lawful contract of lease of the possession and control of the said tenements, had not, in the circumstances set forth, any duty in regard to the condition thereof to the pursuer, and they should be assoilzied.

A proof was taken before the Lord Ordinary (Ormidale), and the facts established at the proof are set forth in his opinion, *infra*.

Thereafter, on 1st July 1912, he pronounced the following inter-locutor:—"The Lord Ordinary, having considered the cause, finds the defenders the Shotts Iron Company, Limited, liable in damages to the pursuer: Assesses the same at £60, for which sum decerns against the said defenders: Assolizies the defenders Inglis's trustees from the conclusions of the summons, and decerns: Finds the defenders the Shotts Iron Company liable in expenses to the pursuer and to the defenders Inglis's trustees: Allows accounts of said expenses to be lodged, and remits the same to the Auditor to tax, and to report." * July 17, 1918.
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* "OPINION.—There is no controversy as to how the little girl, Jane Kennedy, met with the accident and sustained the injuries for which the pursuer now seeks compensation.

"On the 9th August 1910 she went with her mother, about 8 o'clock in the evening, to visit a Mrs O'Hara at a house 23 High Tarboothie, Shotts. The house is approached by and up a stair of about fourteen steps, which affords an access common to Mrs O'Hara's house and a house adjoining it, occupied at the time of the accident by the witness Mrs Lennie. Both of the houses open on to a landing at the top of the stair. The stair and the stairhead or landing are protected by an iron baluster railing having a wooden handrail on the top. The two houses form part of a block or tenement of eight double houses known as Inglis's Land. After remaining with her mother in Mrs O'Hara's house for a short time the child, who was about four years old, went out on to the stairhead landing. She appears then to have leaned against one of the rails, and the rail giving way the child fell over on to the ground below, a distance of about nine feet, carrying the rail along with her. I have no doubt that the weight of the child, young though she was, was sufficient without the application to the rail of any shaking or other violence, to dislodge the rail, for it is proved that the stone at its base, into which it had originally been thrust and battened down with lead, was broken away, and that the rail had nothing to hold it in its place. It merely rested on the surface of what stone there was left.

"There is a conflict as to whether the rail which slipped over was the fifth rail from the top of the stair as averred on record, or the fourth. This seems to me immaterial; but I see no reason to doubt the evidence of the pursuer's witnesses that it was the fifth rail. There is no evidence, in my opinion, relevant to infer contributory negligence.

"The defenders Inglis's trustees are the proprietors, and the defenders the Shotts Iron Company are the tenants under them of the whole block or tenement. Mrs O'Hara, again, is a tenant of the Shotts Company. Are both the defenders, or one or other of them, responsible for the accident?

"It is maintained by both defenders that they are not liable in any way to the pursuer on the ground that there was no contractual relation between them and the girl Kennedy; that whatever might be their liability as in a question with the tenant of the subjects, Mrs O'Hara, they are under no liability to keep the premises safe and secure for members of the public who may happen to be Mrs O'Hara's guests or visitors, and the following cases were cited in support of that contention:—*Cameron v. Young*, [1908] A. C. 176; *Cavalier v. Pope*, [1906] A. C. 428; *Laing v. Fox*, [1897] 1 Q. B. 415; *Robins v. Jones*, (1863) 15 C. B. (N. S.) 221. In all these cases the accident occurred inside the premises which had been let. On the evidence in this case I am not prepared to hold that they have any application. Little, it is true, was said in the course of the lengthy proof about the exact nature and extent of Mrs O'Hara's occupation or tenancy, but it is not proved that the stair and the stairhead formed part of the subjects let to her as her house was. They could not well be, for it was a common stair. Accordingly it seems to me that any one lawfully using the stair was entitled to assume that reasonable care would be taken

July 17, 1913. The Shotts Iron Company reclaimed against this interlocutor, and the case was heard before the First Division (without the Lord President) on 1st and 2nd July 1913.

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Argued for the defenders the Shotts Iron Company;—Liability depended on the ordinary rules of law fixing the duties of landlord and tenant to subtenants and to the public respectively, and under these rules neither defenders were liable, and at any rate the Shotts Company were not. This was not a case of a hidden danger or "trap," as the defect in the railing was obvious, or at any rate was known to the mother of the injured child. The injured child was not on the premises on the invitation of either of the defenders; she was a mere licensee,¹ and there was no contractual relation² between her and the party who had possession and control of the stair, whichever of the defenders this might be. But assuming that in spite of the absence of any contract between either of the defenders and the

to safeguard them from danger by the person who truly had the possession and control of the stair and the stairhead.

"It was further maintained, however, that the girl Kennedy was a mere licensee permitted by those who were the owners or were otherwise responsible for the stair to be on it, but that unless she were on it upon the business or for the benefit of those responsible, they owed her no positive duty, and could not therefore be guilty of actionable negligence—that she was bound at her own risk to take the stair just as she found it, or, to use the words of Keating, J., in *Smith's* case, that in using the stair she took it 'with all its imperfections'—(*Gautret v. Egerton*, (1867) L. R., 2 C. P. 371; *Smith v. London, &c., Docks Company*, L. R., 3 C. P. 326). Clearly the girl Kennedy was not on the premises on any matter of business. But I do not read the cases cited as laying down the rule contended for. The decision in *Gautret* was on relevancy, and the averments were held to be irrelevant for want of specification. In *Smith's* case the view that the defendants were under no duty to the plaintiff because he had no business with the defendants was in effect negatived. It was held that the gangway there was an invitation to all persons having business on board the ship, not necessarily business in which the defendant was directly interested, to go upon it. I think that here the stair was an invitation to all persons having a legitimate interest to enter Mrs O'Hara's house to do so by means of the stair which was the only access provided. As said by Byles, J., in the course of the argument in *Smith's* case, at page 331, the bell of a door says, 'Come and ring me.' If so, then the person responsible for the proper upkeep of the stair owes a duty to the person who uses it, viz., to take reasonable precautions to safeguard the user from the risk of danger and injury. The present case seems to me to be within the principle of the judgment in *Miller v. Hancock*, [1893] 2 Q. B. 177. When the house was let to Mrs O'Hara, the stair not being let to her, there was an implied undertaking to maintain the stair so far as might be necessary for the reasonable enjoyment of the subjects let. In *Miller's* case no doubt the persons, who are referred to as 'using' the stair on the understanding that they might lawfully do so, were persons who had business with the tenant, and the person who was injured was a person who had been visiting the tenant on business, but there the subjects let were business premises. When the subjects let are a dwelling-house, it seems to me that the lessor or the person who retains the stair under his control must be assumed to sanction the use of the stair not only by the tenant, but by those who may happen to visit her. The premises let

¹ *Latham v. R. Johnson & Nephew, Limited*, [1913] 1 K. B. 398; *Devlin v. Jeffray's Trustees*, (1902) 5 F. 130.

² *Burchell v. Hickisson*, (1880) 50 L. J. (N. S.) C. P. 101.

injured girl, one or other of the defenders might be made liable, it July 17, 1918. was Inglis's trustees, the proprietors, and not the Shotts Company who must be held to have owed a duty to the public in respect of this common stair,¹ whatever might be the duty of the Shotts Company to their subtenants. It was the houses alone which had been let to the Shotts Company, leaving the stair, which was the access to them, in the possession and control of Inglis's trustees. But, even assuming the stair to be included in the subjects let to the Shotts Company, then it had been sublet by them to their subtenants, and the Shotts Company had no liability to third parties who were there on the invitation of the subtenants, for they were parties with whom the Shotts Company had no contractual relation.²

Argued for the pursuer;—The defect in the railing in question was not an obvious one, nor had it been proved that it was *de facto* known to the child's mother. The question whether the child was there as

could not be reasonably enjoyed by her otherwise, and it seems to me that such visitors are, just like the persons coming on business as in *Miller's* case, entitled to be protected from danger in using the stair provided as the access and the only access to the house of their friend. They are not only permitted, but they are invited to use the stair. Moreover, even in the case of a mere licensee, as I read the authorities, the owner or occupier of the ground over which the licensee is allowed to pass is not protected from liability if he places anything of the nature of a trap in the way of the licensee. Now the railing here was to the ordinary passer-by truly of the nature of a trap, for the defective rail when in position had to such a person all the appearance of being sufficient for its purpose, and he was therefore entitled to rely on its apparent sufficiency. It was not as if the danger or risk had been a perfectly obvious one in the sense that it was discoverable at a glance however casual. It might have been a totally different case if the railing round the stairhead had disclosed a gap due to a rail having fallen out and not having been replaced, and the child had fallen through that gap. In that case she—if a mere licensee—might have been bound to take the stair as she found it with all its visible imperfections.

"It is, in my opinion, proved that the defect in the railing was one which a person charged with the duty of keeping the premises in repair could easily have detected if only there had been reasonable inspection. On such inspection it would have been at once seen that the rail had no hold in the stone on which it rested. The stone had weathered and got broken away to the extent of nearly two inches. A shake of the handrail would have dislodged the rail. It had no grip in the wooden coping. That there was a good deal that required attention and repair at this part of the railing is evident from the fact that not only the rail which was carried away by the girl Kennedy, but the two rails next to it, were after the accident replaced by longer rails.

"There is a conflict as to whether the attention of Forrest, a foreman joiner in the employment of the Shotts Company, to whom the tenants were in the habit of making complaints and requests, was drawn to the state of the railing on the occasion of a not dissimilar accident which happened in 1907. I am reluctant to discredit Forrest, who denies that any notice was then given to him. I cannot help thinking that he would have had the railing repaired if there had been, but however that may be I am satisfied that, if he was charged with the duty of inspection in connection with the stair in question, he should have discovered the defect for himself.

"The question whether both the defenders, or, if only one, which of them,

¹ *M'Martin v. Hannay*, (1872) 10 Macph. 411; *Bailey v. Shearer's Judicial Factor*, (1894) 21 R. 498.

² *Cameron v. Young*, 1908 S. C. (H. L.) 7.

July 17, 1913. a licensee or on invitation¹ did not arise in this case, for the lessor of premises had the duty to protect not only his tenants, but also those who visited them in the ordinary course and on the business for which the premises were let.² In a question between the two sets of defenders the true test of liability was that of possession and control.³ These were primarily with Inglis's trustees, and if they had not divested themselves thereof and transferred them to the Shotts Company, they would be liable in the present case; but the evidence clearly showed that possession and control had passed to the Shotts Company. The whole tenement, including the stair, had been let to them, and what they sublet were the individual houses, retaining the stair. There was therefore no room for the application of the doctrine of *Cameron v. Young*.⁴

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Argued for the defenders Inglis's trustees;—There was no liability *ex dominio*.⁵ The sole test of liability was possession and control,⁶

is liable to compensate the child, is a narrow and difficult one. The pursuer maintains that both are liable, Inglis's trustees because they are the owners of the property, and the Shotts Company because they were charged with the duty of seeing that the premises were kept in repair. In any view, they maintain that the control of the property was confused and subdivided, and, no express or definite agreement having been come to, or in practice followed, with regard to outside repairs, that therefore both must be subjected in liability.

"In my opinion the Shotts Company are alone liable. No doubt with regard to premises like those in question the owner may be primarily liable in a question with a member of the public for their being kept in a properly safe condition, but there is nothing to prevent his so demitting the possession and control of his property as to transfer this liability to someone else. In the present case Mr Inglis, who died in January 1910, his trustees thereafter coming in his place, was in effect the proprietor. (As a matter of fact he had a nine hundred years' lease of the subjects, running from 1857, from the Shotts Company.) Prior to 1892 he appears himself to have let his different houses to various tenants, there being an arrangement between him and the Shotts Company that the latter should collect the rents for him, and that, on the other hand, a preference should be given to the work-people of the Shotts Company as tenants. The Shotts Company, as Mr Turnbull their manager puts it, were to have a first claim on the houses. How long that arrangement had existed is uncertain, but it was in force when Mr Turnbull first came on the scene in 1887, a previous arrangement embodied in the letter No. 74 of process having gone out of existence prior to that

¹ Latham v. R. Johnson & Nephew, Limited, [1913] 1 K. B. 398, per Farwell, J., at p. 404.

² Beven on Negligence, (3rd ed.) vol. i. p. 448; Smith v. London and St Katharine Docks Co., (1868) L. R., 3 C. P. 326; White v. France, (1877) 2 C. P. D. 308; Brady v. Parker, (1887) 14 R. 783.

³ Smith v. London and St Katharine Docks Co., (1868) L. R., 3 C. P. 326; Fulton v. Anderson, (1884) 22 S. L. R. 100; Sawyer v. M'Gillicuddy, (1889) 10 Am. St. Rep. 260; Miller v. Hancock, [1893] 2 Q. B. 177; Hargroves, Aronson, & Co. v. Hartopp and Another, [1905] 1 K. B. 472; Laurie v. Magistrates of Aberdeen, 1911 S. C. 1226; Laing v. Paull & Williamsons, 1912 S. C. 196.

⁴ 1908 S. C. (H. L.) 7.

⁵ Moffat & Co. v. Park, (1877) 5 R. 13.

⁶ Laurie v. Magistrates of Aberdeen, 1911 S. C. 1226; Mathieson's Tutor v. Aikman's Tutor, 1910 S. C. 11; Laing v. Paull & Williamsons, 1912 S. C. 196. Reference was also made to Mechan v. Watson, 1907 S. C. 25.

and there was no doubt that, as matter of fact, possession and control had passed from these defenders to the Shotts Company. These defenders had let the whole subjects, including both the stairs and houses, to the Shotts Company. The Shotts Company had accordingly *de facto* possession and control, and this was the consideration which determined liability in a question with a third party.

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At advising on 17th July 1913,—

LORD MACKENZIE.—The ground upon which one or other of the defenders in this case is sought to be made liable for an accident to the pursuer's daughter, a girl of four years of age, is failure in duty to keep in a safe condition an outside stair leading to two dwelling-houses. In consequence of the defective state of the iron baluster railing the child fell through and was injured.

date. In 1892 Mr Turnbull concluded a new arrangement with Mr Inglis, by which the Shotts Company leased the houses from him themselves for seven years. The lease, as already noted, covered the whole of the houses in the block or tenement, and, necessarily, it seems to me embraced all the outside stairs which formed accesses to the houses. This lease was renewed from time to time, the last renewal being for seven years from May 1908. The terms and conditions are set out in letters passing between the parties, dated 17th and 19th February 1892. The important term in the present connection, that, namely, relating to repairs, is thus dealt with. In Mr Inglis's letter, dated 17th February, he says—'provided . . . all repairs inside the houses and offices be made by you . . . all outside repairs on the houses being of course done by myself.' In his reply on 19th February Mr Turnbull puts it thus,—'During the lease the cost of outside repairs to be borne by you and of inside repairs by us.' I read the two statements of the stipulation as substantially identical. It was quite naturally only the apportionment of the expenses connected with the houses which was in the minds of parties. I do not think that either party had in view the question of whose was to be the duty of actually executing the repairs. The question of who undertook this duty, with its resultant liability for negligence in the performance of it, must be determined, in my judgment, by what in fact and in practice was done after the lease was entered into. I have come to the conclusion that the Shotts Company undertook the duty of seeing to the necessary repairs being effected on Mr Inglis's property. Without examining the evidence in detail it seems clear enough that the actual working arrangement was that Mr Inglis, who was not on the spot, was to leave the matter in the hands of the Shotts Company, he, however, recouping the Shotts Company for any expense incurred by them in effecting repairs on the outside of the houses. In relation to their own tenants the Shotts Company were in the position of owners, retaining the full possession and control of those portions, like the stairs and stairheads, which were not actually let to their tenants. It was to the Shotts Company, and to them alone, that their tenants looked for any and all repairs, whether inside or outside their houses. They knew of no distinction or difference in this regard, and had no dealings with Mr Inglis. They were employees of the Shotts Company, and the rents of their houses were paid to the Shotts Company by deduction from their wages. Any expenses they were put to in connection with outside repairs the Shotts Company deducted from their rent when remitting it to Mr Inglis. But, before the accident to the girl Kennedy, with only one exception, if it be an exception, the repairs were all effected by the Shotts Company at their own hand without previous consultation with or notification to Mr Inglis or his trustees. On

July 17, 1913. The defenders Inglis's trustees are proprietors of the building (being lessees for 900 years). The Shotts Iron Company are lessees from them of a block of eight houses, which include the two above mentioned. They are workmen's houses adjacent to the works of the Shotts Company. The pursuer was not a tenant of the Shotts Company. His wife, with the girl, was, when the accident happened, visiting a friend called Mrs O'Hara, who was a subtenant from the Shotts Company of one of these houses, the only access to which was by the stair in question.—[His Lordship here discussed the question whether she was aware of the faulty condition of the railing and came to the conclusion that such knowledge had not been proved.]

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The question then is whether there was a duty on either of the defenders, as in a question with the pursuer, to keep the railing of the staircase in a

the one occasion when they did notify Mr Inglis it was in connection not with a repair, but with an addition to the premises—the erection of new ashpits or outhouses. It has to be kept in view that the Shotts Company were the owners of many houses in the same locality in addition to being tenants of Inglis's Land, and for the repairs on these, both inside and outside, they were admittedly responsible in the fullest sense. It was quite natural, therefore, for them in practice to make no distinction between their supervision of their own and Mr Inglis's houses, and I think it was proved that they did not. A Mr Wellwood, who was in the service of the Shotts Company up to 1901, was charged with the duty of looking after the houses. Mr Wellwood lived in the district for some time after 1901, and died in 1908. He had gone to reside in Girvan some time before his death, and although he continued to receive payment from Mr Inglis of £2 a year down to his death, as a fee or gratuity for looking after Mr Inglis's property at Shotts, there is no evidence, except perhaps with regard to some clothes poles, to show that he actually took any hand in inspecting the premises or effecting repairs as Mr Inglis's representative. It was certainly not known to the Shotts Company that he did or was supposed to do so. The inspection after 1901 was all done by Forrest. Forrest was somewhat reluctant to admit that he was charged with a responsible duty in regard to outside repairs on Inglis's Land, but I am satisfied that in fact and practice he made no distinction between Inglis's Land and the subjects owned by his employers. It was to him that the tenants all alike applied when they wanted anything done. Their requests, no doubt, were mainly concerned with inside repairs, but, as I have already said, they knew nothing about any distinction between outside and inside repairs. It is noteworthy that after the accident to the girl Kennedy it was to Forrest that application was made to have the railing repaired, and it was he and another workman employed by the Shotts Company who repaired it. This they did without notification of any kind to Inglis's trustees, merely charging the costs in the usual way when the rent came to be remitted. I think it is somewhat remarkable that when this action against the Company was raised, they being the only persons called as defenders in the first instance, they made no intimation of the claim for damages to Inglis's trustees. I do not think that the Shotts Company disputed that if Forrest's attention had been called to the defective condition of the railing at Mrs O'Hara's house prior to the accident he would have attended to it. Forrest admits that he had, in relation to Inglis's Land houses, the duty of effecting such repairs as he saw for himself were necessary as well as those to which his attention was directed by the tenants, but he says he was not to be held responsible. It seemed to me that Forrest used these words without knowing exactly what he meant by them. But whether that be so or not, I read Forrest's evidence as in effect an admission that he was charged with seeing that necessary repairs

safe condition. There is no liability on the owner of property *ex dominio* July 17, 1913. *solis*. Nor where a dwelling-house is let is there a right of action against the landlord by one who is not a party to the contract for defects within the subjects let—*Cameron v. Young*.¹ Where, however, a staircase is common to two or more tenants of the same landlord, there is a duty upon him to see that it is kept safe, not only in a question with his tenant, but in a question with those lawfully resorting there—*M'Martin v. Hannay*,² *Miller v. Hancock*.³ A distinction may have to be drawn, where the danger is not a concealed one, between those resorting for the purpose of business and those who are merely visitors—*Latham v. Johnson*.⁴ In the present case the necessity for making this distinction does not arise, as the danger was not obvious but concealed. The result therefore is that the pursuer has a good ground of action, the difficulty being to decide upon whom the liability rests.

The Lord Ordinary has held that liability rests with the Shotts Iron Company, and in this view I agree. Though Inglis's trustees are the owners of the property, the test to be applied in fixing liability is to ascertain with whom the possession and control was at the date of the accident—*Laurie v. Magistrates of Aberdeen*,⁵ *Laing v. Paull & Williamsons*.⁶ The peculiarity of the present case arises from the fact that the Shotts Company are themselves tenants from Inglis's trustees, though lessors as in a question with Mrs O'Hara. The position taken up by the Shotts Company is that the outside stair was not let to them, and that even if let there was no duty on them to repair it. This involves consideration of the terms of the arrangement between Inglis's trustees and the Shotts Company and the actings of parties following thereon. Prior to 1892 the arrangement with regard to Inglis's houses, as explained by Mr Turnbull (manager of the Shotts Company since 1887), was that the Company were rent collectors for Inglis and handed him over the rent. All the advantage was that the Company got the preference for their workmen for the houses. A letter dated in 1868 is produced, showing that the Shotts Company was at that time renting these houses, but Mr Turnbull is not able to speak to any arrangement other than the one made in 1892. It is evident that the Shotts Company then desired more complete control over the houses, because, as they say in their letter of 12th February 1892, they sometimes had questions about occupancy with workmen of theirs living in the houses. They accordingly proposed to lease the houses at a rent of £37, 10s. for a seven years' lease, Inglis keeping the

were effected on the outside of the houses of Inglis's Land. He failed to perform this duty, and for his failure the Shotts Company are responsible. They were truly the persons having the control of the outside common stair so far as their tenants were concerned, and I think that Mr Inglis and his trustees were absolved from all liability to members of the public who used the stair to visit a tenant of the Shotts Company. It was on the invitation of the Shotts Company and not of Mr Inglis that such a visitor used the stair.

"In the whole circumstances I think £60 should be sufficient compensation, and for this sum I shall give decree against the Shotts Company."

¹ 1908 S. C. (H. L.) 7.

² [1893] 2 Q. B. 177.

³ 1911 S. C. 1226.

⁴ 10 Macph. 411.

⁵ [1913] 1 K. B. 398.

⁶ 1912 S. C. 196.

July 17, 1913. houses in habitable repair. Inglis replied on 17th February 1892,—“I am inclined to agree to your proposal, provided that during the currency of the lease all repairs inside the houses and offices be made by you, and that the garden fences be kept in a proper state of repair, all outside repairs on the houses being of course done by myself.” Mr Turnbull on 19th February 1892 wrote—“We are favoured by the receipt of your letter of 17th inst, with reference to proposed lease of eight houses at Tarboothie belonging to you, and have pleasure in agreeing to your terms, viz.—1. Duration of lease to be seven years from Whitsunday 1892. 2. Rent to be thirty-seven pounds ten shillings (say £37, 10s.) per annum, payable half-yearly. 3. The houses to be handed over to us in good habitable repair, and to be given up by us at end of lease in like condition, natural decay excepted. 4. During the lease the cost of outside repairs to be borne by you and of inside repairs by us. We will also keep up the garden fences. We understand that this closes the business.” The terms of these letters are quoted, because an argument was founded upon the slight variation in expression. I do not think anything turns on this, and I agree with the Lord Ordinary that the two stipulations are substantially identical. The argument for the Shotts Company upon these letters was that when they sublet to Mrs O'Hara they substituted her in their place, and that the duty of inspection and repair of the staircase, as in a question with the pursuer, remained as it originally was, with Inglis and his trustees. This involves, in my opinion, a misapprehension of the effect of the contract between Inglis and the Shotts Company, and of that between the Shotts Company and Mrs O'Hara. What the Company leased from Inglis was not the houses A, B, C, D, and so on, eight in number, but a block of eight houses. The whole subject was let to them, including the stairs of access. So far there was nothing to make any of the stairs common in a question between Inglis and the Shotts Company. The stairs were only made common stairs when the Shotts Company proceeded to divide the subject, and let to separate tenants houses which had as their access the same stair. They thereby made the stair common, and the necessary legal consequences flow therefrom. By letting the whole Inglis gave the Shotts Company possession and control of the whole, including the staircase in question. When the Shotts Company let to the different tenants, the obligations arising out of that possession and control remained with them. The fact that Inglis had to bear the cost of outside repairs does not prevent this. In the case of *Laing*¹ one of the parties was bound to bear the cost of the repairs, but the other defenders, the Town-Council, were held to have had the control of the street, and therefore to be liable.

The position of matters in regard to these houses was that down to 1901 the letting of them was in the hands of Wellwood, who was in the employment of the Shotts Company. He had charge of them before 1892, and continued to have charge afterwards. When he retired in 1901, another employee of the Shotts Company, Forrest, took his place. Forrest says in his evidence: “Since 1901 I have been the only person who has had supervision of these houses.” He proves that from 1901 down to the date of the

¹ 1912 S. C. 196.

accident in 1910 he never got authority from anyone on behalf of Inglis's July 17, 1913.
trustees before executing the outside repairs, details of which were put to him, and the accounts for which are in process. His statement is that these
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were just done in the ordinary course of his duty, and that the Shotts Iron Company settled with Inglis's trustees for the work that was done. Forsyth, Lord Mac-
kenzie.
the Company's assistant joiner, proves that he took his instructions from Forrester, just as Deans, the plasterer and slater, took his instructions from Wellwood. It has to be borne in mind that Inglis was not resident on the spot, and could not therefore personally supervise his property. Wellwood had gone to reside in Girvan a year or two before his death in 1908. He seems to have continued to receive £2 a-year from Mr Inglis down to his death, but there is an absence of evidence of his having exercised any supervision after he left the Shotts Company. I think the letter dated Shotts, 18/12/07, written by his wife at a time when she and her husband were resident at Girvan, informing Mr Inglis that his property at Tarboothie was in good order, is not an item of evidence of any value. The only intervention on Wellwood's part during the period from 1901 to 1908 was that his wife ordered some clothes poles, the account for which has never been paid, nor was it ever rendered to Inglis's trustees. The tenants of the houses were workpeople engaged with the Shotts Company, and their rents formed a deduction from their wages. It is clear from the proof that it was to the Company, who were their employers as well as landlords, that they looked for both inside and outside repairs. The Shotts Company had the repairs done and charged Mr Inglis in remitting the rent to him. After the accident which has given rise to the present litigation it was to Forrester that complaint was made, and he, with another workman of the Shotts Company, repaired the railing.

The result of all this, in my opinion, is that what was left in Inglis's trustees was the bare ownership of the property. The possession and control were with the Shotts Company. I have considered the evidence given by Mr Turnbull, especially with reference to what he states passed at an interview between him and Mr Inglis, apparently in 1892. Nothing that was then said by Mr Turnbull can take off the effect of the proved facts in the case. Nor can I find that, except in regard to a notification received by the Shotts Company in 1892 from the sanitary inspector, there was any intimation by the Company to Mr Inglis before they did what outside repairs were in their opinion necessary. The amount expended on these may have been inconsiderable, but there is sufficient evidence to instruct what the course of conduct was. The Shotts Company did not act in accordance with the theory put forward by Mr Turnbull in his evidence that it was the duty of Mr Inglis and his trustees to look after the outside repairs of this property. Inglis was under obligation to pay for the outside repairs, in terms of his contract. The Shotts Company, as matters were dealt with, had the duty to inspect and keep safe the railing in question. It follows from this that it was upon the invitation of the Company, and not of Inglis's trustees, that the pursuer's child visited Mrs O'Hara, and was injured while doing so. The cause of the accident was a defect in the railing which would have been discovered if a proper inspection had been made by the Shotts Company. There was a failure on the part of Forrester,

July 17, 1913. the person whose duty it was to inspect, and there was thus negligence on the part of the Company. The Lord Ordinary has refrained from saying that he did not believe Forrest when he said he had never heard of the defect, and it was not necessary for the judgment to do so. It is significant that after the accident no intimation of it was made to Inglis's trustees. They were not originally called as defenders in the action.

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kenzie.

In my opinion the Shotts Company are liable to the pursuer upon the ground that they had possession and control of the stair and railing, and that in consequence of their contract with their tenant the pursuer's child was upon the stair as a visitor upon their invitation. I am therefore of opinion that the judgment of the Lord Ordinary should be affirmed.

Upon the question of the liability of the Shotts Company for the expenses incurred by Inglis's trustees I agree with the finding in the Lord Ordinary's interlocutor. The contest in the case has really been between the two sets of defenders. Inglis's trustees were brought into the process in consequence of the defence put in by the Shotts Company in which they averred that they were merely tenants and had undertaken no obligation with regard to outside inspection and repair. They are responsible for Inglis's trustees being called, and ought, in my opinion, to pay their expenses as well as those of the pursuer. No question was raised as to the amount of damages awarded.

LORD JOHNSTON.—I had the advantage of perusing Lord Mackenzie's opinion and I entirely concur in the result which he reaches, to the effect that the Shotts Company are liable to the pursuer on the ground that they had possession of the stair and rail, and that in consequence of their contract with their tenant the pursuer's child was upon the stair on their invitation as a visitor.

LORD KINNEAR.—I also agree.

After a discussion on expenses,¹—

LORD KINNEAR.—I think it is quite clear that this question must be disposed of as Lord Mackenzie proposes. It is said that the pursuer ought to have found out whether the true liability rested upon the Shotts Company or Inglis's trustees, and brought his action against the right defender. He was not bound to know anything about the relations between the Shotts Company and Inglis's trustees, but he only made his claim against the person who had always appeared to stand towards him in the relation of landlord of the premises. But then when that person, having been called as the defender, says, "We are not really the landlords and somebody else is," that put it upon the pursuer to bring in the third party.

THE COURT adhered.

ST CLAIR SWANSON & MANSON, W.S.—DRUMMOND & REID, W.S.—
MACPHERSON & MACKAY, S.S.C.—Agents.

¹ In the discussion counsel for Inglis's Trustees referred to *Morrison v. Waters & Co.*, (1906) 8 F. 867, per Lord President Dunedin, at p. 869.

PETER GUTHRIE, Pursuer (Respondent).—*Chisholm, K.C.*—
A. A. Fraser.

No. 161.

JAMES KINGHORN, Defender (Appellant).—*Moncrieff, K.C.*—
C. H. Brown.

July 18, 1913.

Guthrie v.
Kinghorn.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—
Accident arising out of and in the course of the employment—Injury by fall-
ing slate during a gale.

During a severe gale a carter in charge of a horse and lorry within his employer's yard was struck by a sheet of corrugated iron blown from the roof of an adjoining building, and was injured.

Held (dub. Lord Dundas) that the arbitrator was not entitled to find that the accident arose out of the employment.

Adamson v. George Anderson & Co. (1905), Limited, supra, p. 1038, distinguished.

IN an arbitration under the Workmen's Compensation Act, 1906, be- 2D DIVISION.
tween Peter Guthrie and his employer, James Kinghorn, the Sheriff- Sheriff of the
substitute of the Lothians (Guy) awarded compensation, and, at the Lothians and
request of the employer, stated a case for appeal. Peebles.

The case set forth :—

"The appellant is a firewood merchant and carries on business at 47 West Bowling Green Street, Leith. The appellant's premises consist of a large yard on which stands his firewood factory, and are reached from West Bowling Green Street by a private passage, 17 to 22 feet wide. The said passage and yard are much exposed to high winds, and are surrounded by unsubstantial buildings. On the day on which the accident occurred—26th November 1912—the wind, between three and four o'clock in the afternoon, blew at the rate of 52 miles an hour or thereby on the top of Blackford Hill, 4 miles distant, and 500 feet higher up than said yard. No evidence was adduced as to the velocity of the wind in the appellant's said yard and passage or cart entrance. On said date the respondent, who was a carter and firewood salesman to the appellant, was leaving the said premises in charge of a horse and lorry loaded with firewood for sale, and while he was still within the appellant's said yard he was struck by a sheet of corrugated iron, which was blown off the roof of an adjoining building, a distance of about 70 feet. Said roof had blown off three or four times in the last few years, and on the occasion in question twenty-eight sheets of the said corrugated iron, which formed the roof of said building, fell into the appellant's yard, and three or four sheets were blown into West Bowling Green Street. The respondent's head was cut, three of his ribs were fractured, and he was otherwise injured. The respondent had been out all day with his horse and lorry, along with a boy in the appellant's employment whose regular duty it was to assist him. The accident happened between three and four o'clock in the afternoon, and immediately after it the appellant sent said horse and lorry loaded with firewood out in charge of two young boys. I found that the said accident arose out of and in the course of his employment."

The question of law for the opinion of the Court was :—"Did the accident which the said Peter Guthrie sustained on 26th November 1912 arise out of his employment with the said James Kinghorn, within the meaning of the Workmen's Compensation Act, 1906?"

The case was heard before the Second Division on 18th July 1913.

July 18, 1913.

Guthrie v.
Kinghorn.

Argued for the appellant;—The respondent was not entitled to compensation unless he showed that his injuries were due to some special risk to which he was exposed by reason of his employment. In the present case he could not prove this; for the accident was of a kind to which all who had to be on the streets on 26th November 1912 were equally exposed.¹ The case of *Adamson v. Anderson & Company*² was distinguishable. The decision in that case proceeded on the fact that the workman had to stoop over his work, and so could not keep a look-out for falling slates.

Argued for the respondent;—The present case was ruled by *Adamson v. Anderson & Company*.² The point of distinction between the two cases on which the appellant relied was unsubstantial. In the present case, as in *Adamson's*,² the workman's attention was engaged by his work so that he could not be on the watch for objects falling from above. *M'Neice v. Singer Sewing Machine Company, Limited*,³ was also an authority in favour of the respondent.

LORD SALVESSEN.—The facts in this case are very simple. It appears that the respondent, who was a carter in the employment of the appellant, was engaged with his horse in the appellant's yard, which is situated near West Bowling Green Street, Leith, when he was struck by a sheet of corrugated iron, which was blown off the roof of an adjoining building a distance of about seventy feet. It is said, I do not think it is material, that the roof of this building, which was of an unsubstantial character, had been blown off on three or four previous occasions within the last few years; but there is nothing to suggest, so far as the knowledge of the appellant is concerned, that it had not been replaced in a suitable manner.

Now, these being the facts of the case, and the only material facts, the Sheriff-substitute has reached the conclusion that this accident arose not merely in the course of the employment, which is admitted, but out of the employment of the respondent. I am quite unable to assent to that view. I adopt the language of the Master of the Rolls in the case of *Craske v. Wigan*,⁴ where he says: "I think it would be dangerous to depart from that which, so far as I am aware, has been the invariable rule of the Court of Appeal since these Acts came into operation, namely, to hold that it is not enough for the applicant to say: 'The accident would not have happened if I had not been engaged in that employment, or if I had not been in that particular place.' He must go further and say: 'The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger.' Unless something of that kind is established the applicant must fail, because the accident is not one arising out of and in the course of the employment."

I put the question that was put by the Lord President in the case of

¹ *M'Neice v. Singer Sewing Machine Co., Limited*, 1911 S. C. 12; *Rodger v. Paisley School Board*, 1912 S. C. 584; *Blakey v. Robson, Eckford, & Co., Limited*, 1912 S. C. 334; *Craske v. Wigan*, [1909] 2 K. B. 635; *Amys v. Barton*, [1912] 1 K. B. 40; *Challis v. London and South-Western Railway Co.*, [1905] 2 K. B. 154; *Murray v. Denholm & Co.*, 1911 S. C. 1087.

² *Supra*, p. 1038.

³ 1911 S. C. 12.

⁴ [1909] 2 K. B. 635, at p. 638.

Rodger,¹ What were the special risks incident to the employment of this July 18, 1913. workman? I should have thought the risk of being kicked by his horse, or of being injured in the course of driving his horse through the traffic along the streets; but certainly no one would have said that one of the risks of his employment as a carter was that a piece of corrugated iron might come down from a neighbouring building seventy feet away and hit him on the shoulder and face. That is not what one would describe as an ordinary risk. It is an extraordinary occurrence—a thing that might occur when a great gale is blowing. The workman is not specially exposed to that risk because of his employment. It may be that the locality is one which is windy, or it may be a locality where the houses are less substantial than they are in other parts of the town; but that is not a risk arising out of his employment, for any person frequenting the yard would be exposed to exactly the same risk. It is, of course, true that he would not have met with the accident unless he had been in that particular place, and that he would not have been in that particular place unless he had been engaged in that particular employer's work; but, as the Master of the Rolls said, that is not enough; you must point to something in the nature of the employment that made you peculiarly liable to a risk of that kind.

Guthrie v. Kinghorn.

Lord Salvesen.

Now, the only case that presents some difficulty at first sight is the case to which we were referred—*Adamson v. Anderson*²—in which the First Division held the other day that an accident occurring through a slate falling on a person who was working in a back yard was, upon the admitted facts of the case, an accident arising out of the employment. But then we have not the same facts admitted in this case as were admitted there. The two facts which were admitted there, and which seem to me to differentiate this case entirely from that of *Adamson*,² are, in the first place, that the man there was stooping over his work, and was therefore unable to avoid a danger from above; and in the second place, that other workmen who were in the same place, but who were not compelled to stoop, were able to avoid, and did in point of fact avoid, exactly the same danger which he failed to avoid. It was held by the First Division that the workman's special employment had appreciably increased the risk of accident of this particular kind; and upon that ground, although the Court thought it was a narrow case, they did not interfere with the decision at which the Sheriff had arrived. The present case is quite distinguishable from that of *Adamson*,² and we would be opening the door very wide—it has already been opened pretty wide in workmen's compensation cases—if we were to hold that because a man is employed in a particular place, therefore any accident which occurs to him in that place, because of the nature of its surroundings, is an accident arising out of his employment. I think that would be going a great way beyond any of the decided cases. I have therefore no difficulty in holding that we should sustain the appeal, and hold upon the facts stated that the Sheriff was not entitled to find in law that the accident to the respondent arose out of his employment.

LORD DUNDAS.—I do not entertain so clear and confident an opinion as

¹ 1912 S. C. 584.

² *Supra*, p. 1038.

July 18, 1913. my brother, Lord Salvesen, about the way in which this case ought to be disposed of. I have had, and still have, some doubt about the matter, but Guthrie v. Kinghorn. I do not press it so far as to dissent from the conclusion proposed, in which Lord Dundas. I understand your Lordship and my brother, Lord Guthrie, concur. I confess I find it rather difficult to point to any really substantial or satisfactory distinction between this case and that of *Adamson v. Anderson*,¹ decided a few days ago in the other Division. Then, again, the Sheriff-substitute is, of course, the master of fact, and the question here is largely, though not entirely, one of fact. But your Lordships, as I understand, all consider that, upon the facts found, the arbitrator was not entitled in law to hold as he has done, and, having stated my doubt about the matter, I do not propose to say anything more.

LORD GUTHRIE.—I concur in the opinion expressed by Lord Salvesen. It is admitted that this unfortunate occurrence was an accident within the meaning of the Act. It is further admitted that what took place was in the course of the man's employment. Mr Chisholm submitted an argument under two heads to justify the Sheriff's finding that what took place arose out of the employment. He said, in the first place, that he did not need to show any special risk, but, if this were necessary, that the facts found disclosed a special risk. I think that, if anything is certain in this class of case, it is that, in order to justify an award such as we have here, there must have been some special risk to which the workman was exposed. Special risk may be one or other of three kinds. It may be owing to the nature of the employment at the time. All that can be said about that is that at the time the respondent was in charge of his employer's horse and lorry, and it was said that, consequently, he was not in a position to attend to his own safety in the same way as an ordinary passer-by would be able to do. I do not see, in relation to the kind of accident we have here, that the finding in fact justifies the inference which Mr Chisholm draws from it. In the case of *Adamson v. Anderson*,¹ it is noticeable that the First Division thought the case a narrow one, and that Lord Johnston was careful to put the judgment of the Court expressly on the two admissions which have been noticed by Lord Salvesen. Second, you may have special risk owing to the general nature of the man's employment, but in relation to the accident here there was no special risk due to his employment as a lorry-man. In the third place, you may have special risk arising from the place where the accident happened. We are told that the adjoining roof had blown off three or four times within the last few years, but it is not said that on these previous occasions any part that was blown off fell into the place where this man was injured. I therefore think, without questioning the judgment in *Adamson v. Anderson*,¹ that the question should be answered as Lord Salvesen proposes.

LORD JUSTICE-CLERK.—I concur in the judgment proposed. If I had had to decide a case with the same facts as those in *Adamson v. Anderson*,¹ before it had been dealt with by the other Division, I should have had the greatest

¹ *Supra*, p. 1038.

possible difficulty in coming to the conclusion that the judgment of the July 18, 1913. Sheriff awarding compensation should be affirmed. Their Lordships of the First Division indicated plainly that they looked upon that case as a very narrow one, and I think we find in the opinion of Lord Johnston a circumstance referred to which distinguishes that case from the present. His Lordship says: "The fact that he (*i.e.*, the workman) was engaged in the open air, bending over to adjust heavy machinery, is a fact from which it may reasonably be deduced that under the circumstances of his particular vocation he was exposed to something apparently beyond the normal risk, and that to this abnormal exposure the accident was attributable." Now, that seems to me to distinguish that case from the present. If a man is obliged to keep his eyes towards the ground while he is stooping to do something, he is in a totally different position from the driver of a van or lorry, whose business is to keep his eyes about him, not to stoop and look down. Accepting the view so clearly expressed by the Master of the Rolls in the case referred to by Lord Salvesen, I think it is not possible to hold in this case that there is ground for saying that the accident arose out of the employment. For these reasons I agree with your Lordships.

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Lord Justice-
Clerk.

THE COURT answered the question of law in the negative.

STERLING CRAIG, S.S.C.—CAIRNS & ROBERTSON, S.S.C.—Agents.

CHARLES ROBERT BRODIE (Mrs Lawrie's Executor), First Party.—
Chree, K.C.—Wark.

No. 162.

SARAH WEATHERHEAD HAIG AND OTHERS, Second and Third
Parties.—*Constable, K.C.—Lippe.*

July 18, 1913.

Lawrie's
Executor v.
Haig.

Succession—Mutual settlement—Contractual or testamentary—Revocation.

A husband and wife executed a mutual settlement in which each bequeathed to the other, on survival, the whole of his or her estate, for that other's liferent use and subject to certain burdens and directions which were identical in each case. In addition, the wife conveyed a heritable property to the husband in liferent and to certain of her own blood relations in fee. The settlement contained a clause reserving power of revocation by mutual consent during the joint lifetimes of the spouses, and declaring its finality unless so revoked, but reserving to the survivor a power of disposal over "all his or her own means and estate to be made and acquired after the decease of the first of us."

Held that the inference from the reservation of a power of disposal over estate acquired after the decease of the first of the spouses was that the provisions with regard to the estate conveyed by the mutual settlement were intended to be contractual; and, accordingly, that the wife was not, after the death of her husband, entitled to revoke the destination of the heritable property conveyed by her in that deed.

ON 22nd November 1913 a special case was presented to the Court for the determination of a question arising upon the construction of the mutual disposition and settlement of Alexander Sandilands, butcher, North Berwick, and Margaret Eeles or Sandilands, his wife, dated 6th June 1874.

The circumstances of the case appear fully from the following narrative, which is taken from the opinion of the Lord President:—

"Mr Sandilands, a butcher in North Berwick, executed a mutual

July 18, 1913. settlement with his wife by which he conveyed to her all the estate which should belong to him at the time of his death, and nominated her his executrix, but declared that the conveyance was to be under certain burdens which his wife was to be bound to implement and fulfil. These burdens were that she should herself only have the life-rent use and enjoyment of the estate, that she should pay certain specific legacies, and that, at her death, the entire residue of the estate should be paid to certain named persons. On the other hand, the wife conveyed her general estate to the husband in the same terms, imposing upon it the same burdens, textually repeated, as had been imposed by her husband upon his estate. But the conveyance by the wife differed from the conveyance by the husband in this particular that there was, in addition to the general conveyance, a special conveyance of a special subject, which was a tenement of land in North Berwick, and was conveyed in the following manner, viz. :—

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" ' In favour of . . . my husband, in case he survive me, in life-rent, but for his life-rent use only, and of the said Mary Eeles or Haig and Elizabeth Eeles, daughters of the said late George Eeles, butcher, North Berwick, and their respective heirs and assignees whomsoever in fee,' the persons preferred to the fee being near relatives in blood of the lady herself.

" The settlement ended with this clause :— ' And we . . . reserve full power in our joint lifetimes, and of mutual assent and consent, but not otherwise, to alter or revoke these presents, but we severally and jointly expressly declare that, if not altered of joint consent, the same shall be final and conclusive on both of us, but reserving to the last survivor of us to dispose all his or her own means and estate to be made and acquired after the decease of the first of us, and power of disposal thereof as he or she may think fit.' "

" Mrs Sandilands survived her husband and lived for a period of thirty-five years after his death. She succeeded to a certain amount of property which her husband left behind him. On her death she left a holograph settlement, dated 10th March 1911, in which she disposed of her heritable property which she described as ' absolutely mine,' Nos. 45 and 47 High Street, North Berwick, to a person other than the parties named in the mutual settlement. This special case is brought to determine whether that property belongs to this donee or whether its disposal is ruled by the terms of the mutual settlement. There is no question as to the identity of Nos. 45 and 47 High Street as the parcel of ground described in the mutual settlement."

After the death of her first husband Mrs Sandilands married James Lawrie, a butcher in North Berwick, whom she also survived.

The parties to the case were (*first*) Mrs Lawrie's executor under her holograph settlement, (*second*) the representatives of Mary Eeles or Haig, one of the fiars named in the destination of the North Berwick property in the mutual settlement, and (*third*) Elizabeth Eeles or Brodie, the other fiar mentioned in that deed.

The contentions of the parties as set forth in the special case were as follows :—

" The first party maintains that the said Mrs Margaret Eeles or Sandilands or Lawrie in the circumstances before stated was entitled to revoke her *mortis causa* conveyance of the said subjects in the mutual disposition and settlement in favour of the said Mary Eeles or Haig and Elizabeth Eeles, and that she did effectually revoke the

same by her said subsequent holograph settlement, and did thereby July 18, 1913.
validly convey the same in favour of the first party.

"The second and third parties, on the other hand, maintain that the said Mrs Margaret Eeles or Sandilands was not entitled after the death of her husband the said Alexander Sandilands, to alter or revoke the terms of the said mutual disposition and settlement, and that accordingly the second parties, as universal legatees and disponees of their said deceased mother, and the third party in her own right, are entitled to the fee of the said heritable subjects." Lawrie's
Executor v.
Haig.

The questions of law were:—"1. Was Mrs Margaret Eeles or Sandilands entitled after the death of her husband, the said Alexander Sandilands, to alter or revoke the destination of the heritable subjects, Nos. 45 and 47 High Street, North Berwick, contained in the mutual disposition and settlement executed by her and her said husband on 6th June 1874; and was the alteration and revocation thereof contained in her holograph settlement of 10th March 1911 effectual? or 2. Does the destination of the said heritable subjects still fall to be regulated by the provisions of the said mutual disposition and settlement?"

The case was heard before the First Division (without Lord Johnston) on 18th July 1913.¹

LORD PRESIDENT.—[After the narrative quoted *supra*].—The general rules in regard to mutual settlements have been again and again laid down and are well settled. The main point is to discover whether a particular provision is contractual or is merely testamentary. There are certain general presumptions that can always be appealed to in determining this point. For example it is presumed that provisions in favour of the other party to the settlement are contractual; it is also presumed that provisions in favour of the issue of the marriage between the parties are contractual. On the other hand it is presumed that, where the objects of the testator's bounty are other than the parties to the deed or the children of the marriage between these parties, the provisions are testamentary. It is also presumed that persons want freedom with regard to the disposal of their own property, whatever may happen with regard to the property got from the other party. All these presumptions, however, must yield to indications in the deed that something else was intended. As is said by Lord McLaren in his book on Wills (vol. i., p. 423), and as I said in the case of the *United Free Church of Scotland v. Black*² everything turns on the instrument itself. Lord Kyllachy in the case of *Corrance's Trustees v. Glen*³ gave an instance of the class of clause from which it might be inferred that provisions in a mutual settlement—and not merely provisions in favour of the parties themselves, but also provisions as to the ultimate disposal of the estate—were contractual. It might be inferred, he said, "*inter alia*, from clauses restrictive of revocation, which are so expressed as to be unequivocally referable to the ultimate dispositions under the mutual deed." He was there, no doubt, dealing with the case of a person, who had received

¹ The following authorities were referred to:—Robertson's Trustees v. Bond's Trustees, (1900) 2 F. 1097; Corrance's Trustees v. Glen, (1903) 5 F. 777; United Free Church of Scotland v. Black, 1909 S. C. 25.

² 1909 S. C. 25, at p. 30.

³ 5 F. 777, at p. 780.

July 18, 1913. nothing from the other party, disposing of his own property, but I think the statement applies equally in the case of a survivor to whom property has come from the predecessor. I am bound to say that I think that the particular clause in this deed leads necessarily to the conclusion that the provisions as to the ultimate destination of the property in the deed are contractual and not testamentary. I put no stress on the reservation of "full power in our joint lifetimes, and of mutual assent and consent, but not otherwise, to alter or revoke these presents," which is indeed pleonastic, and must be so unless you can go the length of holding that the deed created a *jus quæsitum tertio*, and no stress upon the phrase that "if not altered of joint consent the same shall be final and conclusive on both of us," which goes without saying. But the last clause seems to me to be conclusive, "Reserving to the last survivor of us to dispoñe all his or her own means and estate to be made and acquired after the decease of the first of us, and power of disposal thereof as he or she think fit." Now this power can only have been reserved because the parties were under the impression that without the reservation a disposition by the survivor of his own property acquired after the death of the other would have been struck at by the settlement. Accordingly, I think it is clear that in the view of these two people, the provisions in this settlement were contractual, and would have applied to everything but for this clause reserving power to dispose of what was to be acquired after the dissolution of the marriage. In these circumstances I think that the second parties are entitled to the property, and that the first question should be answered in the negative and the second in the affirmative.

LORD KINNEAR.—I am of the same opinion.

LORD MACKENZIE.—I am of the same opinion. The question whether the provisions in favour of ultimate beneficiaries made by the spouses in this settlement are contractual is one which must be judged upon the terms of the deed itself, and to my mind there is an inference from the clause of reservation to the effect that the spouses intended to contract that the disposition of their means and estate to the ultimate beneficiaries should stand, except to the extent that there was the reservation that the last survivor was to have power "to dispoñe all his or her own means and estate to be made and acquired after the decease of the first of us and power of disposal thereof as he or she think fit." Now that can only refer to dispositions to the ultimate beneficiaries, and excludes the idea that the spouses had power to deal with the property which fell under the terms of the settlement.

THE COURT answered the first question in the negative, and the second in the affirmative.

MACKAY & YOUNG, W.S.—HENRY BOWER, S.S.C.—STEEDMAN & RICHARDSON, S.S.C.
—Agents.

ROBERT PARK, Appellant.—*Moncrieff, K.C.—Fenton.*
THE COLTNESSE IRON COMPANY, LIMITED, Respondents.—
Horne, K.C.—Strain.

No. 163.

July 19, 1913.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Schedule 17 (b)—Arbitration—Procedure—Proof—Appeal—Remit to arbitrator for further statement of fact—Power of arbitrator to hear further evidence. Park v. Coltness Iron Co., Limited.

In a case stated for appeal against the decision of a Sheriff-substitute acting as arbitrator in proceedings under the Workmen's Compensation Act, 1906, in the course of which proceedings proof had been led, the Court remitted to the Sheriff-substitute to find whether the workman had given statutory notice of his accident as soon as practicable thereafter. The Sheriff-substitute reported that he had himself re-examined the doctor who attended the workman during his illness, and made a finding in answer to the question put by the Court. This report was objected to on the ground that it proceeded on evidence which had been taken after the proof had been closed. *Held* that the Sheriff-substitute was entitled under the remit to take further proof, and objection repelled.

Sheriff—Process—Proof—Summary cause—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), First Schedule—Rules of procedure regulating proof in ordinary Court—Application of rules to summary causes.

Opinion (per the Lord President) that the rules with regard to proof appended to the Sheriff Courts Act, 1907, are rules for regulating procedure in the ordinary Court and have no application to summary causes.

In an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Lanark, between Robert Park and the Coltness Iron Company, Limited, the Sheriff-substitute (Scott Moncrieff) refused to award compensation and, at the request of the workman, stated a case for appeal. 1st Division.
Sheriff of
Lanarkshire.

The case, after setting forth certain facts as having been admitted or proved,* proceeded as follows:—"I found in law that the respondents had been prejudiced in their defence by the appellant's delay in giving notice of the accident, which delay was not occasioned by mistake or other reasonable cause, and accordingly refused the appellant's claim for compensation."

The questions of law were:—" (1) In the circumstances above

* The effect of the arbitrator's findings in fact was as follows:—

The workman received an injury on 12th November 1912, after which date he continued in his employment until 15th November, when he fell ill and was incapacitated until 6th January 1913. A doctor was called to attend him on 18th November and the doctor found him to be suffering from erysipelas, which, three days later, on 21st November, he was able to attribute to the injury. "That the appellant's condition shortly after ceasing work was such as to preclude him from personally attending to his affairs or giving notice of his accident." On 30th November the workman's father applied for and obtained a form of application for compensation, which was filled up and sent in to the employers on 2nd December. Upon that date, the earliest on which the employers could have examined the workman, it would have been impossible to say from such an examination that his condition was attributable to the accident. "That the appellant's delay in giving notice was not occasioned by mistake or other reasonable cause."

July 19, 1913. stated was there evidence upon which I was entitled to find that the respondents were prejudiced in their defence so as to bar the appellant from recovering compensation? (2) In the circumstances stated should I have refused compensation to the appellant? *

Park v. Coltness Iron Co., Limited.

After hearing counsel on 5th June 1913, the Court, on 10th June, pronounced the following interlocutor:—"Remit to the Sheriff-substitute, as arbitrator, to find whether the statutory notice was given by the appellant as soon as practicable, and to report." *

On 11th July 1913 the Sheriff-substitute made a report in these terms:—

"Having reconsidered the case in respect of the remit to him . . . and having himself re-examined the doctor who attended the appellant during his illness, finds . . . that notice . . . must be held to have been as soon as practicable. The re-examination of the doctor was objected to by the agent for the respondents upon the following grounds:—(1) That there was no warrant for taking proof; (2) that proof had already been taken and closed; and (3) that the doctor's evidence had already been taken."

The appellant thereafter presented a note, in which he set forth the remit and report, and craved the Court to dispose of the case on the stated case and report.

The case was heard again before the First Division (without Lord Johnston) on 19th July 1913, when counsel for the respondents objected to the competency of the report.

Argued for the respondents;—The direction to the Sheriff-substitute in the remit was not to be construed as a direction or an authority to him to call for and hear fresh evidence. It was merely a direction to furnish an amplified statement of the facts established by the evidence already led. The effect of the Workmen's Compensation Act, 1906, Second Schedule 17 (b),† read along with section

* The Lord President (who delivered the leading opinion), after examining the facts stated to have been proved, and considering the terms of section 2 of the Workmen's Compensation Act (referred to *infra*), pointed out that, though it was expressly found that the appellant's delay in giving notice of the accident was not occasioned by any "mistake or other reasonable cause," there was no finding as to whether notice of the accident had "been given as soon as practicable after the happening thereof," all in terms of the provisions of that section.

The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), enacts:—Sec. 2. "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured . . . Provided always that—(a) the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not . . . prejudiced in his defence by the want, defect, or inaccuracy . . . or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

† The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), enacts:—Second Schedule, 17 (b). "Any application to the Sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by section fifty-two of the Sheriff Courts (Scotland) Act, 1876 [now section 50 of the 1907 Act, *infra*] . . . subject to the declaration that it shall be competent to either party within the time and in accordance

50 of the Sheriff Courts Act, 1907,* was to subject proceedings under July 19, 1913. the former Act to the rules of procedure governing summary applications in the Sheriff Court, including the rules of the First Schedule to the Sheriff Courts Act. The Sheriff-substitute as arbitrator in these proceedings had no authority to depart from the rules, in particular rule 75, of the latter Schedule, or from the general rule of practice governing the closing of proofs.

Park v. Coltness Iron Co., Limited.

Counsel for the appellant were not called on.

LORD PRESIDENT.—In this case I need not repeat what was said at the former advising, when we remitted to the Sheriff-substitute to find whether the notice was given by the appellant as soon as practicable and to report. The learned Sheriff, in order to qualify himself to give that report, thought it necessary to re-examine the doctor, and it has been argued to us to-day that that vitiates the report, upon the ground that the proof being closed the Sheriff had no power to hear any further proof, in respect of certain rules appended to the Sheriff Courts Act, 1907. It is true that paragraph (17) (b) of the Second Schedule to the Workmen's Compensation Act, 1906, provides that "any application to the Sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by section 52 of the Sheriff Courts (Scotland) Act 1876." It is also true that section 50 of the Sheriff Courts Act, 1907, which deals with summary applications, is substituted for section 52 of the Act of 1876, and that arbitrations under the Workmen's Compensation Act are accordingly to be dealt with in the same way as summary applications in the Sheriff Court. I think, however, the objection fails for two reasons, either of which would be sufficient for the disposal of the case. In the first place, I think it is perfectly clear that the rules with regard to proof appended to the Sheriff Courts Act are rules for regulating procedure in the ordinary Court, and have no application to summary causes, in which no procedure is prescribed and in which the Sheriff is to order such procedure as he thinks requisite. Accordingly these rules have no application to arbitrations under the Workmen's Compensation Act, which under paragraph (17) (b) of the Second Schedule to that Act fall to be treated as summary causes.

There is another reason why this objection is bad. The appeal which is

with the conditions prescribed by Act of Sederunt, to require the Sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session; who may hear and determine the same, and remit to the Sheriff with instruction as to the judgment to be pronounced. . . ."

* The Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), enacts:—Sec. 50. "In summary applications (where a hearing is necessary) the Sheriff shall appoint the application to be heard at a diet to be fixed by him, and at that or any subsequent diet (without record of evidence unless the Sheriff shall order a record) shall summarily dispose of the matter and give his judgment in writing: Provided that wherever in any Act of Parliament an application is directed to be heard, tried, and determined summarily or in the manner provided by section fifty-two of the Sheriff Courts (Scotland) Act, 1876, such direction shall be read and construed as if it referred to this section of this Act: Provided also that nothing contained in this Act shall affect any right of appeal provided by any Act of Parliament under which a summary application is brought."

July 19, 1913. taken here is specifically given by paragraph (17) (b) of the Second Schedule to the Workmen's Compensation Act, which allows parties to appeal by way of stated case. Under section 17 (g) of the Act of Sederunt of 26th June 1907,¹ this Court has power to send back the case to the Sheriff for amend-

Ld. President. ment. I am clearly of opinion that that power of remitting includes a power of remitting to the Sheriff to do anything he thinks necessary, and as a matter of fact we have again and again remitted to the Sheriff to take further proof. It is quite true that in this case we did not say in so many words that the Sheriff was to take further proof, but I think he correctly interpreted the spirit of the remit, and I think it would be quite futile to hold that his report is vitiated because he has taken such additional proof as he deemed necessary for the determination of the matter remitted to him.

Upon the merits the learned Sheriff has returned an answer which enables us to deal with the whole of the case, and our judgment will be that the second question of law should be answered in the negative and the case remitted to the learned Sheriff to find the compensation which he thinks due.

LORD KINNAR and LORD MACKENZIE concurred.

THE COURT pronounced this interlocutor:—" . . . Having resumed consideration of the stated case, and also considered the finding by the Sheriff-substitute as arbitrator, . . . and having heard counsel for the respondents, answer the second question stated in the negative, recall the determination of the Sheriff-substitute as arbitrator, and remit to him to award compensation, and proceed as accords. . . ."

SIMPSON & MARWICK, W.S.—W. & J. BURNES, W.S.—Agents.

No. 164. THE NEWBURGH AND NORTH FIFE RAILWAY COMPANY, Applicants
(Respondents).—*Clyde, K.C.—Macmillan, K.C.—Gentles.*
July 17, 1913. THE NORTH BRITISH RAILWAY COMPANY, Defendants (Appellants).—
D.-F. Dickson—Cooper, K.C.—E. O. Inglis.
Newburgh and North Fife Railway Co. v. North British Railway Co. *Company—Shares—"Paid-up share capital"—Shares issued for a consideration other than cash or the equivalent of cash—Original shares issued at a discount—Railway—Contractors' line.*

Railway—Railway and Canal Commissioners—Arbitration—Ascertainment of quantum meruit under a contract—Competency—Railway and Canal Traffic Act, 1873 (36 and 37 Vict. cap. 48), sec. 8.

For the purpose of authorising them to construct a railway, the promoters of the Newburgh and North Fife Railway Company obtained an Act of Parliament, which incorporated the Companies Clauses Consolidation (Scotland) Act, 1845, the Companies Clauses Act, 1863, and Acts amending the same. A Schedule to the Act contained an agreement between the Company and the North British Railway Company, whereby the North British Company guaranteed a fixed dividend upon "the paid-up share capital" of the Newburgh Company. The Newburgh Company, having failed to obtain sufficient subscriptions to their shares, entered into an agreement with a Syndicate, whereby the Company undertook

¹ C. A. S., 1913, L., xiii. 17 (g).

to issue to the Syndicate their whole unissued capital, and the Syndicate undertook to construct the railway. It was established by proof that the cost of construction was about 60 per cent of the face value of the capital issued to the Syndicate, and that the Syndicate disposed of the shares so issued at less than par.

Held (rev. judgment of the Railway and Canal Commissioners), by a majority of seven Judges (*diss.* the Lord President, Lord Kinnear, and Lord Dundas), that the capital so issued to the Syndicate was not "paid-up share capital" of the Newburgh Company in the sense of the agreement with the North British Company, and that the North British Company were only bound to contribute to the dividend on so much of the capital of the Newburgh Company as was issued in consideration of cash or the equivalent of cash.

Further *held* (*diss.* Lord Johnston) that it was competent for the Railway and Canal Commissioners, sitting as arbiters, to determine what amount of the capital was issued in consideration of cash or the equivalent of cash.

Opinions (per Lord Johnston, Lord Salvesen, and Lord Skerrington) that a company incorporated under the Companies Clauses Acts is not entitled to issue its original shares at a discount: *Question* whether such a company is entitled to issue shares for a consideration other than cash or the equivalent of cash.

Statham v. Brighton Marine Palace and Pier Company, [1899] 1 Ch. 199, and *Webb v. Shropshire Railways Company*, [1893] 3 Ch. 307, *doubted*.

(SEE previous report—1911 S. C. 710.)

On 19th January 1910 the Newburgh and North Fife Railway Company presented an application to the Court of the Railway and Canal Commissioners, coming in place of arbiters, for the determination of several differences which had arisen out of an agreement between them and the North British Railway Company, and claimed, *inter alia*, that the applicants' "paid-up share capital," upon which the defendants were bound to contribute towards a fixed dividend, amounted to £180,000.

The Newburgh and North Fife Railway Company was incorporated in 1897 by Act of Parliament* authorising the construction of a

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1ST DIVISION with three consulted Judges. Railway and Canal Commission.

* The Newburgh and North Fife Railway Act, 1897 (60 and 61 Vict. cap. cccxi.), enacts:—

Sec. 2. "The Companies Clauses Consolidation (Scotland) Act, 1845, and Part I. (relating to cancellation and surrender of shares), Part II. (relating to additional capital), and Part III. (relating to debenture stock) of the Companies Clauses Act, 1863, as amended by any subsequent Act, the Lands Clauses Acts, the Railway Clauses Consolidation (Scotland) Act, 1845, and Part I. (relating to construction of a railway), and Part III. (relating to working agreements) of the Railways Clauses Act, 1863, are, except where expressly varied by this Act, incorporated with and form part of this Act."

Sec. 6. "The capital of the Company shall be one hundred and eighty thousand pounds in eighteen thousand shares of ten pounds each, and subject to the provisions of Part II. of the Companies Clauses Act, 1863, the Company may raise any sum or sums not exceeding sixty thousand pounds of the said capital by the creation and issue of preference shares, with a preferential dividend in priority to the ordinary shares of the Company. Provided that no such preference shares shall be created or issued unless and until it shall be certified by the Sheriff, upon production of the books of the Company, or such other evidence as he may think suf-

July 17, 1913. railway about thirteen miles in length between Newburgh and St Fort in the county of Fife.

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The agreement scheduled to the Act, and by section 42 made binding upon the North British Railway Company (the first parties) and the Newburgh Company (the second parties), provided, *inter alia*, (Article First) that in the event of an Act being obtained, and the capital being subscribed, the second parties should construct the railway, which (Article Second) the first parties should thereafter maintain and work in perpetuity. It was further provided (Article Fourth) that the first parties should collect the gross revenues of the railway, and should be entitled to retain 50 per cent thereof as remuneration for maintaining and working the railway, and should pay over the balance of 50 per cent to the second parties. (Article Seventh) "If the nett revenue accruing to the second parties is not sufficient to pay a dividend of four per centum per annum on the paid-up share capital of the second parties then the first parties shall out of fifty per centum of the mileage proportion of receipts accruing to them on their own railway from traffic including mails passing over their system or any part thereof to or from any place on the railway contribute such sum as may be necessary to make up that dividend so far as the said fifty per centum of mileage receipts accruing in each half year to the first parties shall suffice to pay such deficiency." (Article Eighth) "Should the sum to be contributed under the immediately preceding article along with the said nett revenue of the second parties not be sufficient to pay a dividend of four per centum per annum on the paid-up share capital of the second parties then the first parties shall out of twenty-five per centum of the mileage receipts accruing to them on their own railway from traffic including mails passing over their system or any part thereof and over the railway contribute such further sum as may be necessary to make up the said dividend of four per centum per annum so far as the said twenty-five per centum of mileage receipts accruing in each half year to the first parties shall suffice to pay such deficiency." (Article Fourteenth) "All questions which may arise between the parties hereto in relation to this agreement or to the import or meaning thereof or to the carrying out of the same shall

sufficient, that a like sum of sixty thousand pounds of the said capital has been issued as ordinary share capital and accepted, and one-half thereof has been paid up."

Sec. 8. "The Company shall not issue any share created under the authority of this Act, nor shall any such share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share is paid in respect thereof."

Sec. 11. "The Company may from time to time borrow on mortgage of the undertaking any sum not exceeding in the whole sixty thousand pounds . . . [in three instalments of £20,000 as the railway is completed] . . . but no such sums shall be borrowed until sixty thousand pounds (being one-third of the share capital of one hundred and eighty thousand pounds) is issued and accepted, and one-half thereof is paid up in respect of each of the said sums of twenty thousand pounds . . ."

Sec. 42. "The agreement, dated the sixth day of April one thousand eight hundred and ninety-seven, between [the promoters] on behalf of the Company, of the one part, and the North British Railway Company, of the other part, as set forth in the Schedule to this Act, is hereby confirmed and made binding upon the Company . . ."

be referred to arbitration under and in terms of the Railway Companies Arbitration Act, 1859."

The Newburgh Company failed to raise any capital beyond the directors' qualifying shares, which amounted to £1500, and with the knowledge of the North British Railway Company they applied for and obtained from Parliament three extensions of time.

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Eventually in the year 1905 the Company entered into negotiations with the financial house of Arbuthnot, Latham, & Company, who undertook to form a syndicate for the construction of the railway. In order that a valid meeting of the shareholders of the Company might be held, the directors of Arbuthnot, Latham, & Company subscribed for and were allotted shares to the amount of £9100, which sum was paid in cash, but a rebate of 40 per cent was subsequently given to these shareholders.

On 31st May 1906 an agreement was entered into between the Company and the Syndicate formed by Arbuthnot, Latham, & Company under the name of The Engineering Electric and Construction Syndicate, Limited (therein called "the contractors"). The agreement contained, *inter alia*, the clauses printed in the footnote *infra*.*

* "(1) The contractors shall construct and complete fit for traffic as a single line of railway but with land and bridges for a double line to the satisfaction of the Company's engineer and so as to comply in all respects with the said Acts and the said agreement between the Company and the North British Company the railway [and other works] specified in Article 1 of the said agreement with the North British Company. (3) The contractors shall pay for all land provided for the construction of the works and all compensation payable to the landowners and others in respect of land required for temporary purposes or of property injuriously affected and shall execute all accommodation works which the Company may be called upon or may agree to execute and shall provide the sum of £4400 for meeting the cost of administering the affairs of the Company during construction of which £3300 shall be paid as required during construction and the balance shall be paid on the works being completed and taken over by the North British Company for the purpose of working. Any lands which shall be acquired and shall be superfluous shall be deemed to belong to the contractors and shall at their request be sold by the Company for the contractors' benefit on terms and conditions approved by the contractors and the net proceeds shall be handed over to the contractors. (4) The contractors will provide for or satisfy all legal costs and charges including all costs payable by agreement or under the Lands Clauses Consolidation Act to landowners . . . and also all other legal and Parliamentary costs charges and expenses and all engineers' and surveyors' and valuers' fees and charges which the Company may now be liable for or may incur with the approval of the contractors. . . . (5) The Company shall at the request and cost of the contractors give all notices and take all steps necessary for obtaining possession of or acquiring any land required for the purposes of the works and for having the amounts of all purchase-money and compensation in respect thereof settled but all money (if any) required to be paid into Court for the purpose of obtaining possession of land shall be provided by the contractors. (6) In consideration of the construction of the works and of the payments and expenses to be made and borne by the contractors under this contract the Company shall pay to the contractors in the manner hereinafter mentioned the sum of £240,000 of which £109,400 shall be paid in ordinary shares of the Company £60,000 in preference shares and £60,000 in 4 per cent debenture stock of the Company (which shall bear interest as from the taking over of the works by the North British Company for the purpose of

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The line was completed and opened for traffic on 25th January 1909. The cost of construction on the one hand and the amount received by the Syndicate from the issue of shares on the other hand,

working the line) and the remainder namely the sum of £10,600 in cash. (7) For the purpose of determining the payments to be made to the contractors on account during the progress of the works the said contract sum of £240,000 is considered as divided into £195,000 for the actual execution of the works including maintenance and £45,000 for the matters mentioned in clauses 3 and 4 hereof but such division is not to otherwise affect the payment of the contract sum whatever may be the relative proportion or value of the two parts of this contract. Of the said £45,000 £15,000 in ordinary shares fully paid shall be paid on the execution hereof in respect of the expenses incurred by the contractors under clauses 3 and 4 hereof up to and including the 31st day of May 1906. (8) Within eight days after the expiration of each calendar month the Company's engineer shall estimate the value of the work executed and materials provided (exclusive of plant) during the period of such calendar month. In estimating such value such engineer shall have regard to the division of the contract sum mentioned in the preceding clause hereof and a schedule of prices shall be made out by the contractors subject to approval by the Company's engineer under which the execution of the work including maintenance shall work out at £195,000 and such schedule of prices shall be the basis on which the valuation for payments on account is to be made. In respect of the matters payments and things mentioned in clauses 3 and 4 hereof and not included in the £15,000 above referred to the Company's engineer shall within eight days after the expiration of each calendar month estimate the proportion which the acreage of the land of which during such calendar month the Company shall have obtained possession bears to the total acreage of land estimated to be required for the works and a like proportion of the sum of £30,000 (being the balance of the said sum of £45,000), shall be added to the monthly valuation mentioned above in respect of all the payments matters and things mentioned in clauses 3 and 4 hereof not included in the £15,000 aforesaid and the Company's engineer shall certify the total amount of such valuation and additional sum. (9) The amount of such certificates as mentioned in clause 8 hereof, shall be paid by the Company to the contractors by crediting the amount of each certificate on or by the issue as fully paid to the contractors or as they may direct of the shares ordinary or preference and the debenture stock in such proportions as shall be within the Company's legal powers. If on the taking over of the works by the North British Company for the purpose of working as aforesaid all the contract price shall not have been paid or issued to the contractors the Company shall immediately upon the North British Company so taking over the works issue or pay to the contractors or as they shall direct any shares debenture stock securities or cash at that time remaining to be issued or paid to the contractors. Provided that the contractors may at any time (a) require the sum represented by any certificate to be paid wholly or in part in cash until the whole of the sum payable in cash has been paid or (b) may require the Company to issue to them certificates of indebtedness to represent the proportion of the contract price comprised in any such certificate. Any such certificate of indebtedness shall be so framed as to enable the Company or the contractors at any time to convert the same into the shares or debenture stock in respect of which such certificates of indebtedness may have been issued but so that the Company shall not have the power to exercise such right of conversion until after the taking over of the works by the North British Company for the purpose aforesaid. (10) The Company shall at the request and cost of the contractors offer for public subscription by the issue of prospectuses or other methods of advertisement any of the shares or debenture stock hereinbefore mentioned whether at the

appear from the balance-sheet of the Syndicate as at 17th November July 17, 1913. 1911.*

The contentions of parties as presented to the Railway and Canal Commissioners upon this question appear in article 18 of the application by the Newburgh Company:—"The whole of the ordinary and preference shares have been created and issued, and the value thereof, amounting to £180,000, has been received by the applicants, and the

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time the contractors shall be entitled thereto or not and as to the said shares notwithstanding that the same may have been allotted to the contractors provided that the Company shall not be bound to issue any debenture stock at a lower price than par."

* "THE NEWBURGH AND NORTH FIFE RAILWAY CONTRACT.
"EXPENDITURE.

Expenses—

Preliminary, .	£7,847	5	0		
Administration, .	4,400	0	0		
Parliamentary deposit, .	315	9	8		
Sundries, .	45	6	8		
				£12,608	1 4
Land purchases, &c., .				29,550	15 2
Works, .				132,616	13 8
				£174,775	10 2
<i>Less sums allowed for delay in completion of contracts—</i>					
Messrs W. Beattie & Sons, .	£4,600	0	0		
M. & J. R. Watson, Ltd., .	265	0	0		
				4,865	0 0
				£169,910	10 2
Loss on sale of shares and debentures, .				43,760	0 0
Interest to block-takers, .				8,205	19 8
Management and underwriting fee, .				14,400	0 0
Administration expenses of the Syndicate, .				42	3 0
Balance—Excess of income over expenditure carried to balance-sheet, .				9,706	7 2
				£246,025	0 0

"INCOME.

The Newburgh and North Fife Railway—

Cash, .	£10,600	0	0		
				£10,600	0 0
<i>Shares—</i>					
10,940 Ordinary, at £10, .	£109,400	0	0		
6000 Preference at £10, .	60,000	0	0		
Debenture Stock, .	60,000	0	0		
				229,400	0 0
				240,000	0 0
Lloyds' bonds for extras at par, .				6,025	0 0
				£246,025	0 0"

July 17, 1913. applicants maintain and claim that the paid-up share capital, towards payment of the dividend on which the defendants are bound to contribute as aforesaid, amounts to £180,000. The defendants maintain that the applicants have not been paid or received the value of the share capital created and issued by them, at least, to the extent of the nominal value thereof, and that the value received by the applicants for such shares is far short of the nominal value thereof, and accordingly that the paid-up share capital, towards payment of the dividend on which the defendants are bound to make the aforesaid contribution, is not £180,000, and does not exceed the sum of £132,000."

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The application, which included other matters, was heard by the Railway and Canal Commissioners between 28th November and 6th December 1911, and judgment was delivered on 27th January 1912.*

* LORD MACKENZIE'S opinion contained the following passages :—*Paid-up Capital*.—Under the dividend guarantee clauses the obligation of the North British Company is to make up to the extent specified in articles 7 and 8, if necessary, a sum sufficient to pay a dividend of 4 per cent on the paid-up share capital of the Newburgh and North Fife Railway Company. . . . The argument for the North British Company was that the agreement of 31st May 1906 between the Newburgh Company and the Syndicate, under which the latter agreed to construct the line, and the former agreed in consideration thereof to issue their capital to the Syndicate, was *ultra vires*. It is not suggested that there was any fraud or misrepresentation. It is said to be *ultra vires* because (1) under it there was a delegation of the duties of the directors and of the Company; (2) it provided for the issue of share capital otherwise than for payment in cash; (3) it provided for the issue of shares at a discount; and (4) the capital was not applied to the purposes which the Act authorises. In my opinion all these grounds of attack fail. The position of the Company in 1906 has to be considered. Their Act had been obtained in 1897, and they had on three different occasions obtained an extension of time for the exercise of their powers. They had failed to raise their capital, and accordingly entered into the agreement with the Syndicate by which they got the line made. It is said that the Syndicate agreement is not a construction contract. [His Lordship quoted articles 1 and 6 of the agreement.] I agree with the passage in Mr Dempster's evidence where he says "the contract which we entered into then was a wise contract and fully justified from a business point of view." The Newburgh Company made the agreement in *bona fide*. Before entering into it estimates had been obtained, and the calculations made are fully detailed in the evidence of Mr Dempster and Mr Beer, into which I do not propose to go in detail. It is sufficient to say that in my opinion they amount to this, that the Syndicate underwrote the construction of the line on the basis approximately of a 10 per cent profit, with a possibility of about the same amount more if none of the sum estimated for contingencies was required. In consideration of the issue of the whole capital to them the Syndicate took upon themselves the obligations and risk of the construction of the line. The profit was not, in these circumstances, excessive. It was argued that the Syndicate, before they made the agreement with the Newburgh Company, had an offer for the construction of the line at a figure considerably under that which appears in the estimates obtained by the Newburgh Company. There is no sufficient evidence to connect the Newburgh Company with this. With regard to the point that the total capital was fixed on the basis of a double line being constructed, whereas only a single line with land and bridges for a double line was made, the evidence shows that there was a rise in the cost of construction between the date of the Act and 1906. So far as the facts are concerned, therefore, my opinion is against the contention of the North British Company, as set out in their pleadings and maintained at the bar,

An order was pronounced on 21st March 1912 to the effect, *inter alia*, "that according to the true construction of articles 7 and 8 of the said agreement [*i.e.*, the agreement contained in the schedule to the Newburgh and North Fife Railway Act, 1897] . . . the amount of the paid-up share capital of the applicants, towards payment of dividend on which the defendants are bound to contribute, is £180,000, making with a debenture issue of £60,000 a total of £240,000."

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The defendants, the North British Railway Company, appealed to the Court of Session, and the case was heard by the First Division, consisting of the Lord President, Lord Johnston, and Lord Skerrington, on 5th, 6th, 7th, and 8th November 1912. Thereafter a rehearing was ordered before a Court of Seven Judges, and the case was reargued on 4th, 5th, and 6th March 1913 before the Lord President, Lord

that the agreement of 31st May 1906 was not a genuine or *bona fide* construction contract.

It is, however, said that the agreement is contrary to law. The basis of the argument was that the Newburgh Company had done what was equivalent to issuing their shares at a discount. This argument is based on the view that it would have been illegal for them to do so. It is to be observed, however, that the Newburgh and North Fife Railway is a company formed under the Companies Clauses Act, and is not a company under the Companies Act of 1862. So far as the decisions have gone, they are adverse to the defendants' contention that it is illegal for a company formed under the Companies Clauses Act to issue their shares at a discount. I may refer to the opinion of Lord Shand in the case of *Klenck v. The East India Company for Exploring and Mining, Limited*, 16 R. 371, at p. 280; the judgment of Romer, J., in the case of *Statham v. Brighton Marine Palace and Pier Company*, [1899] 1 Ch. 199 (this is a decision directly on the question), and the case of *Webb v. Shropshire Railways Company*, [1893] 3 Ch. 307 (the decision in this case, however, turned upon the terms of the special Act). It is not necessary to determine whether it was illegal for the Newburgh Company to issue their shares at a discount or not. They did not in fact issue their shares at a discount. They received full value for the share capital which they issued. It has long been recognised as regards companies under the Companies Acts that shares can be issued against money's worth. As Lord Watson points out in the *Ooregum* case, [1892] A. C., at p. 137, it has been ruled that so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined. The effect of the judgment in *in re Wragg, Limited*, [1897] 1 Ch. 796, is that the Court will not inquire into the value of the consideration unless the agreement under which the shares were issued is impeached for fraud or misrepresentation, the question of value being one to be decided between the parties themselves. This law is no less applicable in the case of a company under the Companies Clauses Act than it is in the case of a company under the Companies Acts. When it is applied to the present dispute, in which there is no suggestion of fraud or misrepresentation, a decision against the defendants upon the facts really concludes the case against them. The argument against the validity of the Syndicate agreement which was founded upon an examination of its terms in my opinion fails. If sound against the Syndicate, it would be equally sound against a contract made with any firm of contractors for the construction of a line.

It was further contended that even assuming the Syndicate contract to be *ex facie* valid, yet the money had been misapplied by being spent on purposes which were not authorised by the statute. I understood that the case to which the greatest weight was attached on this point was the *Great*

July 17, 1913. Kinnear, Lord Dundas, Lord Johnston, Lord Salvesen, Lord Guthrie, and Lord Skerrington.

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Argued for the appellants;—In the scheduled agreement the appellants' obligation to contribute towards the dividend was subject to the conditions that the capital of the Newburgh Company should be subscribed, and that the Company themselves should construct the railway. The capital had not been "subscribed" or "paid-up." The word "subscribed" was to be read in its ordinary sense as "paid in cash," and had been so interpreted in a case¹ under section 16 of the Lands Clauses Act,² a section intended primarily for the protection of land-owners. Allotment was not equivalent to subscription,³ although in a question between a company and its creditors subscription might mean "obligation to subscribe."⁴ As the condition that the capital should be subscribed had not been fulfilled, the appellants were freed from their whole obligation to contribute towards the dividend, and

North-West Central Railway Company v. Charlebois, [1899] A. C. 114. In that case a contract was held *ultra vires* on the ground that certain benefits which were really of a gratuitous nature were given. There is nothing of a similar character under the Syndicate agreement in question here. Great stress was laid upon the document No. 168, which is a statement of the income and expenditure of the Engineering and Electric Construction Syndicate, Limited, from 30th May 1906 to 17th November 1911, under the heading of the Newburgh and North Fife Railway Contract—[Printed *supra*, p. 1171]. This, however, is a document with which the Newburgh Company had no concern. It relates to the affairs of the Syndicate. What the Syndicate did with the shares after they got them—whether they dealt with them in blocks, as was the case here, or disposed of them in any other manner they considered most advantageous for themselves, either at a profit, or, as was to be anticipated here, at a loss, does not affect the validity of the bargain made by the Newburgh Company.

My conclusion therefore is that the whole capital of the Newburgh Company is fully paid up within the meaning of the scheduled agreement. This answers in terms, what, according to the opinions expressed by the First Division on 22nd February 1911 [1911 S. C. 710], is within the reference.

MR GATHORNE HARDY concurred.

SIR JAMES WOODHOUSE.— . . . With regard to the third obligation, whereby the North British Company guarantees the dividend on the paid-up capital, I am quite unable to follow Mr Cooper in the long argument which he addressed to us, with a view to establishing that the defendants were under no legal liability to make up the deficiency in the revenue under articles 7 and 8 of the agreement. I see no ground for his contention that the applicants exceeded their statutory powers in entering into the agreement of the 31st May 1906 with the Construction Syndicate, neither do I think there is any rational basis in fact for his allegation that the applicants

¹ *Great Western Railway Co. v. Swindon and Cheltenham Extension Railway Co.*, (1882) 22 Ch. D. 677, *per* Chitty, J., at p. 687, reversed by Court of Appeal on another ground.

² 8 and 9 Vict. cap. 18.

³ *Arnison v. Smith*, (1889) 41 Ch. D. 348, *per* Kekewich, J., at p. 356, Lord Halsbury, Lord Chancellor, at p. 368, Cotton, L.J., at p. 371; Lindley, L.J., at p. 373; *Bloomenthal v. Ford*, [1897] A. C. 156, *per* Lord Herschell, at pp. 168, 169.

⁴ *Burke v. Lechmere*, (1871) L. R., 6 Q. B. 297.

neither the Railway Commissioners nor the Court could reform the contract. Moreover, the Newburgh Company had acted *ultra vires*—first, in delegating their powers to the Syndicate and, second, in issuing their shares for a consideration other than money or money's worth. (1) Parliament had committed to the Company the duty of constructing the railway, and what required statutory powers could not be delegated.¹ The Company could employ contractors, but the Syndicate, as appeared from the 1906 agreement, occupied a higher position than that of a contractor. They undertook the whole duties and liabilities of the Company except the ministerial work of serving notices on the landowners and issuing scrip. They could even dictate the times at which scrip should be issued. The delegation of statutory duties was contrary to public policy.² Where a company was created for a public purpose, either under the Companies Acts or by Act of Parliament, whatever was not permitted nor fairly incidental to its powers must be held to be prohibited.³ The agreement with the Syndicate was therefore null *ab initio*, and the appellants, even if they had known of it, could not have homologated it.⁴ (2) The Newburgh Company were acting *ultra vires* in handing over their capital to the Syndicate on a slump contract without any relation to the actual expenditure. The capital represented more than the sums which were spent in acquiring the land and constructing the line, and the surplus was spent on unauthorised purposes, and was therefore an illegal bonus.⁵ Admitted

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acted throughout in an illegal or irregular manner, so as to relieve the defendants from their liability.

It is important to note that the defendants not only carefully abstained from making, but wholly disclaimed any imputation of fraud, misrepresentation, or bad faith against the applicants. I have most carefully considered the proofs and documents in process, and I fail to find in the facts and circumstances in evidence before us the shadow of a case to support the contentions put forward by Mr Cooper. I think the transactions between the Newburgh Company and the Syndicate are characterised by the utmost good faith and fair dealing, and are within the powers of their Act. My Lord has in his opinion dealt fully with the cases that were discussed before us, and I desire respectfully to express my entire concurrence in the conclusions at which he has arrived.

¹ Attorney-General v. Great Eastern Railway Co., (1879) 11 Ch. D. 449, per James, L.J., at p. 467, (1880) 5 App. Cas. 473.

² Beman v. Rufford, (1851) 1 Simon (N. S.), 550; Winch v. Birkenhead, Lancashire, and Cheshire Junction Railway Co., (1852) 5 de G. & Sm. 562, per Parker, V.-C., at p. 579; Johnson v. Shrewsbury and Birmingham Railway Co., (1853) 22 L. J., Ch. 921; Howard's case, (1866) L. R., 1 Ch. 561, per Kindersley, V.-C., at p. 563; Gardner v. London, Chatham, and Dover Railway Co., (1867) L. R., 2 Ch. 201, per Cairns, L.J., at p. 212.

³ Ashbury Railway Carriage and Iron Co. v. Riche, (1875) L. R., 7 E. and I. App. 653; Attorney-General v. Great Eastern Railway Co., 11 Ch. D. 449, 5 App. Cas. 473, per Lord Selborne, Lord Chancellor, at p. 478, Lord Blackburn, at p. 481, and Lord Watson, at p. 486.

⁴ Ashbury Railway Carriage and Iron Co. v. Riche, L. R., 7 E. and I. App. 653, per Lord Cairns, Lord Chancellor, at p. 672, Lord Chelmsford, at p. 679, and Lord Selborne, at p. 695.

⁵ Edinburgh Northern Tramways Co. v. Mann, (1891) 18 R. 1140, per Lord Trayner, at p. 1146, (1892) 20 R. (H. L.) 7, per Lord Herschell, Lord Chancellor, at p. 11; Mason's Trustees v. Poole & Robinson, (1903) 5 F. 789, per Lord President Kinross, at p. 797; Earl of Shrewsbury v. North Staffordshire Railway Co., (1865) L. R., 1 Eq. 593, per Kindersley,

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that the face value of the shares could not be realised, and that the Company were in fact buying the Syndicate's credit, still that was not one of the objects contemplated by the Company's Act of Parliament.¹ The Act, particularly sections 6, 8, 9, and 11, contemplated the issue of shares for cash and for nothing else, and there was no authority for the proposition that companies incorporated under the Companies Clauses Consolidation (Scotland) Act, 1845,² could issue their original shares for anything but money or money's worth. In section 8* the words "shall otherwise have become entitled" referred to the acquisition of shares by transfer, marriage, inheritance, or bankruptcy, and did not refer to purchase otherwise than in cash. Companies registered under the Companies Acts could issue their shares for money's worth, but that was in virtue of section 25 of the Companies Act, 1862,³ re-enacted in section 25 of the Companies (Consolidation) Act, 1908.⁴ Even in the case of these companies the money's worth must be of genuine present value, not a mere promise to give goods.⁵ In the present case the shares were not even issued for money's worth, but were issued at a discount. In so issuing them the Company were acting *ultra vires*. Section 21 of the Companies Clauses Act, 1863,⁶ gave power to a Company to issue new shares on such terms and conditions as the directors might think advantageous, "but so that not less than the full nominal amount of any share or portion of stock be payable or paid in respect thereof." The words quoted were repealed with regard to railway companies by section 27 of the Railway Companies (Scotland) Act, 1867,⁷ and with regard to other companies under the Companies Clauses Act, by section 5 of the Companies Clauses Act (1863) Amendment Act, 1869⁸; but these sections applied only to the issue of new shares, and there was no authority apart from the case of *Statham*⁹ for a company issuing their original shares at a discount. This applied equally to companies under the Companies Acts and those under the Companies Clauses Acts, the principle being that the public were to be assured that the capital, so far as not spent on authorised objects, remained undiminished.¹⁰ Section 89 of the Companies (Consolida-

V.-C., at p. 617; *Great North-West Central Railway Co. v. Charlebois*, [1899] A. C. 114, at p. 122.

¹ 60 and 61 Vict. cap. ccxxi.

² 8 and 9 Vict. cap. 17, secs. 6, 8, 9, 11, 13, 14, 17, 19, 20, 23, 37, 38, 39, and 59.

* The Companies Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 17), sec. 8, enacts:—"Every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company . . . shall be deemed a shareholder of the company."

³ 25 and 26 Vict. cap. 89.

⁴ 8 Edw. VII. cap. 69.

⁵ *Pellatt's case*, (1867) L. R., 2 Ch. 527; *National House Property Investment Co., Limited, v. Watson*, 1908 S. C. 888.

⁶ 26 and 27 Vict. cap. 118.

⁷ 30 and 31 Vict. cap. 126.

⁸ 32 and 33 Vict. cap. 48.

⁹ *Statham v. Brighton Marine Palace and Pier Co.*, [1899] 1 Ch. 199.

¹⁰ *Hoole v. Great Western Railway Co.*, (1867) L. R., 3 Ch. 262, *per Cairns, L.J.*, at p. 270; *Trevor v. Whitworth*, (1887) 12 App. Cas. 409, *per Lord Herschell*, at p. 415, *Lord Watson*, at p. 423, and *Lord Macnaghten*, at p. 438; *Ooregum Gold Mining Co. of India v. Roper*, [1892] A. C. 125, *per Lord Halsbury, L.C.*, at p. 133, *Lord Herschell*, at p. 141,

tion) Act, 1908,¹ allowed the payment of brokerage, but only if provided for by the articles of association.² *Statham's case*³ was wrongly decided, and the dicta of Lord Shand in *Klenck's case*⁴ were unsound. In support of the competency of the appeal the appellants referred to sec. 17 (4) of the Railway and Canal Traffic Act, 1888,⁵ and to the case of the *North-Eastern Railway Company v. the North British Railway Company*.⁶ July 17, 1913.
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Argued for the respondents;—The appellants were working the line under their agreement with the respondents, and accordingly they were not entitled to have it reduced altogether. The appellants knew that the capital could not be raised, they knew of the agreement with the Syndicate, and were themselves sub-contractors under it; they were accordingly barred from maintaining the plea of *ultra vires*. It might be open to a shareholder of the Newburgh Company to complain of the particular terms of the agreement, but the appellants, as a third party, could only object to the result on the ground that money had been spent outside the undertaking. The Commissioners, who were final on questions of fact, had held, as appeared from the opinions, that the agreement was fair and honest and that the Newburgh Company got full value for their shares. The consideration was not merely the construction of the line; it included a guarantee of indemnity against claims, and also the cost of getting the shares underwritten. It was permissible for a company to have recourse to a financial house and to pay brokerage if necessary⁷; and in fact the shares of railway companies were usually underwritten. It made no difference that the financial house was also the contractor. Contractors' lines such as this had received judicial cognisance.⁸ The agreement with the Syndicate did not amount to delegation. The Newburgh Act did not direct the method of construction, and what was not prohibited was permitted. The authorities cited by the appellants on this point, except *Howard's case*⁹ (which was a delegation by directors of their power to allot shares), were cases where the Court held that the contract amounted to a sale or lease of the undertaking. Here there was neither sale nor lease, but a construction contract, and as soon as the construction was finished the Newburgh directors resumed their powers. It was immaterial that the price was a slump sum payable by instalments. The Company were entitled under the Lands Clauses Consolidation (Scotland) Act, 1845,¹⁰ to acquire land by agreement, and the Syndicate under their agreement with the Company might get it cheaper than the directors could. The observation of James, L.J., in *The Attorney-General v. The Great*

and Lord Macnaghten, at p. 145; *Klenck v. East India Co. for Exploration and Mining, Limited*, (1888) 16 R. 271; *Mosely v. Koffyfontein Mines, Limited*, [1904] 2 Ch. 108, per Vaughan Williams, L.J., at p. 114.

¹ 8 Edw. VII. cap. 69.

² *Dominion of Canada General Trading and Investment Syndicate v. Brigstocke*, [1911] 2 K. B. 648.

³ [1899] 1 Ch. 199.

⁴ 16 R., at p. 280.

⁵ 51 and 52 Vict. cap. 25.

⁶ (1897) 25 R. 333.

⁷ *Metropolitan Coal Consumers' Association v. Scrimgeour*, [1895] 2 Q. B. 604.

⁸ *Ystalyfera Iron Co. v. Neath and Brecon Railway Co.*, (1873) L. R., 17 Eq. 142, per Jessel, M.R., at p. 148.

⁹ L. R., 1 Ch. 561.

¹⁰ 8 and 9 Vict. cap. 19.

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*Eastern Railway Company*¹ as to delegation was made in the course of the argument and had no authority. The expression "paid-up capital" meant primarily capital upon which there were no unpaid calls,² and payment need not necessarily be made in cash, it might be in services rendered,³ or it might be credited by way of set-off.⁴ This was the natural meaning of the words "shall otherwise become entitled to a share" in section 8 of the Companies Clauses Consolidation (Scotland) Act, 1845.⁵ The cases cited by the appellants on this point were inapplicable. *Arnison's case*⁶ was one of false representation; *Lord Shrewsbury's case*⁷ was one of devoting capital to paying an illegal bonus, as also was *Charlebois's case*.⁸ *Mason's case*⁹ and *Mann's case*¹⁰ dealt with illegal payment of promotion expenses, and in *Mann's case*¹⁰ there was also breach of a fiduciary duty. The shares in the present case were in fact issued for money or money's worth, but it was not *ultra vires* to issue shares, original as well as new shares, at a discount, if no better price could be got.¹¹ The Companies Clauses Consolidation (Scotland) Act, 1845,¹² made no distinction in the issue of original and new shares. The prohibition in section 21 of the Companies Clauses Consolidation Act, 1863,¹³ against issuing new shares at a discount (afterwards repealed by section 27 of the Railway Companies (Scotland) Act, 1867¹⁴), left the law as to the issue of original shares as it was, and the prohibition in the Act of 1863 would not have been necessary unless it had been previously possible to issue shares at a discount.

At advising on 17th July 1913,—

LORD JOHNSTON.—Under the reference contained in article 14 of the agreement between the North British Railway Company and the promoters of the Newburgh and North Fife Railway Company, which was scheduled to the Act of the latter Company passed in 1897, and by its 42nd section confirmed and made binding on the Company, two main questions were submitted by the parties to the Railway Commissioners—the first, which embraced a large number of matters of detail, was, speaking generally, whether the North British Company, in fulfilling the obligations undertaken by them to work the North Fife Company's line, were developing the

¹ 11 Ch. D., at p. 467.

² *Webb v. Shropshire Railways Co.*, [1893] 3 Ch. 307, *per* Lindley, L.J., at p. 329; Lindley on Companies, (6th ed.) p. 549.

³ *Ooregum Gold Mining Co. of India v. Roper*, [1892] A. C. 125, *per* Lord Herschell, at p. 140; *In re Wragg, Limited*, [1897] 1 Ch. 796, *per* Vaughan Williams, J., at p. 815, and Lindley, L.J., at p. 829.

⁴ *Spargo's case*, (1873) L. R., 8 Ch. 407.

⁵ 8 and 9 Vict. cap. 17, quoted *supra*.

⁶ *Arnison v. Smith*, 41 Ch. D. 348.

⁷ *Earl of Shrewsbury v. North Staffordshire Railway Co.*, L. R., 1 Eq. 593.

⁸ *Great North-West Central Railway Co. v. Charlebois*, [1899] A. C. 114.

⁹ *Mason's Trustees v. Poole & Robinson*, 5 F. 789.

¹⁰ *Edinburgh Northern Tramways Co. v. Mann*, 18 R. 1140.

¹¹ *Statham v. Brighton Marine Palace and Pier Co.*, [1899] 1 Ch. 199, *per* Romer, J., at p. 204; *Webb v. Shropshire Railways Co.*, [1893] 3 Ch. 307, *per* Lindley, L.J., at p. 329.

¹² 8 and 9 Vict. cap. 17.

¹³ 30 and 31 Vict. cap. 126.

¹⁴ 26 and 27 Vict. cap. 118.

traffic of the line in the spirit of the agreement; the second related to a July 17, 1913. "difference as to the amount of the paid-up share capital" of the North Fife Company towards the payment of the dividend on which the North British Company were bound to contribute.

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The Newburgh Company maintained that the amount was £180,000, being the whole authorised share capital of the Company, which they contended was issued and paid up.

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The North British Company, admitting that the question of their liability or non-liability to do so was matter of arbitration under the scheduled agreement, and therefore within the jurisdiction of the Commissioners to decide, maintained that in the circumstances, and for the reasons advanced by them, they were under no liability to contribute towards payment of dividend on the whole share capital of the Newburgh Company. But they further maintained that, if they were not so liable, it was not within the jurisdiction of the Commissioners to determine whether they were liable to contribute any sum to make up any dividend on a smaller amount of the share capital of the Newburgh Company, or to fix and determine any capital of the Newburgh Company towards payment of the dividend on which they were bound to contribute. The second question therefore involved the determination of the meaning and effect of the undertaking of the North British Company to supplement, if necessary, the sources of revenue for payment of a stated dividend on the "paid-up share capital" of the North Fife Company.

The first question is not within the appeal to us. That appeal is entirely limited to the second question. In order to understand it, it is only necessary to say that the North British Company, by the agreement above referred to, undertook to work the North Fife line for 50 per cent of the gross revenue of the North Fife Company, as gross revenue is defined in article 4 of the agreement, and to hand over the balance of 50 per cent to or for behoof of the North Fife Company. Out of their 50 per cent the North Fife Company were to pay (article 5) sundry items, including interest on debenture stock and other borrowed money. The balance of their 50 per cent is the "net revenue" of the Company. And (article 7) "If the net revenue" accruing to "the North Fife Company is not sufficient to pay a dividend of 4 per centum per annum on the paid-up share capital" of the Company, the North British Company are to contribute *pro tanto* what is necessary to make up the deficiency, out of two sources of revenue. These are defined (articles 7 and 8), and without going into details I may say that they are both derived directly or indirectly from traffic originating in or passing over the North Fife line. This is not a guarantee of a 4 per cent dividend pure and simple. Its value is contingent, depending on actual traffic. But it was regarded by those concerned, on the advice of experts, as practically amounting to a 4 per cent guarantee, and was, I think, so intrinsically of the nature of a guarantee, that it must be judged of on the same footing as if it was an absolute guarantee, that is with strictness. It was an obligation to contribute towards dividends on the North Fife stock out of funds which, if not called upon, would remain in the coffers of the North British Company, and be available for its purposes. And I cannot distinguish in its essence between

July 17, 1918. such an obligation and a proper guarantee. I desire to emphasise this because the consideration goes deeply into the question before this Court and appears to me to have been overlooked by the Commissioners.

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Such being the obligation of the North British Company, the real question at issue is, what is "paid-up capital," not merely *per se*, but in the sense of the agreement? Is it, as maintained by the North British Company, capital subscribed and paid up in the ordinary sense of these terms: is it, in fact, capital raised on a cash basis? Or is it, as maintained by the North Fife Company, capital not subscribed for, not paid up, but raised by being issued in block to an intermediary in consideration of his undertaking the risks and obligations of the promoters and of the Company in obtaining the Act and in getting the line completed, with right to the intermediary to place the capital on the market on such terms as he pleased, and making a profit or suffering a loss accordingly—in other words, capital raised on a basis other than cash?

When the case was first before the Judges of the First Division, I came without difficulty to the conclusion that, on a consideration merely of the terms of the contract, the contention of the North British Company was sound, and that the Commissioners had come to a wrong conclusion. A further discussion of the case, and a more close examination of the history and nature of the transaction by which the capital of the North Fife Company came to be issued or raised, has not only confirmed my first view, but it has also impressed me with the importance of the question at issue, and the dangerous consequences which may ensue if the contentions by which the North Fife Company have supported their case are to receive the *imprimatur* of the Railway Commissioners and of this Court.

It is necessary, therefore, before considering the documents on which I think the question depends, first to state, as clearly as possible, how the nominal capital of the North Fife Company was raised.

The project of the North Fife promoters was a line from St Fort to Newburgh, to link the North British Tay Bridge route with their original line from Ladybank to Perth, *via* Newburgh. The promoters were no doubt locally interested, but they were counting on the competition between the North British and the Caledonian. They regarded their line as of importance to the North British in this competition. It was, at the time, to a certain extent so regarded by the North British Company. Hence the agreement which we have to construe. It was made, and the North Fife Act passed in 1897. But even with the *quasi* guarantee of the North British, the promoters failed to get anyone with capital to look at their shares. I do not think the North British Company, after the North Fife Act was got, were particularly anxious on the subject of the construction of the line, for, though they looked benevolently on the promoters, and gave their concurrence to several extensions of time being obtained, they made no objection that the line was still not commenced in 1906. In that year the solicitor for the promoters, who one can see was really the soul of the promotion, came into touch with a firm of Arbutnot, Latham, & Company, a financial house in London—they are described as "an accepting house"—and therefrom sprang a further agreement under which the North Fife line was ultimately made.

I am of opinion, contrary I think to some of the Commissioners, and I July 17, 1913.
 am inclined to think also to some of your Lordships, that we are bound to
 look behind this agreement which came to be made between the North and North
 Fife Company and Messrs Arbuthnot, Latham, & Company. It may be Newburgh
 that, having entered into a pooling arrangement with the Caledonian in the Fife Railway
 end of 1907, the North British have ceased to have any interest in the Co. v. North
 North Fife line, and that, since it was opened in 1908-9, the North British British Rail-
 Company have fallen very far short of acting in the spirit of their under- way Co.
 taking of 1897, and have starved instead of developing the traffic of the Ld. Johnston.
 North Fife line. But as they are bound to develop the traffic within the
 spirit of the agreement, so the North Fife Company were bound to issue
 their capital within the terms of the agreement, if they are to exact the
 contribution in guarantee of their dividend.

What then was the position created in 1906 by the agreement between
 the North Fife Company and Messrs Arbuthnot, Latham, & Company?
 By that time the promoters had become hopeless of raising capital them-
 selves. They had failed to interest any other capitalists. Accordingly,
 they then entered into an agreement with Arbuthnot, Latham, & Company
 (under the guise of the Engineering Electric and Construction Syndicate,
 Limited), the true meaning and effect of which was—We hand you over
 our whole share capital and all our powers under our Act, and you under-
 take to construct and complete our line.

It was well known, and was the basis of the agreement, that Arbuthnot,
 Latham, & Company were a financial firm. But they were of good stand-
 ing, and the promoters of the North Fife line took steps to satisfy them-
 selves that they were financially able to carry out what they undertook.
 Still, in fact, what the North Fife promoters bought or acquired, under the
 contract of 1906, was Arbuthnot, Latham, & Company's credit, and of
 course they paid for it. I do not like to say that they sold their Act to
 Arbuthnot, Latham, & Company, because in the expression there is an
 invidious imputation of personal interest. And I should wish to say, with
 Sir James Woodhouse, that "the transactions between the Newburgh Com-
 pany and the Syndicate are characterised by the utmost good faith and fair
 dealing," though I must qualify that statement by the addition of the words
inter se, and though I cannot follow his lead when he says farther, "and
 are within the powers of their Act." Were it necessary for my judgment
 I should be prepared to hold that they were not within their powers under
 their Act. But it is not in my opinion so much a question of their powers
 under their Act, as of what was in the contemplation of their agreement with
 the North British Company. It is here that I find myself obliged to part
 company with the Commissioners. They have, I think, mistaken the issue.
 What the North Fife Company did was not, in my opinion, within the
 contemplation of that agreement. In point of fact what the promoters did,
 though I do not use the expression invidiously, was in effect to sell or
 assign their Act, for they put Messrs Arbuthnot, Latham, & Company pre-
 cisely in their position under the Act, though they coupled this with an
 obligation on their vendees or assignees to complete the line. Now Arbuth-
 not, Latham, & Company, though nominally the contractors, never intended
 to construct the line themselves. They were to employ proper construc-

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tional contractors, and in point of fact had in their pockets an offer to execute the work from the contractors who ultimately undertook it. And they were placed in command of the whole share and debenture capital of the Company, subject to its being doled out to them proportionally to the progress of the work. It was on their ability *first* to contract on cash terms for the construction of the line, and *second* to place, at least on terms, the share capital of the Company with their clientele, that they relied for their profit. They had the credit and the connection which gave them that ability. The promoters had neither. Hence I think it absolutely true that what the promoters acquired was the credit of Arbuthnot, Latham, & Company, and with it, if it proved as good as they were advised, the completion of their line, and that what Arbuthnot, Latham, & Company acquired in return was the whole capital of the Company under the Act, to make the best they could of—and their profit depended on the one hand on the terms of the cash contract they were able to make for the construction of the line, and on the other on the terms on which they were able to place the Company's capital on the market. As to both they had a perfectly free hand. When the true meaning and effect of the agreement between the North Fife Company and Messrs Arbuthnot, Latham, & Company is grasped, three conclusions, I think, unquestionably follow:—1st, that the issue of capital thereby effected was not an issue directly sanctioned by the general or special Acts applicable; 2nd, that it cannot be supported as an issue of capital in consideration of value in kind, on the principle accepted in cases under the Registered Companies Acts, even assuming that principle applicable; and 3rd, that it cannot possibly be represented as such an issue as was contemplated by the North British Railway Company and the North Fife Company, when they entered into the agreement under construction.

The promoters, no doubt, thought that they had done a good stroke of business in enlisting Arbuthnot, Latham, & Company to do what they were quite unable to do themselves, viz., make their Act march. They seem to have thought that they had obtained an Act to enable them to make a line of railway; that their business was to make it; that they were taking the only way which, in their circumstances of credit and with the line's prospects, was open to them to attain that end; that in the result the railway was made, completed, and opened, and that there the matter ends. I cannot help thinking that this was very much the view of the Commissioners. But irrespective of whether this course of dealing was within the Company's powers under their Act, it must be apparent that the question between the North Fife Company and the guarantors of dividends on their capital is not quite so simple as this mode of presenting it would suggest.

I have given the general result of this agreement between the promoters and Messrs Arbuthnot, Latham, & Company, and I only intend to refer to it in detail so far as necessary for this judgment. For there is an immense amount of material, even in this branch of the case, which must be avoided if any pretence of brevity is to be attained. I have purposely spoken of the promoters and not of the Company, for I think that there is a grave question whether the Company, though created by statute, had in 1906 yet come into existence, and as to the validity of a good many of the earlier actings of those who assumed to represent the Company. But I do not desire to

cumber this judgment with any question not necessary for the decision of July 17, 1913. the case, and I shall assume that the agreement was made by a properly constituted board of directors of an existing company. Also I have spoken of Messrs Arbuthnot, Latham, & Company as the real contracting parties. But they created as an intermediary, *ad hoc*, the Engineering, Electric, and Construction Syndicate, Limited, for good reasons, fully explained. This Syndicate was just their *alter ego*, and the ostensible transaction in 1906 was between the North Fife Company and the Syndicate.

On its face the contract was a contract to construct, not as was contemplated by the Act a double, but only a single, line of railway with land and bridges for a double line. The Syndicate, as nominal contractors, undertook not only (1) to construct the line, but also to pay or provide (2) the legal and parliamentary costs of the Act, (3) the legal costs incurred by the Company during construction of the line, (4) a sum of £4400 for the administrative expenses of the Company during construction, and in addition (5) to pay for all land required, subject to a right to any surplus land. I should have mentioned that the capital of the Company was £180,000, in 18,000 £10 shares, with a borrowing power of £60,000, in all £240,000, and that it was open to the Company to issue £60,000 of their share capital in preference shares. In consideration, then, of these undertakings, article 6 of the agreement provided that the Company should pay to the contractors £240,000, exactly the amount of their share and debenture capital, "of which £109,400 shall be paid in ordinary shares of the Company, £60,000 in preference shares, and £60,000 in 4 per cent debenture stock of the Company, . . . and the remainder, namely the sum of £10,600, in cash."

The history of this £10,600 is worth pursuing. It had a double origin. In the first place, the Act, section 16, required as a quorum for general meetings five shareholders, holding not less than £10,000 of the Company's capital. In the second place, there was required for the expenses of the Act and for the costs of administration during construction a sum of about £10,600 in cash. Accordingly, with the idea of legalising their proceedings and to produce this sum, 1063 shares were subscribed and paid for in cash, producing £10,630, and this was the only sum in cash in respect of its shares which was ever subscribed, or ever came into the coffers of the Company, and it was immediately turned over to the Syndicate under the agreement in order that they might implement their cash obligations to the Company. The amount was provided to the extent of £1500 by the subscription for qualification shares by five directors, to the extent of £9100 by members of the firm of Arbuthnot, Latham, & Company, and of the balance of £30, for some unexplained reason, by three officials of the Company each taking a share. And in the end, when the rest of the capital was disposed of by the Syndicate at much below par, it was thought not only just, but competent, to place the partners of Arbuthnot, Latham, & Company, *pari casu* with those who acquired the remaining shares, by giving them *ex post facto* an equivalent rebate. This remarkable transaction shows clearly that the parties to it understood and appreciated the so-called construction agreement exactly as I do.

But the provision of the contract to which I wish to draw particular attention is contained in the seventh and following sections:—The contract

July 17, 1913. price of £240,000 was arbitrarily divided into £195,000 for works and maintenance, and £45,000 for land and parliamentary and other costs. Then a schedule of prices was to be made out by the Syndicate, or contractors, subject to the approval of the Company's engineer, under which, irrespective of real values, the costs of the works and maintenance should work out at £195,000, and such schedule of prices was to be the basis on which the valuation for payments to account, as the work proceeded, should be made. In the same way the remaining £45,000 also was to be arbitrarily divided into £15,000, to be attributed to the element of costs and to be met at once by payment in ordinary shares, and £30,000, to be attributed to land, and to be doled out along with the monthly payments for works, in proportion to the acreage, not the value, of land taken, as compared with the total land required.

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But an astute attempt was made to legalise the transaction or make it square with the assumption that share capital can, under an Act embodying the Companies and Railways Clauses Acts, be issued in return for work done. I have shown how the "contract sum of £240,000" was (article 7) to be artificially divided and attributed proportionally to the value of work from time to time completed and the acreage of land taken. At the expiry of each calendar month (article 8) the engineer was to estimate the value of work executed, &c., during the month. And, in estimating that value, he was to "have regard to the division of the contract sum mentioned in the preceding clause hereof," and a schedule of prices was, as already stated, to be made out, irrespective of real value, under which the execution of the work, including maintenance, "shall work out at £195,000, and such schedule of prices shall be the basis on which the valuation of payments on account is to be made." For the value of work so estimated, &c., the engineer's certificate was to be issued to the Syndicate, as contractors. Then (article 9) the amount of the engineer's certificates was to be paid "by crediting the amount of each certificate on or by the issue as fully paid to the contractors or as they might direct of the shares ordinary or preference and the debenture stock in such proportions as shall be within the Company's legal powers." To which intent certificates of indebtedness were to be issued by the North Fife Company for the amount of the engineer's certificates, in order that the amount of these certificates of indebtedness might be converted into the shares or debenture stock to cover which they had been issued.

To complete the statement of facts, I have only to add that at the time this agreement was made between the North Fife Company and the Syndicate, the Syndicate had provided themselves with constructional contractors, ready to make the line on a cash basis of something like £160,000—it is unnecessary for my judgment to go into more accurate calculations—and that the Syndicate had in view the marketing of the shares in blocks of £12,000, as they actually did, on terms that the takers must accept £6000 ordinary along with £3000 preference and £3000 debenture stock at an overhead price of 80 per cent, though their scheme was generally expressed as if preference and debenture stock were taken at par, and ordinary at 60 per cent, which works out to the same thing. The result was a realisation of the Company's capital at a rebate (for I cannot call it a discount), when certain allowances are made, of something like £50,000.

In these circumstances the Railway Commissioners have determined that July 17, 1913. the amount of the paid-up share capital (the debenture capital not falling to be considered) of the North Fife Company, towards payment of the dividend on which the North British Railway Company are bound to contribute, is £180,000, being the whole authorised share capital of the Company. In this determination I think that the Commissioners' judgment is not well founded.

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We have had a very able and learned argument on this part of the case, and a very exhaustive citation of authority, but much of it has been, I think, beside the point. There was a long discussion, for instance, on the question whether a company, created by special Act incorporating the Companies Clauses Acts, could issue its stock at a discount. I do not think that the North Fife Company has established that general contention. But I do not propose to enter on its discussion at length. I content myself by saying that the contention is in the teeth of the terms of the Company's special Act, and of the Companies Clauses Acts of 1845, 1863, and 1869, and is supported only by the general rubric of the much canvassed case of *Webb v. Shropshire Railways Company*,¹ whereas a perusal of the case itself shows that its circumstances do not support the general rubric, for they were special, almost unique, while the terms of the Act in question were adapted solely to suit those special circumstances. Even Romer, J.—who appears to have held personal views on the general question hitherto unsupported, which he adumbrates in *Webb's case*,¹ and to which as Judge of first instance he gave effect in the *Brighton Marine Palace case*²—in *Webb's case*¹ admits that the general considerations “do not apply to this case at all.” The opinion of Lord Shand in *Klenck's case*³ is also prayed in aid by the North Fife Company. That opinion does not touch the general case which we have here. It is only that “apparently in certain limited cases the shares of railway and other companies which have adopted the Companies Clauses Acts may be issued at a discount.” This is not one of these limited cases, *cf.* Lord Macnaghten in *Ooregum Gold Mining Company*.⁴ But I do not think that the North British Company are concerned with this question. For, first, it is impossible to describe the transaction regarding the capital of the Company, when analysed, as the issue of stock or shares at a discount. And, in the second place, I do not think that the North British Company are entitled directly to raise it. It is one for the shareholders *inter se*, or for the creditors, should the equivalent of a winding-up prove necessary and possible.

What the North British Company are concerned with, but what, as I have already said, has rather been lost sight of in the argument, is the interpretation and enforcement of an agreement. I have already dealt with the essential provisions of that agreement, but it must be noted that it was a provisional agreement—provisional on *the Act passing*, and the line being *made under the Act*. Thus article 1 says that, “in the event of an Act being obtained *and the capital being subscribed*,” the North Fife Company

¹ [1893] 3 Ch. 307.

² *Statham v. Brighton Marine Palace and Pier Co.*, [1899] 1 Ch. 199.

³ 16 R., at p. 281.

⁴ [1892] A. C., at p. 146.

July 17, 1913. shall, as soon as convenient, purchase the land, and make, construct, and complete the line: article 2, that, "upon the construction and completion and opening" of the entire line, the North British Company shall work it: article 4, that the North British Company shall collect the "gross revenues" of the line, and "shall be entitled to retain 50 per centum thereof as their remuneration," and shall pay over the "balance of 50 per centum to the"

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To the expression in article 1, "In the event of . . . the capital being subscribed," and to the expression in article 7, "on the paid-up share capital," I am only able to give that meaning which the ordinary use of language demands. When a man is said to "subscribe" for capital in a company, and there is nothing in the document to qualify the expression, the expression imports that he undertakes to pay his subscription in cash, and so when the share capital is spoken of as "paid-up share capital," the expression imports that it has been paid up in cash.

There is nothing in the agreement in question to qualify these expressions, but there is something which leads directly to support the ordinary construction. The agreement is dependent on an Act being obtained, and it is entered into with reference to that Act and in reliance on its terms. When one turns to that Act it is found that the preamble narrates the obligation of the North British Company under the scheduled agreement to contribute, if necessary, to make up a dividend of four per cent on the "paid-up share capital" of the North Fife Company. And when the sections of the Act are examined, I do not think that there can be the slightest doubt that "paid-up share capital" means capital divided into shares, and, so far as paid-up, paid-up in cash. Section 6 says that the capital shall be £180,000 in 18,000 shares of £10 each, and that the Company may raise any sum not exceeding £60,000 of the said capital by the creation and issue of preference shares, provided that no such preference shares shall be created or issued until the Sheriff certifies that a like sum of £60,000 of the said capital has been issued as ordinary share capital, and accepted, and *one-half thereof has been paid up*. Again, section 8 says that the Company shall not issue any share under authority of the Act, nor shall any such share vest in the person accepting the same until a sum not less than one-fifth of the amount of said share is paid in respect thereof. Again, section 9 says that a fifth of the amount of a share shall be the greatest amount of a call, that two months at least shall intervene between successive calls, and that three-fourths shall be the utmost aggregate of calls made in any year. Again, with regard to the exercise of the borrowing powers conferred, section 11 says that "No such sums shall be borrowed until £60,000 (being one-third share of the capital of £180,000) is issued and accepted, and one-half thereof is paid up in respect of each" sum of £20,000, which goes to make up the £60,000 to which the borrowing powers

are limited. Lastly, section 14 says that "All monies raised under this Act, whether by shares, debenture stock, or borrowing, shall be applied only to the purposes of this Act to which capital is properly applicable."

I do not propose to enter on an examination of the Companies and Railways Clauses Act of 1845 and the subsequent Acts. It is, I think, sufficient to say that in their every provision they consist with, and would lead to the same conclusion as, the Company's special Act of 1897.

When these provisions of the special Act of 1897 and of the general Acts incorporated therewith are referred to, there cannot, I think, be the slightest doubt that—when the parties contracted by the scheduled agreement that, in the event of an Act being obtained and the capital being subscribed, the North Fife Company should purchase the land and build the line, and that the North British Company should contribute to make up the deficiency of net revenue to pay a dividend of 4 per cent on the paid-up share capital of the North Fife Company—parties were dealing, as regards the North British Company's guarantee, on a cash basis, and nothing but a cash basis. It is not conceivable that any Company or individual should have undertaken such a guarantee on any other condition, for to read the agreement as the North Fife Company now seek to read it would be to assume the North British Company to undertake an indefinite guarantee, the onerousness of which would depend not merely on the costs of construction, which they could estimate, but on the credit of the North Fife Company, which they could not, because it would become a guarantee of dividend upon a capital liable to be watered according to the necessities and at the discretion of the North Fife Company. The probabilities of the situation are, of course, no conclusive indication of the intention of the agreement, but when they consist with its terms they cannot, I think, be left out of sight.

The argument for the North Fife Company must then come to rest on their contention that a great deal of water has flowed through Westminster Bridge since the Company and Railway legislation of 1845; that we have become accustomed to the practice of what are styled "contractors' lines"; that innumerable small lines have been in use to be made on contracts based not on cash, but on shares; and that everyone, including the Legislature sitting at Westminster, knows this, and legislates and contracts accordingly. I have always understood that what ninety-nine people do without legal warrant does not become legally warrantable to the hundredth, and I should be very much surprised to learn that Parliament in 1897 had any idea, when they were passing an Act authorising the making of a railway, containing the usual anxious and stringent clauses relating to the creation and issue of capital such as the one in question, that they were authorising the exercise of compulsory powers and the dealing with share capital in the way which has been here adopted, and that anyone dealing with the promoters or with the Company must be held to have dealt with that knowledge and in view of such a possibility. The bare suggestion is to impute to the Legislature the folly of continuing a practice which had ceased to have any meaning, and the dishonesty of sending forth statutes containing specious clauses which they knew to be empty words.

I think that what I have just indicated was the real case attempted to be

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July 17, 1913. made by the North Fife Company when driven to their last line of defence.

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 Ld. Johnston. There is, so far as I know, no case which directly raises this question, and only one which can be said to raise it indirectly, viz., that of *Rixon v. Edinburgh Northern Tramways*.¹ Undoubtedly, in the last end of a series of most complicated transactions, there was evolved a contract for construction of the balance of a line of tramways for payment in shares, based not on the face value but on the speculative and depreciated market value of the shares. I do not disguise the fact that the Court assumed the competency of such a contract. But the point now at issue was not raised, and though it might and should have been raised, I cannot, particularly having in view the judgment of the House of Lords, regard it as a considered judgment on the point in question. No reference was made either to the Company's special Act or to the Companies Clauses Acts of 1845 *et seq.* It may be asked, How comes it that so-called "contractors' lines" have come to be made without challenge? I think the answer is plain. The conception of the transaction indicated by the phrase involves a fraud on the Legislature indeed, but in circumstances in which no one has both title and interest to challenge. It is only where abnormal circumstances occur, as here, and I admit also in *Rixon's* case,¹ that challenge is possible.

But the North Fife Company endeavoured to present their agreement with the Syndicate under the guise of payment in shares for work done, and to pray in aid the authority of cases decided under the Registered Companies Acts of 1862 *et seq.* The attempt is specious. But even if the analogy holds, which I doubt, the substratum of fact fails, as I trust the analysis which I have made of the real terms of the transaction between the North Fife Company and the Syndicate has shown. There was no true payment in shares for work done, even in the sense of the authorities founded on. For there can be no doubt that in the case of registered companies shares can only be issued on a cash basis, and to be paid in money, or else in money's worth. It is true that, if there is a valid contract by the company for the acceptance of something of substantial value as money's worth, the Court will not inquire strictly into the adequacy of the consideration.² Yet "the cases decide that a man must really pay for the shares. And further that, if the contract makes it manifest on its face that the taker of the shares is paying less than their nominal cash value, he may be liable for the balance."³ It is of the essence of such a transaction that, as the claim of the Company is on a cash basis, so the value of the consideration given by the shareholder is a cash value. No case has occurred, and on the principle of the cases founded on no case could, I think, occur in which the depreciated value of the share as a marketable article is set against the actual value, as estimated by the parties, of the work done, services rendered, or material supplied, or in which the value of the latter is on the face of the contract artificially inflated in order to exhaust the nominal value of the shares. Take it either way, that is precisely what has been done here.

¹ 18 R. 264, 20 R. (H. L.) 53, [1893] A. C. 636.

² *In re Wragg*, [1897] 1 Ch. 796.

³ *Vaughan Williams, L.J.*, in *Mosely's* case, [1904] 2 Ch., at p. 114.

For these reasons I have come to the conclusion that the method of proceeding adopted in 1906 by the North Fife Company, in the first place, ^{Newburgh and North Fife Railway Co. v. North British Railway Co.} was not warranted under that Company's Act of 1897, and, in the second place (and this is sufficient for the decision of the case), was not such as to bring into operation the guarantee obligation of the North British Company under the agreement between them and the North Fife Company scheduled to that Act. On this branch of the inquiry, therefore, I think that the order of the Railway Commissioners was wrong, and that their declaration that, according to the true construction of articles 7 and 8 of the scheduled agreement, "the amount of the paid-up share capital of the applicants towards payment of dividend on which the defendants are bound to contribute is £180,000, making with a debenture issue of £60,000 a total of £240,000," should be recalled, and that a consequent modification should be made in their finding of expenses.

Having thus determined, so far as I am concerned, that the order of the Railway Commissioners was wrong, it remains for consideration whether it is competent for the Commissioners, if the case be remitted to them, to do anything further under the reference, and if so, what? I refer to what I said at the outset of this judgment as regards the attitude of the North British Railway Company in the event of the Commissioners being found to be wrong, upon which no judgment has, or could have, yet been given. I would remind your Lordships that the scheduled contract contains a provision (section 14) to the effect that "all questions which may arise between the parties hereto in relation to this agreement or to the carrying out of the same, shall be referred to arbitration under, and in terms of, the Railway Companies Arbitration Act, 1859." Under the Regulation of Railways Act, 1873, section 8, and the Railway and Canal Traffic Act, 1888, section 17 (2), it is competent to bring in the Railway Commissioners as arbiters in place of special arbiters, with appeal to this Court.¹ According to the practice of the Commission no deed of submission, defining the question to be submitted and exactly limiting *a priori* the functions of the Commissioners as arbiters, is required. The practice apparently is to commence such proceedings by an application and answers, and by these papers for the parties to make the questions at issue appear. In their paper in this case the Newburgh Company, having stated that their authorised capital was £180,000, that the whole of it was created and issued, and that the value thereof amounted to £180,000, maintained and claimed that the paid-up share capital towards payment of the dividend on which the defendants, the North British Railway Company, were bound to contribute, amounted to £180,000. At the same time they conceded that the defendants countered their contentions, and they, therefore, applied to the Court for an order determining, *inter alia*, the difference which has arisen between the applicants and the defendants "as to the amount of the paid-up share capital of the applicants, towards payment of the dividend on which the defendants are bound to contribute." But there arise, on this statement and on the counter-statement of the defendants, these questions:—

1st. Is the paid-up capital of the Newburgh Company on which the

¹ North-Eastern Railway Co. v. North British Railway Co., 25 R. 333.

July 17, 1913. North British Company are bound to contribute to pay dividend, in the sense of the scheduled agreement, £180,000? That question, as I have explained at length, I am prepared to decide in the negative.

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2nd. Is the paid-up capital in the sense of the agreement any less sum than £180,000?

3rd. Though the share capital of the Newburgh Company may not be either £180,000, or any less sum, in the sense of the agreement, ought not the North British Company, on equitable principles, to contribute towards payment of a dividend on something which may be termed for shortness a *quantum valuit*?

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4th. Are either the second or the third questions, or both, within the jurisdiction of the Commissioners to decide?

I take the fourth question first. I remain of the opinion which I stated in the former case between these parties,¹ that the third question is outside the contract, and therefore could not be disposed of by the Commissioners as arbiters. It assumes no liability under the contract, but a liability outside the contract. Neither do I think that the second question is within the reference, because it is just in another guise a reference to equitable considerations.

The conclusions which I have already reached involve this proposition, that the capital of the Company has neither been issued nor paid up in the sense of the contract. In a sense it has been issued. Personally I do not think that it has been legally issued, but I accept the view that the parties to this case have neither the title nor the interest to try that question. How then has it been issued? It has, except as to £10,000 or thereby, been dealt out to the Syndicate, on a fictitious not on a cash basis, proportionally to the work done by the subsidiary contractor. The Syndicate have marketed it to purchasers, who are now the shareholders, for what they could get, which works out at somewhere about 80 per cent of its face value, throwing in the debenture stock issue. It will not stand in the sense of the contract as issued and paid-up in the hands of the shareholders at its face value. It never was properly subscribed even in fact. But, passing over that difficulty, how are you to ascertain any other value than its nominal value, at which it is to be taken for the purpose of the contract? It is said it has been issued in respect of work done, and can be held as paid up in the sense of the contract to the extent of the real value of the work done. How is that to be ascertained? It can only be ascertained in one of two ways. Either you must take the price at which the Syndicate, who got the stock, actually sold it to finance the venture on which they had entered; or you must ascertain, independently of that stock exchange transaction, what the Syndicate can show to have been the real cost of the work when reduced, as it can from the books of the Syndicate be reduced, to a cash basis. Now it appears to me that neither of these operations is an operation under the contract. The contract has been broken, or perhaps, more properly stated, the conditions of the contract, on which the guarantee of dividend becomes enforceable, have not been complied with. We should, if we sent the case back to the Commissioners, be remitting to

¹ Reported 1911, S. C. 710.

them to do something which is not within their jurisdiction—viz., to find July 17, 1913. on equitable considerations a figure which is to be substituted for the figure ^{Newburgh} which should have been ascertainable under the contract, but cannot be ^{and North} so ascertained. Though I regret it, I am obliged to say that, except of ^{Fife Railway} consent of parties, the Commissioners have no jurisdiction to entertain the ^{Co. v. North} questions—the second and third which I have indicated above, or either ^{British Rail-} of them—which remain between the parties, and that we have no juris- ^{way Co.} diction to remit to them to do so. ^{Ld. Johnston.}

But should your Lordships on this branch of the case be, as I understand you are, of a different opinion, I should gladly acquiesce, because further litigation would thus be avoided and this is greatly in the interest of the parties.

Though the matter is not strictly before me for decision, I think it right to express my opinion that there is room in equity for fixing a *quantum* based on the actual or cash costs under the subcontract, plus a reasonable brokerage for the issue of stock, such as was recognised in the case of *Metropolitan Coal Consumers' Association*,¹ and cases there referred to and distinguished, and plus proper administrative charges during construction, but not including any allowance for the remuneration of the Syndicate for their intervention. I am of this opinion, because the scheduled contract is a many-sided one. It must be assumed to have been entered into, so far as their guarantee obligation is concerned, by the North British Company for valuable consideration. Through the making of the line, they have received and have accepted that consideration, and in equity a *surrogatum* ought to be found for the obligation which they undertook, but which cannot now be enforced in terms under the contract. It would be a pity that, when a more appropriate tribunal is not only constituted but is already in possession of the facts, the parties should require to have recourse to this Court by new proceedings. For myself I think this desirable result can only be reached by consent of parties. But, as I have already said, I gladly acquiesce in a different course being taken, should that in the opinion of your Lordships be possible.

LORD SALVESSEN.—In this case I have had the advantage of reading Lord Johnston's opinion; and as I agree in his narrative of the facts and much of his reasoning, it is unnecessary that I should go as fully as he has gone into the details of the case. Many of the points on which he has touched are not directly involved in the decision of the case, although they have a bearing on what is the true issue between the parties, namely, the sound legal construction of article 7 of the agreement of March and April 1897. The words upon which the whole controversy turns are as follows:—"If the net revenue accruing to the second parties is not sufficient to pay a dividend of four per centum per annum on the paid-up share capital of the second parties then the first parties shall . . . contribute such sum as may be necessary" to pay off such deficiency. I purposely omit for the sake of simplicity the sources from which the deficiency is to be made up, for the guarantee is not an absolute one in form; although for practical pur-

¹ [1895] 2 Q. B. 604.

July 17, 1913. poses it may be treated as absolute in substance. It was so dealt with when the memorandum to blocktakers was issued; for it is there stated:—"It will be seen from the attached reports that the undertakings given by the North British Company are stated by the experts to practically amount to a 4 per cent guarantee." The one question in the case is, what is the meaning of "paid-up share capital of the second parties"? Does it mean such capital as the North Fife Company actually issued as paid up; or does it mean, as the North British Company contend, capital which is paid up in cash or its equivalent? The Railway Commissioners have found that the former is the sound construction on the footing, which they hold to be established in fact, that the agreement which the North Fife Company made with the Syndicate for the construction of the line was *bona fide*, and that the terms to which they consented were justified, looking to their pecuniary exigencies and the state of the money market at the time. I am unable to assent to this view. I think the contractual obligation undertaken by the North British Company was based upon the assumption that the capital of the North Fife Company would all be subscribed by the public in the ordinary way; and I cannot understand how it should be enlarged by the circumstance that the promoters of the North Fife Company found it necessary, in order to get their line constructed, to issue their ordinary shares as fully paid when they received in money or money's worth only 60 per cent of the nominal capital.

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Lord Johnston has referred in detail to the various sections of the private Act of 1897 which make it plain to my mind that the Legislature in authorising the construction of the new railway had only in view the issuing of capital for money or money's worth. In particular, I think that the provisions as to the issue of debentures demonstrate this; for it is declared that no sum shall be borrowed "until £60,000 (being one-third of the share capital of £180,000) is issued and accepted and one half thereof is paid up in respect of each of the said sums of £20,000." This provision is for the security of debenture-holders, and is, I think, unambiguous. We are not here concerned with any claim by the debenture-holders; for the debentures were issued in blocks along with the preference and ordinary shares. But I think any independent debenture-holder whose money had been taken on the footing that the Act was to apply, would have had serious reason to complain if he had found that his security was to consist of one-half in cash of the value of the ordinary shares; and that the obligation of the shareholders to pay the remainder was to be discharged by an additional payment of 10 per cent.

The position of the North British Railway Company with regard to their guarantee appears to me to be *in pari casu*. The promoters of the North Fife Railway Company Act, in terms of the Standing Orders of Parliament, deposited an estimate of expense amounting to £176,296, 7s. 6d. for the construction of the line as a double line. The total authorised capital, £240,000, was fixed on this basis. As matters have turned out, the whole capital has been issued as fully paid-up; although only a single line, with the necessary passing places and also with the land and bridges for a double line, has been constructed. The Railway Commissioners seem to think that this may be accounted for by the fact that the cost of construction had

increased between the date that the Act was obtained and the date at which July 17, 1913. the line was actually constructed. I assume that there was a general rise in prices; but if so the capital authorised to be issued made ample provision for such a contingency. The whole sum paid to the contractors for the construction of the single line with the necessary buildings and equipments was under £128,000; and the total sum expended, including preliminary expenses, administration, and purchase of lands, amounted to under £170,000, leaving £70,000 for the construction of the remaining line. As the £128,000 included bridges, stations, and land for a double line, it may safely be assumed that the additional £70,000 would have sufficed to construct the double line to which the agreement referred.

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The construction to be put upon similar words was the subject of decision in the case of *Arnison v. Smith*.¹ In that case a prospectus had been circulated inviting application for debentures which were to rank "in priority to £300,000 share capital (£200,000 of which has been subscribed)." In point of fact the amount of capital subscribed was much less, unless there were taken into account £100,000 of shares which had been issued as fully paid to a firm of contractors who had agreed to construct the waterworks for £400,000, of which £300,000 was to be paid in cash and £100,000 in fully paid-up shares. The Court held in these circumstances that it was untrue to say that £200,000 had been subscribed, and that persons who were induced to take debentures on the faith of the prospectus were entitled to damages against those who issued it. In my opinion the words "paid up" which are used in this contract are clear and unambiguous, and mean what the Court decided that the word "subscribed" meant, that the shares had been issued for cash. If therefore this guarantee had been obtained from the North British Company on a statement that £180,000 of capital had been paid up, when in fact it had been allotted to the contractors for the construction of the line, I think it is obvious that the guarantee would not have been binding. It appears to me to be equally plain that it cannot be enforced against the North British Company to an extent beyond the amount that was actually paid up. To that extent the guarantors are responsible under their guarantee, but no further. Had the Company been in a position to get the public to subscribe for its shares there is no reason to suppose that it could not have made as favourable a contract as the financiers who received substantially the whole capital. It would not have required to give any bonus in the shape of shares, although it may be that it would have incurred a certain amount of expense in advertising, printing, and the like, the reasonable amount of which it is quite possible to ascertain.

It has been suggested that the North British Company must have had in view at the time when the contract was entered into that the North Fife Company might have to resort to a method similar to that which it actually adopted of raising capital. I see no ground from which this can be inferred. In 1897 an investment on which a return of 4 per cent was guaranteed by a great corporation like the North British Railway was by no means unattractive; but whether or not, this surely cannot affect the construction of the contract. If the directors of the North Fife Company had been prepared

¹ 41 Ch. D. 348.

July 17, 1913. to deal fairly with the North British Company they might have given them the option of providing the necessary capital for the construction of the line; but the parties were no doubt so much at arm's length at this time that such a proposal could scarcely have been made. The effect, however, of what the Company has done was, as the Syndicate stated in the memorandum to blocktakers, to fix the price at which the ordinary stock was disposed of so as to yield a return of $5\frac{1}{2}$ per cent to 6 per cent per annum instead of the 4 per cent which the North British Company had contracted to pay. In other words, on the construction which has commended itself to the Court below, the guarantee for 4 per cent was increased by the action of the North Fife Company to a guarantee of 6 per cent on the actually paid-up capital without the guarantors being consulted in the matter. It is easy to understand why the directors of the North Fife Company came to make what would undoubtedly have appeared to be, in the earlier history of the Company, so improvident a bargain. After nearly ten years of futile attempts to float the concern, they found themselves in the unpleasant position of having personally to meet the preliminary expenses of obtaining their Act, unless in some way they could get the line constructed. To extricate themselves from this predicament they were not unnaturally prepared to assign the whole authorised capital of the Company in return for an obligation by a prominent financial house to undertake the construction of the line and relieve them of the heavy bill they had incurred. Neither party to the transaction seems to have thought that the North British Company, on whose credit they traded, had also a claim to be considered.

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In the view I have taken it is unnecessary that we should consider many of the questions which were so anxiously debated. The sole question, to my mind, is one of the construction of a simple contract of guarantee, and does not involve the much controverted point as to whether a company incorporated by Act of Parliament can issue its original shares at a discount. I reserve my opinion on this matter; but would desire to say that as at present advised I do not agree with Lord Mackenzie, nor with the decision of Romer, J.,¹ on which he bases his opinion. To say that because such a company has been specially authorised by statute to issue further shares at a discount it must therefore be entitled to issue its original shares at a discount does not appear to me to be a convincing argument; and there are strong considerations of public policy which are adverse to such a power. It is unnecessary, however, to pursue the matter. It is still more beside the point that undertakings authorised by Parliament, for which it has been found impossible to obtain from the public the necessary capital, have often been constructed by contractors in the hope that they would ultimately be able, when the undertaking was completed, to induce the public to buy the shares. It may well be that the transferees of shares from such contractors, or even the liquidator of the company, after it has become insolvent, cannot challenge the original issue of the shares on the ground that they were not issued for cash or its equivalent; but that is a department of law with which we are not here concerned. I only refer to it because

¹ *Statham v. Brighton Marine Palace and Pier Co.*, [1899] 1 Ch. 199.

an argument was presented to us on behalf of the North British Company July 17, 1913. to the effect that on analogous considerations that Company had been relieved from the contract of guarantee which it undertook. Such a con- and North Newburgh
tention appears to me hopeless, in view of the fact that that Company have Fife Railway
worked the line since its inception; and have acted upon the footing that Co. v. North
the agreement they made in 1897 was binding upon them, as indeed I think British Rail-
that it was, and still is, in its entirety. way Co.

Lord Salvesen.

The practical result which I reach accordingly is that I think we must reverse the decision of the Court below, "that the amount of the paid-up share capital of the applicants towards payment of dividend on which the defendants are bound to contribute is £180,000." So far I agree with Lord Johnston. We have not had a full argument as to what figure should be substituted; but for the guidance of the Commissioners, I think we should express our views as to the method by which they may reach the true amount of paid-up capital, more especially as on this matter I do not appear to be in full accord with Lord Johnston. That is easily done by reference to the statement of income and expenditure. As regards the three heads—expenses, land purchases, &c., and works (assuming these to be properly vouched)—I think that they represent the equivalent of cash. The next item "Loss on sale of shares and debentures," so far as it consists of the discount of 40 per cent on the ordinary shares, must be struck out. So also, I imagine, must management and underwriting fee, although, instead, the Company will be entitled to take credit for such expenses as would reasonably have been incurred in making a successful public issue. The administration expenses of the Syndicate are equally inadmissible, and also, *prima facie*, the excess of income over expenditure. In short, the account of paid-up capital must be stated on the same footing as if a public issue of shares had been made and taken up, and the Company had been put in funds to pay in cash for the construction of the works and the parliamentary expenses. On this principle the Commissioners will no doubt easily be able to arrive at an estimate of what was the amount of capital that was paid up within the meaning of the guarantee, upon which alone, as I think, the North British Company are bound to contribute.

LORD GUTHRIE.—I concur in the opinion of Lord Salvesen, which I have had the advantage of reading.

LORD SKERRINGTON.—[In his Lordship's absence, his opinion was read by the Lord President]—The agreement of 31st March and 5th and 6th April 1897, between the appellants, the North British Railway Company, and the promoters of the Newburgh and North Fife Railway Company (now represented by the respondents, the Newburgh and North Fife Railway Company), is silent as to the amount of the capital which the parties regarded as necessary for carrying out the undertaking, and no doubt they left the amount to be fixed by Parliament. According to my reading of the agreement it was a condition precedent of the respondents' obligation to construct the railway, and of their right to do so in a question with the appellants, that the whole of the share capital authorised by the special Act should be subscribed. Of course the appellants had it in their power to

July 17, 1913. issue at a discount of new shares or new stock or even of the residue of the original share capital—26 and 27 Vict. cap. 118, sections 16-21; 30 and 31 Vict. cap. 126, sections 27-29; 32 and 33 Vict. cap. 48, sections 5, 6, and 7. The implications from the Acts of 1867 and 1869 is that capital, whether original or additional, cannot be issued at a discount except in the particular cases there mentioned, or unless authorised by the special Act. The case of *Webb v. Shropshire Railways Company*¹ is an example where an Act of Parliament was construed as authorising the issue of fully paid-up original stock at a discount; but the circumstances and language of the Act were special. Lord Lindley (then L.J.), who delivered the opinion of the Court of Appeal, distinguished between stock issued as fully paid up under statutory powers and shares liable to calls. The case of *Statham v. Brighton Marine Palace and Pier Company*² is a judgment by Romer, J., to the effect that a company governed by the English Companies Clauses Act, 1845, may issue fully paid original shares at a discount in the same manner as new shares. The English Act does not contain any clause corresponding to section 37 of the Scottish Act, but the judgment does not proceed upon the absence of any such clause. The learned Judge expressed the opinion that shares subscribed for must be paid for in full, but he rested his judgment upon the view that the Act of 1845 contemplated that shares may be acquired otherwise than by subscription, and that shares allotted without subscription may be issued at a discount. He referred, I presume, to section 8 of the English Act (which is the same as the corresponding section of the Scottish Act). I respectfully dissent from the view that so momentous a result can be implied from a clause which is on the face of it bungled. In my view the words founded on by Romer, J., were intended to meet the case of a person who had acquired a right to scrip before any issue of shares, and who might, if the company were willing to accept him, be treated as if he himself had subscribed and paid the deposit, and so had become entitled to a share in the company.

The agreement of 31st May 1906 between the respondents and the Construction Syndicate does not, in my judgment, afford even *prima facie* evidence to the effect that the respondents received either full value, or indeed any ascertainable value, in return for the £169,400 of shares which were issued to the Syndicate or its nominees. The price of £240,000 payable to the Syndicate was a lump price, which was carefully fixed in such a manner as makes it impossible to discover how much the respondents were to pay (1) for the construction of the railway; (2) in lieu of brokerage for placing their shares and debentures; (3) for the land required for the railway, and in order to satisfy all claims under the Lands Clauses Acts for injurious affection, accommodation works, &c.; and (4) for the expenses incident to the obtaining of the special Act and for all other expenses, past and future, for which the respondents might be or become liable. If in the agreement the total price of £240,000 had been separable into lump sums representing the consideration agreed to be paid in respect of each of these four heads, it might have been possible for the Commissioners to decide whether the price payable to the Syndicate, so far as payable in shares, was

¹ [1893] 3 Ch. 307.

² [1899] 1 Ch. 199.

or was not fixed upon the footing that each share was worth less than its July 17, 1913. face value. I do not think that the Commissioners had materials before them which in law entitled them to find, as they did, that the respondents "did not in fact issue their shares at a discount." As regards brokerage, a company may pay a reasonable reward in respect of the trouble and expense of placing its shares,¹ but it cannot make itself or its capital liable for a sum in lieu of brokerage which can neither be ascertained nor taxed. If the total price had been apportionable, it would have been possible to ascertain whether the lump sum agreed to be paid on this head was or was not excessive, and to restrict it if necessary. Again, under the special Act (sections 2 and 4) the respondents had power to acquire land under the Lands Clauses Acts either by agreement with the sellers or compulsorily, but they had no power to apply their capital in paying an unascertainable lump sum in return for an indemnity by the Syndicate against all claims in respect of land taken or injured. Here again, if the total price could have been apportioned it would have been possible to ascertain whether the price agreed to be paid on this head did or did not exceed the sums for which the respondents were legally liable, and to restrict it if necessary. Lastly, there is a decision of the House of Lords to the effect that it is *ultra vires* of a statutory company to pay a lump sum in respect of the expenses authorised to be paid by the usual clause in the special Act, irrespective of the actual amount of such expenses as taxed.² In the Court of Session some importance was attached to the fact that the persons who received the lump sum of £17,000 stood in a fiduciary relation to the company; but the House of Lords proceeded upon the simple ground that it was *ultra vires* of the company to pay more than the actual expenses as taxed. As regards this matter also, if the total price of £240,000 had been severable, it would have been possible to ascertain whether the portion of it representing expenses did or did not exceed the actual expenses, both past and future, as taxed. In so far as it exceeded the actual expenses the lump sum could have been restricted, as was done in *Mann's*² case. That case was followed in *Mason's Trustees v. Poole & Robinson*.³ Within certain limits I do not doubt that a statutory company, when agreeing upon a price to be paid for property or services, may include in the price additional and undefined amount in respect that the other party to the contract accepts certain risks and agrees to indemnify the company against all liability beyond the sum agreed upon. For example, an ordinary contract to build a house or railway includes either expressly or tacitly an allowance for "contingencies." So if a railway company employs a solicitor at a salary, the solicitor accepts a lump sum and in return agrees to make no further claim against the company, however much his ordinary professional charges may exceed his salary. Again, no one doubts the power of a railway company to protect itself against certain risks by insurance. But there is no real analogy between such cases and the present one. In considering whether this par-

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¹ Metropolitan Coal Consumers' Association v. Scrimgeour, [1895] 2 Q. B. 604.

² Edinburgh Northern Tramways Co. v. Mann, 18 R. 1140, *affd.* 20 R. (H. L.) 7.

³ 5 F. 789.

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ticular agreement was within the powers impliedly conferred upon the respondents by their statute, one must keep in view that the question is to be decided, not upon abstract or logical grounds, but by reference to the ordinary way in which a particular kind of business is conducted in this country. I accept the view of the Commissioners that in this particular case it would have been beneficial for the respondents to have possessed the power to enter into the construction agreement; but in the majority of cases the possession of such a power would be a doubtful benefit. It is, however, enough to say that a contract of this kind is so unusual in practice that a power to make it cannot be implied from a power to make a railway, to buy land, and to pay expenses. In England the Court has been very liberal in supporting honest agreements by which the price of property or services was to be paid for in fully paid shares (*In re Wragg, Limited*¹), and possibly we might have followed that decision if some definite lump price had been fixed for the construction of the railway. But it was admitted by Mr Dempster, the secretary of the respondents' Company, and is indeed obvious, that the total price of £240,000 included some unknown amount "for expenses for raising the capital," in addition to round sums of £30,000 and £15,000, which it was estimated would cover the cost of the land and the expenses.

The practical result, in my judgment, is that the respondents have failed to adduce evidence which entitled the Commissioners to find that the paid-up share capital of the Newburgh and North Fife Railway Company amounts to any sum exceeding £10,600. The case must be remitted to the Commissioners in order that they may, if necessary, determine the actual amount of the legal consideration which the Syndicate gave to the respondents in return for the 16,940 shares allotted to them or their nominees. It is for the respondents to prove the amount, but it is to be hoped that the parties will be able to agree on a figure without further litigation. What I propose to add is in no way binding either upon the Commissioners or upon the parties, but it may be useful to indicate the way in which, as at present advised, I think that the account should be stated. The Syndicate are entitled to credit for the sum which it would have cost to construct the railway if a contractor had been employed by the respondents in the ordinary way and if the respondents had themselves supervised the construction. Credit must also be given for a reasonable allowance in lieu of the brokerage which the respondents would have required to pay in order to place the shares and debentures. The Syndicate must further be credited with the £4400 of cash paid by them to the respondents, with the interest so far as legally paid to shareholders and debenture stock holders during construction, and with the amount paid in respect of land claims and expenses for which the respondents were legally liable. On the other hand the Syndicate must be debited with the market value of the debenture stock when issued, and with the cash received by them from the respondents. I may have omitted items from both sides of the account, and of course there must be an adjustment of interest. The balance of this account will represent the consideration paid by the Syndicate for the 16,940 shares.

¹ [1897] 1 Ch. 796.

LORD PRESIDENT.—Although I must now consider that, as the majority July 17, 1913.
of your Lordships are against me, my opinion is wrong, I think that the
judgment of the Commissioners here ought to have been affirmed, and I can
express my opinion in a very simple form.

I first ask myself this question—which was argued before us—Is it possible for a railway company, which is formed under the Companies Clauses Act, to pay for its railway not in cash, but by issuing shares? I confess that I think it is; and seeing that these operations have been going on in numberless cases ever since the year 1845, and that what are called contractors' lines have often been before the Court and had the consideration of the most eminent persons, including, amongst others, the late Master of the Rolls and many members of the House of Lords, I must say that I should look with the gravest suspicion upon the discovery by the learned counsel for the North British Railway Company, for the first time in the history of this matter, that such transactions were entirely illegal. It has often been for the interests of parties to maintain that they were illegal, and yet no one seems to have thought of this contention till now. The particular case of which I would remind your Lordships is that much-contested litigation, *Rixon v. Edinburgh Northern Tramways Company*.¹ There every effort was made to destroy the contract made with Messrs Dick, Kerr, & Company, and yet this expedient was never thought of.

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way Co.

That question having been answered in this way, I next ask myself—Must that not have been one of the methods of construction of the line which the North British Railway Company had in view when they made their contract? And here, without insisting on the matter, I would remind your Lordships of what is very clearly stated by the Commissioners, namely, the great interest which, in the past, the North British Railway had in the making of this line. This line was a necessary link in what, at that time, was their keen competition with the Caledonian Railway Company. It was in potentiality one of the pawns—if, indeed, it was not a piece of higher denomination—in the struggle between the two great Scottish companies which, happily, resulted in the peace agreement. It is equally clear that, the peace agreement having once been concluded, the line became of very little use to the North British Railway Company, and therefore it is not at all wonderful that, if they are entitled upon any legal ground to get out of their guarantee, they should seek to do so. I am far from expressing any moral blame in this matter. Public companies are entitled to stand upon their legal rights—nay more, probably they are bound to stand upon their legal rights. But as to the question of the North British Railway Company, at the time of the inception of the agreement, having been willing to table a high price for what they were getting, I do not think that the judgment of the Commissioners leaves any shadow of doubt. If that is so, I think that this is one of the methods in which they must have contemplated that the capital should be issued. And the capital was so issued.

The only remaining argument is one which was strenuously urged by the learned counsel, and is also touched on in the opinion of Lord Skerrington which I have just read, namely, whether this was not a void agreement as

¹ 18 R. 264, 20 R. (H. L.) 53, [1893] A. C. 636.

July 17, 1918. being *ultra vires* of the directors of the Company. I need scarcely say that

Newburgh and North Fife Railway Co. v. North British Railway Co. I entirely accept the authority of the House of Lords in *Mann's case*.¹ I have no doubt that you cannot, as there, pay a slump sum and say, "I will give you that in order to relieve me of the expense of the company, and what has been actually paid shall not be looked into." But although that is so, the question, I imagine, can only arise between the company and the

Ld. President. person with whom they have so contracted. It is quite true that a void agreement is, as a rule, void not only as between the two parties who made it but also to all the world. But I see no reason to suppose that personal bar—or, as it is called in the sister country, estoppel—may not operate with regard to an agreement which is void just as much as an agreement which is voidable. I think it is impossible for the North British Railway Company here to say that, as a matter of fact, this agreement is void and that the line has never been constructed at all. They themselves are founding upon the agreement under which the line has been constructed in order to insist upon their right to work the line upon certain terms; and that being so, this argument also fails.

The result, therefore, in my opinion, would be that the view of the Commissioners should have been sustained. I only add that, necessarily, my opinion is based upon the finding in fact which the Commissioners have given, namely, that this construction contract was perfectly fair and above-board and did not represent any donation from the one party to the other.

LORD KINNEAR.—I agree with the Lord President.

LORD DUNDAS.—I also agree with the Lord President.

LORD PRESIDENT.—The majority of the Court being against the determination of the Commissioners, it must be reversed. On the other hand, Lord Johnston's view was that nothing more could be done by the Commissioners, but the other three Judges, composing the majority, are of the view that it should be remitted to the Commissioners to find out how much capital has been legally issued in the sense of the contract, so we shall give effect to this view.

THE COURT pronounced the following interlocutor:—"The Lords having, along with three Judges of the Second Division, considered the note of appeal and whole process, and having heard counsel for the parties, recall the order of the Court of the Railway and Canal Commission, of date 21st March 1912, in so far as the said Court declares 'that the amount of the paid-up share capital of the applicants towards payment of dividend on which the defendants are bound to contribute is £180,000,' and in place thereof, find and declare that the said defendants are only liable under their agreement with the applicants to contribute towards payment of dividend on so much of the issued share capital of the applicants as was issued in consideration of cash or the equivalent of cash, and remit to the Court of the Railway and Canal Commission, after such further

¹ 18 R. 1140, *aff.* 20 R. (H. L.) 7.

inquiry, if any, as may be necessary, to ascertain the amount of such capital in conformity with this finding: . . . Find the appellants and defendants entitled to the expenses incurred since 21st March 1912. . . ."

GUILD & SHEPHERD, W.S.—JAMES WATSON, S.S.C.—Agents.

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ALEXANDER SMITH, Pursuer.—*Crabb Watt, K.C.—J. A. Christie.*
MRS ELIZABETH PATON, Defender.—*G. Watt, K.C.—Lippe.*

No. 165.

Dec. 28, 1912.

Reparation—Slander—Issue—Verdict—Latitude of time—"On or about"—Process—Jury trial.

Smith v.
Paton.

In an action of damages for slander the issue submitted to the jury was whether "on or about 12th March 1912" the defender, at or near a shop occupied by the pursuer and in presence and hearing of one of the pursuer's neighbours, had made a slanderous statement concerning the pursuer which imported that he was a thief.

The jury having found that the slander had been uttered by the defender at the place and in the circumstances set forth in the issue, but that it had been so uttered in February 1912, the Lord President, on account of the discrepancy in the dates, directed that the verdict should be entered for the defender.

ST CLAIR SWANSON & MANSON, W.S.—W. CROFT GRAY, S.S.C.—Agents.

THE PENANG FOUNDRY COMPANY, LIMITED, AND OTHERS, Pursuers.—*Sandeman, K.C.—J. Smith Clark.*

No. 166.

A. H. GARDINER, Defender.—*Murray, K.C.—J. R. Christie.*

Jan. 31, 1913.

Company—Liability of member—Allotment of shares at a discount—Certificate bearing that shares fully paid—Liability for unpaid balance—Personal objection.

Penang
Foundry Co.,
Limited, v.
Gardiner.

The partners in a foundry, with the object of forming a syndicate to acquire the business, obtained deposits of sums of money from a number of persons. The project of forming the syndicate having failed, the partners floated a limited company, proposed to the depositors that their deposits should be applied in taking shares, and offered to each of them a number of shares in proportion to, but of a greater face value than, the amount of his deposit. The company having gone into liquidation, one of the depositors, who had been allotted shares and had received from the company share certificates which bore that the shares allotted to him were fully paid, though in fact they were not, was sued by the liquidators for the price of his shares.

Circumstances in which held (by the Lord Ordinary, Cullen) that, as the defender had accepted the shares in *bona fide* reliance on the statements in the certificates that they were fully paid, the company was barred from maintaining that they were not fully paid; and defender *assolized*.

THE PENANG FOUNDRY COMPANY, LIMITED, registered in Penang under the Companies Ordinance, 1889, of the Straits Settlements, now in liquidation, and James Wilson Halifax and Richard Philip Phillips, of Penang, the liquidators thereof, and William Donaldson, Glasgow, their mandatary, brought an action against A. H. Gardiner,

OUTER HOUSE,
Lord Cullen.

Jan. 31, 1913. **Campbeltown, Argyllshire, for £560, being the price of fifty-six shares of 100 dollars each allotted to and held by the defender in the company. For these shares the company had never received full consideration, but the defender was in possession of share certificates of the Company bearing that the shares were fully paid, and the question in the case was whether in the circumstances the defender was liable for their price.**

Penang
Foundry Co.,
Limited, v.
Gardiner.

The facts as disclosed at a proof are given in the opinion of the Lord Ordinary (Cullen), who on 31st January 1913 pronounced an interlocutor in which he assoilzied the defender from the conclusions of the summons.

OPINION.—[After referring to a question of relevancy discussed at an earlier stage of the case]—The Penang Foundry Company, Limited, acquired the business of a private firm called the Penang Foundry Company, the three partners of which were named Wemyss, Baldwin, and Lawrence. In 1902 Wemyss came to Glasgow and set about the formation of a syndicate to acquire the business of the firm. He enlisted the assistance of his correspondent in Glasgow, Mr MacLavery, of the firm of Graeme & Company. A number of persons, including the defender, were induced to entrust sums of money to Wemyss and his firm. The arrangement about these monies was that they were to be used in taking up shares in the syndicate if and when it was formed, and that the firm should, in the meantime, pay five per cent interest on them, and be liable to repay them in the event of the syndicate not being formed. These parties I shall call the depositors. It was a condition of the arrangements made with the depositors that no syndicate should be formed unless there was raised in all £20,000. This amount was not raised, and the syndicate never came into existence. The depositors remained an unorganised series of individuals who had entrusted varying sums of money to the Penang firm on the footing above explained. For these sums they held receipts granted by Wemyss on behalf of the firm. They had no collective activities, but were simply so many investors who were separately induced to deposit monies with the firm with the view of their possibly being bound together in a syndicate.

The project of forming a syndicate was finally abandoned by Wemyss on 11th April 1903. He then resolved to essay the flotation of a limited company in Penang, and returned to Penang. At this point the firm stood liable to repay to the depositors the monies which they had advanced. Mr Wemyss, however, acting for the firm, put before the depositors the proposal that their deposited monies should be applied to taking shares in the limited company. As an inducement he offered that depositors who agreed to this course should receive for each £100 deposited fourteen shares of the new company of 100 dollars each. This offer was intimated to the depositors by a circular letter in terms of No. 210 of process. Thereafter there was sent out, to some of them at least, a letter asking them to sign an authority for the allotment of shares to them in the form shown in No. 71 of process. The defender received the letter in the form of No. 210. He took no notice of it. He says he did not receive the letter transmitting the form of authority shown in No. 71, and that he signed no such authority. I believe him. Mr MacLavery, to whom such letters of authority would in ordinary course have been sent, says that he never saw such an authority signed by the defender. No such authority by the defender has been found. It would appear, however, that the defender, who was an old friend of Mr MacLavery, and in touch with him, had indicated that he was favourable to Wemyss's proposal. He did nothing, however, that I can see actually binding himself to take shares at this stage. Mr MacLavery sent out to Wemyss in Penang the book No. 15 of process, containing the names, &c.,

of the depositors, with remarks as to what he understood each depositor was Jan. 31, 1913. inclined to do as to taking shares.

The limited Company was incorporated in Penang on 14th December 1903. On 18th March 1904 the directors (Wemyss and his partners) met and resolved to allot. Next day they did allot. Thereafter share certificates were sent to this country, including certificates in favour of the defender, for fifty-six shares of 100 dollars each. The certificates were sent to Mr MacLavery's firm. On 28th July 1904 they wrote to the defender, sending him the said certificates of fifty-six shares, and asking him to return in exchange the receipts which had been given to him for his various deposits, amounting in all to £400. On 1st August 1904 the defender acknowledged the certificates, which he retained, and returned the said receipts. The certificates so sent to the defender and accepted by him bore that the shares were fully paid up.

There is thus no dispute that the defender, by accepting the share certificates sent to him, agreed to become a member of the Company in respect of the fifty-six shares in question. And I have no doubt on the evidence that the defender, in accepting the certificates, believed in the truth of the Company's statement on the certificates that the shares were fully paid up.

It is now necessary to give some explanations as to the formation of the limited Company. It was preceded by an agreement between (1) the firm of the Penang Foundry Company and (2) Mr Samuel Warnock of Glasgow, as trustee for the prospective limited Company. Mr Warnock is a partner in Mr MacLavery's business in Glasgow. The agreement provided, *inter alia*:—(1) that the nominal capital of the prospective Company was to be 600,000 dollars in 6000 shares of 100 dollars each; (2) that the vendors should sell and that the Company should purchase the business of the Penang Foundry Company and assets thereof; (3) that the price should be 200,000 dollars at 2s. per dollar, payable as follows, viz., "The directors may satisfy any portion of the said consideration not exceeding 100,000 dollars by the allotment to the vendors of shares in the capital of the Company to an equal nominal amount, the said shares being credited as fully paid up, and the balance of the said consideration shall be payable in cash"; (4) that the purchase should be completed on 30th June 1903, and the Company should then declare what "portion of the said consideration it proposes to satisfy by the allotment of shares, and shall pay the balance of the said consideration in cash to the vendors or as they shall direct. The shares which are to be allotted in lieu of cash shall be allotted to the vendors or their nominees on or before the 14th day of July next (1903), and before such allotment the Company shall cause this agreement to be registered with the Registrar of Joint Stock Companies."

This last-mentioned provision was not fulfilled and the agreement has not yet been filed. The Company was not incorporated until 14th December 1903. The option given to the Company by the agreement to satisfy part of the price by shares could not thus operate in terms of the agreement, and no new agreement on this subject was made. The defender had nothing to do with this agreement.

On record the pursuers aver that the real vendors under this agreement were (1) the ostensible vendors, the Penang Foundry Company, and (2) the alleged syndicate of whom the defender was said by them to be a member. They further aver that, as a member of the syndicate, the defender had allotted to him directly his fifty-six shares as part of the ear-marked vendors' shares under the agreement. The defender was thus on record represented as having knowingly accepted his fifty-six shares for a consideration other than cash under a contract which has not been filed. This ground of action, however, is now exploded, as there never was a syndicate, and the sole vendor to the Company was the firm of the Penang Foundry Company.

Although the case made, on averment, by the pursuers has for the most part disappeared, there remains their averment that no cash was paid by the

Jan. 31, 1913. defender to the Company for the shares. As to the fact, the evidence in my opinion is to the effect that cash was not paid. The question then arises, what is the effect of the Company having, in the circumstances of the case, issued the share certificates to the defender bearing that the shares were fully paid? On this question it is common ground that the law prevailing in Penang is the same as in this country. Accordingly, if the defender had acquired the shares in question by transfer from an allottee without notice of the fact that, contrary to the Company's representation on the certificates, cash had not been paid for them, it is conceded that the Company would have been barred from denying the truth of their representation. The pursuers, however, contend that this principle cannot apply in the case of an allottee of shares. I confess I do not see why, if the conditions necessary to raise the bar exist. The principle of bar or estoppel is a general one of the common law and, in this connection, cannot be limited to transferees of shares unless the conditions of its application are only possible in the case of transferees. But this, in my opinion, is not sound. It is true that an allottee will not often be in the position of not knowing the footing on which shares which he accepts have been allotted to him. But he may be, and if, in such circumstances, he accepts shares in reliance on the Company's representation that they are fully paid up, and without notice to the contrary, he is, I think, as much entitled to hold the Company to that representation as a transferee acquiring right from him without notice would be. Mr Buckley (9th edition, p. 63) says:—"Nevertheless a *bona fide* purchaser and transferee or even allottee of shares which the company by the share certificate state to be paid who has no notice that the shares are not what they are certified to be is not liable, although the shares have not in fact been paid." For the application of this rule to allottees he cites *Parbury's case*, [1896] 1 Ch. 100, and *Bloomenthal v. Ford*, [1897] A. C. 156. *Parbury's case* was expressly approved by Lord Justice Lindley in *Bloomenthal*, [1896] 2 Ch. 532. I quote his statement of it. "In that case Parbury was an allottee from the company. He had paid a person the full amount of those shares in order that that person might pay the same to the company and procure for Parbury a proper certificate. The person (Wright) who received the money, and who was connected with the company, misapplied the money; but the company gave Mr Parbury a certificate that they had received his money and that his shares were paid up in full, although in truth that was not the case. The doctrine sanctioned by the House of Lords in *Waterhouse v. Jamieson*, (1870) L. R., 2 Sc. App. 29, and in *Burkinshaw v. Nicolls*, (1878) 3 App. Cas. 1004, was properly applied in Parbury's case, although he was an allottee and not a transferee. In the case of *Bloomenthal v. Ford*, from which I have quoted, the decision of the Court of Appeal was against the allottee on the ground that, as they held, he had not adequate ground for believing the shares to be fully paid although he did so believe. The allottee, Bloomenthal, had been induced to lend money to a company on the faith of a security to be given him in the form of fully paid up shares in it. The shares were allotted to him as fully paid up, but in fact they were not." The decision of the Court of Appeal was against Bloomenthal on the ground that, while he believed the shares were fully paid up, he was not justified in this belief. The decision was reversed by the House of Lords where the plea of estoppel against the company was sustained and Bloomenthal was held not liable to pay anything on the shares.

In the present case, the defender did not make an application to the Company for an allotment of shares. Nor is there evidence that he authorised Mr Wemyss to apply for shares in his name. There is no evidence that Wemyss did so. The position was that Wemyss had offered to procure to any of the depositors who consented to put the amount of their deposits in the Company fourteen shares of 100 dollars each for each £100 of deposit. The defender had indicated to Mr MacLavery that he

favoured this proposal, but he had not bound himself. He did not sign Jan. 31, 1913. the letter of authority (No. 71) asked by Wemyss. When the share certificates were sent to him by Mr MacLavery on 28th July 1904, he might, Penang I think, have rejected them. He accepted them, however; and in accepting Foundry Co., them I have no doubt that he believed in the truth of the Company's state- Limited, v. Gardiner. ment that they were fully paid up. He acted in perfectly good faith. I am accordingly of opinion, in these circumstances, that he is entitled to plead the Company's said representation against their present demand. The pursuers maintained the special point that even if the defender was justified in believing that the shares had been paid up to the extent of his deposit (£400), he was not justified in believing that the balance of the share value in dollars (the total value was 5600 dollars) had been paid up. Now it is true that the defender's deposit of £400 was not of the value of 5600 dollars, although it is left uncertain what the exact amount of the shortage was. Let it be stated at 1600 dollars. But the defender's position was that Wemyss had offered, if he agreed to put his deposit of £400 in the Company, to procure him fourteen shares of the value of 100 dollars each. And he had no information as to how Wemyss was to procure him these shares, so far as their nominal value exceeded his deposit, which might have been by Wemyss paying the amount of the excess on each, or, what is the same thing, setting off the cash price of the business under the agreement *pro tanto* against the value of the shares. The defender simply accepted the shares when offered to him by the Company, and he accepted them on the footing on which the Company tendered them to him, namely, that they were fully paid up, and fully believing in the truth of the Company's representation to that effect.

I am accordingly of opinion that the defender is entitled to absolvitor.— [His Lordship then disposed of a plea that the action was premature.]

W. & F. HALDANE, W.S.—SIMPSON & MARWICK, W.S.—Agents.

MRS JULIA GIBLIN OR MELLON, Pursuer.—*Aitchison*.

No. 167.

GEORGE HENDERSON, Defender.—*Black*.

Reparation—Negligence—Lease—Title to sue—Wife of tenant of house on common stair injured owing to defect in stair—Wife's title to sue landlord Feb. 7, 1913.
—*Property*. Mellon v. Henderson.

The wife of the tenant of a dwelling-house on a common stair brought an action of damages against the landlord for injuries sustained by her owing to the defective condition of the stair. The defender pleaded that the pursuer had no title to sue, in respect that she was not a party to the lease.

Held (by the Lord Ordinary, Hunter) that the pursuer had a title to sue, in respect that the stair was not included in the lease but remained under the control of the landlord, who was bound to keep it reasonably safe for tenants and other persons using it as a means of access to the houses.

Cameron v. Young, 1908 S. C. (H. L.) 7, and *Cavalier v. Pope*, [1906] A. C. 428, distinguished.

ON 10th December 1912 Mrs Julia Giblin or Mellon, wife of Arthur OUTER HOUSE. Mellon, brought, with his consent, an action against George Hender- Lord Hunter. son, in which she sued for £500 as damages for personal injury.

The pursuer averred, *inter alia*.:—(Cond. 2) "The pursuer's husband, the said Arthur Mellon, is the tenant of a dwelling-house situated at 33 Hamilton Street, Glasgow, and forming part of a tenement of which the defender is the proprietor. The access to the said dwelling-house

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is by a common passage and stair built of stone and consisting of two flights of steps entering from the street. The first flight of steps leads up to the common stair window, and the second flight to the first flat upon which the said dwelling-house is situated. The right-hand side of the common stair is bounded by the wall of the tenement, and the left-hand side by an iron railing. The said common stair does not form part of the subjects let to the pursuer's husband or to any of the tenants in said property, but is merely an access thereto and remains in the control of the defender as proprietor of the subjects, and it is his duty to maintain said stair in a safe condition." (Cond. 3) "On Sunday, 24th November 1912, about 5.45 P.M., the pursuer, on returning home, ascended the said common stair, and on placing her foot on the first step of the second flight of steps, that step and the step above, along with part of the railing, gave way, and the pursuer was precipitated to the back close, a distance of ten feet or thereby." (Cond. 4) "The pursuer, who was pregnant at the time, was very severely injured as the result of the said accident. . . ." (Cond. 5) "The said accident was due to the fault and negligence of the defender in failing to maintain the said stair in a safe condition. It was the duty of the defender to use all reasonable care and diligence in keeping the access to his property in such a state of repair that no damage from its defective condition should occur to persons lawfully using it. In particular, it was his duty to have said stair properly inspected from time to time by competent persons, especially as the tenement was an old one, and to see that it was maintained in a safe and secure condition. The defender, however, failed to do so. . . . The defender's failure to inspect said stair, and to have it properly strengthened and secured, was the cause of the accident to the pursuer."

The pursuer pleaded, *inter alia* ;—(1) The pursuer having been injured through the fault and negligence of the defender is entitled to reparation.

The defender pleaded, *inter alia* ;—(1) No title to sue. (2) The averments of the pursuer being irrelevant, and insufficient to support the conclusions of the summons, the action ought to be dismissed.

At adjustment of issues on 24th January 1913, the undernoted authorities were referred to.¹

On 7th February 1913 the Lord Ordinary (Hunter) allowed an issue in the usual form.

OPINION.—The pursuer is the wife of the tenant of a dwelling-house, part of a tenement of houses situated at 33 Hamilton Street, Govan, Glasgow. She sues her husband's landlord for £500 damages in respect of personal injuries sustained by her in consequence of part of the railing and two of the steps of the common stair, on one of which she was standing, giving way, with the result that she was precipitated to the back close, a distance of about 10 feet. It is said that the common stair was in a defective condition, and that this condition would have been disclosed by an inspection by competent persons such as it was the defender's duty to make. The defender is said to have failed to make such inspection.

¹ *By the Pursuer*.—M'Martin v. Hannay, (1872) 10 Macph. 411; Miller v. Hancock, [1893] 2 Q. B. 177; Deans v. Grove, 2nd Division, Jan. 24, 1913, unreported (*vide* note on p. 1210); Shields v. Dalziel, (1897) 24 R. 849; Hall v. Hubner, (1897) 24 R. 875. *By the Defender*.—Cameron v. Young, 1908 S. C. (H. L.) 7; Cavalier v. Pope [1906] A. C. 428; Mathieson's Tutor v. Aikman's Trustees, 1910 S. C. 11.

For the defender it was maintained that the pursuer had no title to sue the action, and that in any event she had not stated a relevant case. These pleas were based mainly upon the decision of the House of Lords in the case of *Cameron v. Young*, 1908 S. C. (H. L.) 7, [1908] A. C. 176. In that case the wife and children of the tenant of a dwelling-house were held to have no title to recover damages from the landlord for loss and injury through illness caused by the insanitary state of the premises. Lord Robertson, who gave the leading opinion, said, "The question is whether the appellants, who are not parties to the contract of lease, have a good ground of action against the landlord. It seems to me perfectly clear that they have not; and I rest my opinion not alone on the authority of *Cavalier v. Pope*, [1906] A. C. 428, but on principle common to the laws of Scotland and of England, which *Cavalier v. Pope* applied." Feb. 7, 1913. *Mellon v. Henderson.*

In *Cavalier v. Pope* the owner of a dilapidated house contracted with his tenant to repair but failed to do so. The tenant's wife, who lived in the house and was aware of the danger, was injured by an accident caused by the want of repairs. It was held that, as she was a stranger to the contract, she was not entitled to recover.

In both cases to which I have referred the accident occurred within the subjects actually let by the landlord to the tenant, to whom in consequence of the contract of lease the possession and control of the premises had passed. The present case is distinguishable from those cases by the following circumstances, which are averred: first, that the common stair where the accident occurred does not form part of the subjects let to the pursuer's husband; and, second, that the stair is merely an access to the subjects, and remains under the control of the landlord, in whom the duty of maintaining the stair in a safe condition is said to remain. I think that these circumstances, if proved, make the principle upon which the cases of *Cameron* and *Cavalier* were decided inapplicable to the present case.

There have been a number of cases decided both in England and Scotland where the proprietor of a tenement of houses has been held liable either to the tenant or to a third party visiting the tenant for injuries sustained in consequence of the dangerous condition of a common stair. Among the cases cited to the House of Lords in the course of the argument in *Cameron's* case were the cases of *M'Martin v. Hannay*, 10 Macph. 411 and *Miller v. Hancock*, [1893] 2 Q. B. 177.

In *M'Martin's* case a child who was visiting the tenant of a house in a tenement was killed by falling through the railing of the common stair where one of the banisters was wanting. The proprietor was found liable in damages. Lord Neaves said, "When this proprietor found the stair not properly fenced it was his duty to repair the banisters. He was bound to do so, to insure the safety of all who had a right to be there, whether invited or not. Policemen, tax-gatherers, officers of the law serving process, and such like might all have a right to be there, and this gap ought not to have been standing open so as to be in a dangerous state."

In the case of *Miller v. Hancock* the proprietor of a building in the city of London let out the different floors as business premises to different tenants, but retained in his possession and control the staircase which formed the access to the different premises. A visitor to one of the tenants was injured in consequence of the worn and defective condition of one of the stairs. He was held entitled to recover damages from the landlord. Lord Esher, M.R., said (at p. 179), "So much of the house, whatever it might be, as the defendant did not let, and therefore this staircase, remained in the possession and control of the defendant. What, under such circumstances, are the rights of the tenants and the duties of the landlord towards them? Their only mode of access to their tenements was, as I have said, by this staircase. This may be called an easement, but it was, in my opinion, under the circumstances, such an easement as the landlord was bound to keep so as to afford a reasonably safe entrance and exit to the tenants. . . . Further-

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more, it is obvious that in such a case the landlord must know that premises so let will be of no use to tenants, unless those who supply or deal with the tenants, such as tradesmen or others having business with them, also have access to the premises. . . . I think that there is a relation between the landlord and those who resort to the premises for business purposes, from which a duty arises on the part of the landlord to keep the staircase, which is the means of access to the premises, in reasonably safe repair." Lord Justice Bowen in the same case said (at p. 181), "It appears to me obvious, when one considers what a flat of this kind is, and the only way in which it can be enjoyed, that the parties to the demise of it must have intended by necessary implication, as a basis without which the whole transaction would be futile, that the landlord should maintain the staircase, which is essential to the enjoyment of the premises demised, and should keep it reasonably safe for the use of the tenants, and also of those persons who would necessarily go up and down the stairs in the ordinary course of business with the tenants; because, of course, a landlord must know when he lets a flat that tradesmen and other persons having business with the tenant must have access to it." It does not appear that the scope of the doctrine so expounded by these learned Judges was confined to cases where, as in *Miller's case*, the landlord had in fact retained one room in the tenement for his own use.

Lord Robertson, in his opinion in *Cameron's case*, expresses no disapproval of the law laid down in what I may describe as the common stair cases. On the contrary, I think he may be held impliedly to have approved of them. He says, "I have examined all the cases prior to *Cavalier v. Pope*, which were cited at the bar; and with one apparent, but not real, exception, and one real exception, there is none which conflicts with that decision. All fall within the category of external relations which I have discussed." The two cases there referred to were *Shields v. Dalziel*, 24 R. 849, and *Hall v. Hubner*, 24 R. 875, which it is unnecessary to consider in detail.

The defender made a point upon the relevancy that the pursuer merely averred that the common stair was in the control of the landlord, but did not say that it was not only under the control of, but also in the possession of, the landlord. I do not think that this criticism of the pursuer's case is sound. In the case of *Mathieson's Tutor v. Aikman's Trustees*, 1910 S. C. 11, a boy who had been sent on an errand to premises let as offices to a number of tenants was injured by falling from the lift entrance on the ground floor into the well of the lift—an accident alleged to have been caused by the defective working of the automatic gate which fenced the entrance to the lift. The Court allowed an issue. Lord Kinnear said the pursuer "must prove that the accident was due to the fault of the proprietors, and the only fault alleged is that they have failed to remedy a defect which they knew to exist, or which they were bound to know if they had performed the duty which is assumed to be imposed upon them of keeping the lift in good order. The proof of that duty, of course, depends upon satisfactory evidence upon the first part, that they were really in the control of the lift."

I was also referred to a recent decision of the Second Division in a case of *Deans v. Groves*.¹ That case has not been reported, but I have been provided with a copy of the record and of the opinions expressed by the Judges. The claim there was at the instance of the tenant of a house in a tenement, for himself and as tutor for his pupil children,

¹ Jan. 24, 1913, unreported. In this case the Second Division (*dis. Lord Salvesen*), holding that inquiry was necessary, remitted to the Sheriff-substitute to take a proof before answer. In their opinions the Lord Justice-Clerk and Lord Dundas made no reference to *Cameron v. Young*; Lord Salvesen made the reference quoted *supra*; and Lord Guthrie, while concurring with the majority as to the disposal of the case, expressed his approval of Lord Salvesen's views with regard to *Cameron v. Young*.

and by his wife, against the landlord for injuries sustained by them in consequence of the roof and chimney head of the tenement collapsing and falling through the ceiling of their house upon them. It was maintained that the pursuers had no title to sue—a plea based upon *Cameron v. Young*, and directed against the claim so far as insisted in by the wife and children. The Division allowed a proof before answer. Lord Salvesen dissented on the ground that no special cause had been shown for refusing a jury trial to the pursuer. In the course of his opinion he said, “I think that *Cameron v. Young* does not apply to the parts of a landlord’s property which are not let, and it is not said that the chimney head in question was part of the subjects let to Deans. . . . The common stair cases which were pleaded to us seem to me to be exactly in point, and there has never been any suggestion that these cases were ill decided; on the contrary, they are distinguished and approved in the case of *Cameron v. Young*.” Lord Guthrie, although he assented to the course of remitting the case to the Sheriff-substitute to take a proof, expressed approval of what Lord Salvesen said as to the application of *Cameron v. Young*.

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As I do not think I should be justified in this case in ordering a special form of inquiry, I shall approve of an issue for trial of the case by a jury.

DOVE, LOCKHART, & SMART, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

MRS AGNES GRANT OR HUTCHISON, Pursuer.—*Sandeman, K.C.*
—*Lippe.*

No. 168.

ROBERT ARMSTRONG AND OTHERS (William Grant’s Trustees),
Defenders.—*Blackburn, K.C.*—*R. C. Henderson.*

June 6, 1913.

Hutchison v.
Grant’s Trus-
tees.

Succession—Accumulations—Thellusson Act (39 and 40 Geo. III. cap. 98)
—*Election—Equitable compensation—Applicability of Thellusson Act to accumulation for equitable compensation.*

By his trust-disposition and settlement a testator directed his trustees to hold his estate for his only child, a daughter, in liferent, and on her death to convey the fee to her issue, whom failing, to other persons named. The daughter having claimed and received legitim, the trustees retained and accumulated the income of the estate. On the expiry of twenty-one years from the testator’s death the daughter brought an action against the trustees concluding for payment to her of the future income of the estate, on the ground that further accumulation was prohibited by the Thellusson Act and that the income fell to her as her father’s heir. In defence it was averred that the accumulated income had not sufficed to replace the capital withdrawn by the pursuer in name of legitim; that under the principle of equitable compensation the income fell to be accumulated till the capital was so replaced; and that accumulation for this purpose was not within the operation of the statute.

Held (by the Lord Ordinary, Hunter) that further accumulation of the income was prohibited by the Thellusson Act, and decree pronounced in favour of the pursuer.

WILLIAM GRANT, wine and spirit merchant, Dunoon, died on 14th January 1890, predeceased by his wife, and leaving one child, Mrs Agnes Grant or Hutchison. OUTER HOUSE.
Lord Hunter.

By his trust-disposition and settlement, dated 5th October 1889, Mr Grant conveyed his whole estate to trustees, and as to the residue thereof directed as follows:—“(Sixth) With reference to the residue of my estates after the payments above mentioned, and under burden

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of the foresaid annuities, I direct my trustees to hold the same for behoof of my wife in liferent, should she survive me, she being bound out of said provision to maintain and educate our daughter Agnes, and failing my wife by her predeceasing me, or upon her death should she survive me, I direct my trustees to hold the said residue for behoof of my daughter Agnes in liferent, and for behoof of any children she may have, equally amongst them, and their issue *per stirpes* in fee. On the death of my wife or daughter, whichever of these events shall last happen, the capital of the shares falling to such children or their issue shall be payable to them upon their respectively attaining majority, or if females, on their respectively attaining majority or being married, whichever of these events shall first happen. (Seventh) Should my said daughter die without leaving issue, I direct my trustees, upon her death, or upon my wife's death, should she survive her, to pay over the whole free residue of my estates to" two sisters of the testator, and failing either of them their issue. This provision to the testator's daughter was declared to be in full satisfaction of all legal claims competent to her on his death.

The testator's daughter, Mrs Hutchison, on attaining majority on 4th December 1897 claimed and was paid her legitim. After paying the legitim, the trustees under Mr Grant's trust-disposition and settlement accumulated the income of the estate remaining in their hands.

On 6th May 1913 Mrs Hutchison, with the concurrence of her husband, brought an action against the trustees concluding for payment of the sum of £255, 6s. 5d., the amount of the free income of the estate in the hands of the defenders from 14th January 1911 to Martinmas 1912.

The pursuer averred that the Thellusson Act came into operation with regard to these accumulations on 14th January 1911; that the testator had settled his property in such a manner as, in the event (which had happened) of the pursuer declining to waive her right to legitim, required accumulation of the income, and that she was the person who would have been entitled to the income if no accumulation had, as a result of the terms of the testator's settlement, been required.

The defenders averred that the amount of the testator's estate, after payment of debts, duties, &c., was £7200, and that the amount paid to the pursuer in respect of legitim was £3614, 16s. 7½d. They also averred that "the trust funds remaining in their hands amounted as at 14th January 1911 to £4739, 14s. 11d., whereof £3517, 11s. 7d. was the amount of the original capital remaining after payment of the pursuer's legitim and after deduction of capital charges to that date, and the balance of £1222, 3s. 4d. was the amount of revenue accumulated. The said accumulated revenue thus fell short of the sum paid to the pursuer in name of legitim by the sum of £2392, 13s. 3½d. Under the provisions of the said trust-disposition and settlement the income fell to be paid annually to the pursuer, and the said accumulation of income is occasioned by the pursuer's action in repudiating the liferent bequeathed to her in the said trust-disposition and settlement and in claiming her legitim in lieu thereof. The defenders are accumulating, as they are bound to do, the income for the purpose of making good to the capital of the residue the loss thereto caused by the pursuer's resorting to her legal rights. Should the pursuer be entitled, in addition to her legitim, to the income set free by her repudiation of the provisions of the trust-disposition and

settlement, there will be no means of recouping the trust-estate for June 6, 1918. the sum paid to her in name of legitim, except to the extent of the said sum of £1222, 3s. 4d., and the bequest to her issue, or, failing them, the other residuary legatees will not receive full effect." They further averred that the pursuer had one child who was aged fourteen; that they were bound to hold the estate and accumulate the income till the date when the residue fell to be paid over to the parties who might then be found to be entitled thereto, or until the sum withdrawn by the pursuer in name of legitim was replaced; and that in any case the accumulation of the income was for the payment of debt, or otherwise for the raising of a portion, within the meaning of section 2 of the Thellusson Act.

Hutchison v. Grant's Trustees.

The pursuer pleaded, *inter alia*;—(1) The accumulation of income on the trust-estate after 14th January 1911 being prohibited by the Thellusson Act, all such accumulations form undisposed-of residue and belong to the pursuer as heir *ab intestato* of the testator.

The defenders pleaded, *inter alia*;—(5) The defenders being bound to accumulate and apply the income set free by the pursuer's election of legitim in compensation of the parties injured by said election, and the accumulation of income for this purpose not being within the operation of the Thellusson Act, the defenders are entitled to decree of absolvitor.

The case was heard before Lord Hunter on 5th and 6th June 1913.

Argued for the pursuer;—The Thellusson Act applied if accumulation of income was either expressly or impliedly directed by the testator; and accumulation was impliedly directed if, as here, it was produced by "the natural and necessary operation" of the settlement.¹ It was fallacious to say that the accumulation was due to the operation of the principles of equitable compensation. It was due to the fact that the testator had so disposed of his estate that the parties entitled thereto could not be ascertained till the pursuer's death and that consequently no payment could be made till that date.² The case was not within the exceptions allowed by section 2 of the Act for accumulation of income, seeing that it was not directed for the purpose of raising a provision, nor for payment of a debt, as legitim was not a debt in the sense of the section and, in any case, the legitim had been paid.³ The Act being applicable, the pursuer was entitled to payment of the income released by its operation.⁴

Argued for the defenders;—The present case was not within either the meaning or the letter of the Thellusson Act. As the preamble showed, the Act was designed to thwart provisions for the accumulation of income for the purpose of augmenting the estate and postponing the beneficial enjoyment of the legatees. The accumulation here had neither of these consequences, its sole effect being to replace capital which had been withdrawn from the estate.⁵ The settlement

¹ Lord v. Colvin, (1860) 23 D. 111, *per* Lord Ivory, at p. 126, Lord President (McNeill), at p. 124, Lord Deas, at p. 136; Matthews v. Keble, (1868) L. R., 3 Ch. 691, at p. 696; Tench v. Cheese, (1855) 6 D. M. & G. 453, at p. 462.

² Gollan's Trustees v. Booth, (1901) 3 F. 1035; Logan's Trustees v. Logan, (1896) 23 R. 848; Lees' Trustees v. Fingzies, (1897) 34 S. L. R. 613, 4 S. L. T. 227.

³ *In re Heathcote*, [1904] 1 Ch. 826.

⁴ *McGregor's Trustees v. Kimbell*, 1911 S. C. 1196.

⁵ *In re Gardiner*, [1901] 1 Ch. 697.

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contained no direction as to accumulation of income, either express or implied, for under its provisions every penny of the interest was to be paid away year by year; and the accumulation was not contemplated by the testator,¹ but was due to the derangement of his testamentary directions by the hostile act of the pursuer. The pursuer having claimed legitim, the principle of equitable compensation applied. Under that principle the Court sequestered the benefit intended for the refractory donee²; and the source of the accumulation here was that principle and not any direction of the testator. In *Lord v. Colvin*³ the Judges observed that the accumulations struck at by the statute were such as resulted from the "inevitable operation of the deed" (which could not be alleged of the accumulations in question) and that an "accumulation resulting from the operation of law" would not be within the scope of the statute. In the present case the accumulation was due to the operation of law.⁴ The compensation did not come out of the testator's estate; it was the pursuer who had to make compensation, and it was as being her property that the income, which under the principle of equitable compensation she had not forfeited, was temporarily sequestered for the satisfaction of the debt she had incurred to the residuary legatees. In any event, if there was here an implied direction to accumulate it was to raise a provision for the payment of debts, and an implied direction to that effect must receive the same protection under section 2 of the statute as a similar express direction. It was not necessary under the section that the debts should be those of the testator,⁵ or in existence at his death.⁶

On 6th June 1913 the Lord Ordinary (Hunter) decerned against the defenders for the sum sued for.

OPINION.—The pursuer in this case is the daughter and only child of the late William Grant, wine and spirit merchant, Dunoon, who died on 14th January 1890. She brings the present action against her father's trustees for payment of a sum of £255, 6s. 5d. as unlawful accumulation of interest upon her father's estate, to which she, as his heir at law, is entitled.

Under her father's settlement the pursuer was entitled to a liferent of his whole estate, the fee being destined to her children, with a destination-over to others named in the settlement. She elected, as she was entitled to do, upon her father's death to take her legal provisions. The result of that election was that temporarily, at all events,—although, as is admitted, not absolutely,—her liferent interest in her father's estate was set free. As there was not a forfeiture clause she was entitled, on the estate being recouped in the amount that she had taken out in respect of her legal claims, to be restored to her interests under the will, *i.e.*, to enjoy the remainder of her liferent interest.

More than twenty-one years, however, elapsed before equitable compensation had effected restoration to the estate from the liferent interest of the amount that had been taken out in order to pay the pursuer's legal claims. Consequently, there is no room in this case, I think, for considering equit-

¹ *Lombe v. Stoughton*, (1841) 12 Sim. 304.

² 1 *Swanston's Reports*, p. 433, note to *Gretton v. Howard*; *Macfarlane's Trustees v. Oliver*, (1882) 9 R. 1138.

³ 23 D. 111, *per* the Lord President, at p. 124, Lord Ivory, at p. 127; *Bryan v. Collins*, (1852) 16 Beav. 14, *per* Romilly, M.R., at p. 17.

⁴ *Macfarlane's Trustees v. Oliver*, 9 R. 1138, *per* Lord McLaren, at p. 1160; *Gray's Trustees v. Gray*, 1907 S. C. 54, *per* Lord Kyllachy, at p. 57.

⁵ *Barrington v. Liddell*, (1853) 2 D. M. & G. 480, 22 L. J. (Ch.) 1.

⁶ *In re Mason*, [1891] 3 Ch. 467; *Varlo v. Faden*, (1859) 27 Beav. 255.

able compensation at all. The question is—what is to be done with the accumulations after twenty-one years from the death of the testator? June 6, 1913.

I think the real point in the case is—what has caused those accumulations? On behalf of the trustees it is maintained that it was not the settlement that caused the accumulations, but the election on the part of the beneficiary to take her legal rights. Now under the Thellusson Act what is struck at is illegal accumulations of income arising by direction of the truster, that direction being either express or implied. At first sight there does seem to be a considerable amount of force in the defenders' argument, to the effect that it was the beneficiary's act and not the truster's act that caused the accumulation. But when one asks oneself the further question—Why should the pursuer's election cause accumulation? it is impossible to answer the question as the trustees desire. After the election the life interest was, no doubt, set free, but neither the election nor any rule of law necessitated its accumulation. It went back to the trust, and if it was accumulated at all, it was accumulated in virtue of the trust. Hutchison v. Grant's Trustees.

When one looks at the clause of residue in this case, one finds ample provision for the accumulation, and, in fact, the accumulation in the hands of the trustees just now is going on in virtue of the powers conferred on the trustees by this clause. They have no power and no right to accumulate except such as is thereby given them.

That being so, it appears to me that the provisions of the Thellusson Act, as interpreted in such a case as *Logan's Trustees v. Logan*, 23 R. 848, or in any other of the leading cases, apply to the circumstances here, unless it can be said that the accumulations come within certain exceptions introduced in the Thellusson Act.

The defenders have pled two of these exceptions in their answer 5, because they quote section 2 of the Act which provides:—"Nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler, or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor. . . ." I must say I do not follow the argument which brings what has occurred here within the scope of these exceptions. No provision at all was made by the truster, and the first exception allows of a provision being made. Further, I do not see that what was done was in any proper sense payment of debt—debt either of the truster or of anyone else. It has not been suggested that the second exception, that it was a provision for a child or children of the grantor or settler, is applicable.

That being so, I hold these accumulations to be unlawful accumulations under the Thellusson Act. The Act itself provides that the illegal accumulations should go to the person or persons who would have been entitled to them if such an accumulation had not been directed. That, of course, would give these illegal accumulations to any person who under the settlement has what has been described in English legal phraseology, and I think also adopted in Scotch phraseology, as a gift in possession.

There is no such case here. In fact it is admitted by the defenders that if there are unlawful accumulations under the Thellusson Act, these constitute intestate succession of the testator. The only person entitled thereto is the pursuer. I do not think that any argument has been submitted which deprives her of her right, as heir of her father, to take whatever was undisposed of by him. She has taken nothing under the will of her father. She merely got in the first instance her legal rights and surrendered her liferent, and now she claims the accumulations which in consequence of the operation of the Thellusson Act have become intestate succession of her father.

I therefore hold that the pursuer is entitled to decree against the defenders, but as this was a case where the trustees were entitled to defend the action, I think the expenses should come out of the unlawful accumulations.

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- A. S.*, 13th February 1730, p. 242.
- A. S.*, 15th July 1876, p. 870.
- A. S.*, 26th June 1907, pp. 358, 892, 1003.
- A. S.*, 17th July 1908, p. 60.
- A. S.*, 19th November 1910, p. 758.
- C. A. S.*, 1913, L. xiii., 17 (g), p. 1166.
- C. A. S.*, 1913, M. ii., p. 1036.

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AGENT AND CLIENT. *Law-Agent transacting with client's wife.*

1. *A law-agent acted for a client (who was a partner in a commercial firm) and also, as an individual, made advances to his client's firm. He was, besides, the agent for a branch bank where the firm's bank account was kept, and in that capacity made advances to the firm on overdraft. He also acted from time to time as law-agent for his client's wife with regard to certain investments and other matters. The client's wife, having become entitled to a legacy of £12,000, assisted her husband's business (1) by making direct advances to the firm, (2) by becoming surety for overdrafts from the bank, and (3) by transferring to the law-agent securities for advances made by him to the firm. During these transactions the wife had no separate legal advice. The husband's firm having become insolvent, and the wife having thereby lost the whole of her fortune, she brought an action against the law-agent for recovery of damages for loss sustained by her through his alleged negligence and breach of duty as her law-agent, and for repayment of gain alleged to have been improperly made by him out of his transactions with her. Circumstances in which the House of Lords absolved the defender, having regard in particular to the fact that he had not advised in favour of the transactions and that the pursuer had really acted on her own responsibility.* *Dick v. Alston*, (H. L.) p. 57.

Fraud of agent—Liability of client—Bond left in custody of agent—Fraudulent discharge of bond by agent.

2. The purchaser of a certain property, burdened with a bond, paid the full price of the property, and received along with the disposition the bond and a forged discharge thereof from the seller's

AGENT AND CLIENT—*Continued.*

agent, who was also agent for the bondholders and had custody of the bond. On the agent's death it was found that he had embezzled the sum in the bond. In an action by the bondholders against the purchaser of the property for delivery of the bond, *held* that the pursuers were entitled to delivery of the bond in respect (1) that the bond was not one of the property titles carried to the defender by the assignation of writs, (2) that the pursuers, having given their agent no authority to discharge the bond, were not liable for his fraudulent discharge thereof. *Bowie's Trustees v. Watson*, p. 326.

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AGENT AND PRINCIPAL. *Right in Security—Factor's right to retain estate documents in security of debt due by estate.*

1. *Held* that the factor on a landed estate had, as against a bondholder desirous of appearing as a party to proceedings in the Land Court, no right to retain the leases or documents in security of a debt due to him by the estate. *Macrae v. Leith*, p. 901.

Liability to third parties—Knowledge of agent imputed to principal.

2. The proprietrix of certain subjects handed the title-deeds to her law-agent, a nephew, at whose death it was discovered that he had utilised the title-deeds to obtain money for himself by means of a forged bond over the property. Previously the proprietrix had received a demand for payment of income-tax on "interest" and, not knowing to what such a demand could refer, she asked another nephew, a brother of the law-agent, to make inquiries, in the course of which he learnt that his brother had obtained money for himself on the security of his aunt's title-deeds. He refrained from communicating this to his aunt till after his brother's death, when she heard of the bond for the first time and at once repudiated her signature and raised an action against the bondholders for reduction of the bond and for delivery of the title-deeds. *Held* that the knowledge of the nephew employed to make inquiries, which he had refrained from communicating, could not be imputed to the pursuer so as to bar her from subsequently repudiating the forgery; and decree *granted* as concluded for. *Muir's Executors v. Craig's Trustees*, p. 349.

Usage of trade—Implied authority of architect to employ measurer.

3. *Held* that there is no usage of trade by which the official architect of a building company, which has not commenced operations, or approved of plans, or instructed the architect to proceed with the building, has implied authority to employ the services of a measurer to the effect of rendering the building company liable for the measurer's charges. *Knox & Robb v. Scottish Garden Suburb Co., Limited*, p. 872.

Liability of commanding officer for bank overdraft.

4. On the instructions of the commanding officer of a volunteer regiment, an account was opened with a bank in the name of the Finance Committee of the battalion. The bank having brought an action against the commanding officer for the amount of an overdraft, *circumstances* in which the Court *assoiized* the defender, *holding* that it was not proved that he had as an individual entered into any contract with the bank which could infer personal liability against himself. *National Bank of Scotland, Limited. v. Shaw*, p. 133.

See *Accounting*.

APPROBATE AND REPROBATE. See *Succession*, 23, 24.

ARBITRATION. *Exclusion of arbitration clause by rescission of contract.*

1. In an action of damages for breach of a contract which provided that any dispute between the parties as to its construction should be referred to an arbitrator, and that "no action shall be maintainable against the insurers except upon" the award of such arbitrator, the question whether there had been breach of contract or not depended on the construction to be put upon a certain clause of the contract. *Circumstances*, in which *held* that the parties had not treated the contract as rescinded, and, accordingly, that the arbitration clause was still binding; and action *sisted* that the construction of the clause in dispute might be determined by arbitration. *Hegarty & Kelly v. Cosmopolitan Insurance Corporation, Limited*, p. 377.

Arbiter's right to remuneration—Professional man acting as arbiter.

2. A professional man undertaking the duties of an arbiter without any stipulation as to payment cannot be presumed to be giving his services gratuitously, and is therefore entitled to remuneration. *Macintyre Brothers v. Smith*, p. 129.

See *Friendly Society—Railway*, 3—*Workmen's Compensation Act*.

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ARRESTMENT. *Form of process for making effective maritime lien.*

1. Where one vessel owing to her faulty navigation has damaged another vessel, the maritime lien over the former available to the owner of the latter cannot be made effective by arrestment of the vessel on the dependence of an action against her owner concluding for a sum of damages and *separatim* for declarator of lien and for warrant to sell. So *held* in an action for the recall of an arrestment so used. *Opinion* (per the Lord President) that the maritime lien could be made effective by arrestment of the vessel upon special application, *e.g.*, in the Bill Chamber, after citation of all parties interested. *Clan Line Steamers, Limited, v. Earl of Douglas Steamship Co., Limited*, p. 967.

Jurisdictionis fundandæ causa—Action for delivery of goods in terms of contract and failing delivery for damages.

2. *Held* that jurisdiction in an action concluding for delivery of goods in terms of a contract between the parties, and failing delivery for damages was competently founded by arrestments *ad fundandam jurisdictionem*. *Union Electric Co., Limited, v. Holman & Co.*, p. 954.

ASSESSMENT. See *Rates and Assessments*.

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BANKRUPTCY. *Effect—Company—Winding-up—Creditor's right to a security—Obligation to assign debenture in security for debt—Assignment not completed at date of liquidation.*

1. A company, which was indebted to a bank, entered into an arrangement with the bank whereby it was agreed that, on the bank surrendering certain moveables belonging to the company which the bank held in security, the company should obtain from J., who was indebted to them, a debenture over his assets, and should assign the debenture to the bank in lieu of the surrendered security. The moveables were surrendered and the debenture was obtained

BANKRUPTCY—Continued.

from J. ; but before it had been assigned to the bank the company went into liquidation. The bank having claimed the debenture, *held* that the company did not hold the debenture for the bank, but had, at most, come under a contractual obligation to assign it ; that accordingly they were the parties beneficially interested in it at the date of the liquidation ; and claim for the bank *rejected*. *Bank of Scotland v. Liquidators of Hutchison, Main, & Co., Limited*, p. 255.

Effect—Illegal preference—Act 1696, cap. 5—Transaction in the course of trade—Sale of insolvent's goods by auctioneer—Retention by auctioneer of debt due to him.

2. A farmer, on surrendering the lease of his farm, instructed a firm of auctioneers, with whom he was accustomed to deal, to conduct a dispenishing sale of the farm effects. At the date of instructing the sale he was in debt to the auctioneers, and he was (but not to their knowledge) in embarrassed circumstances ; but in employing them he had no intention of giving them any preference over his other creditors. The sale took place within sixty days of his sequestration. The auctioneers, who had a clause of lien in their conditions of sale, having retained from the proceeds of the sale the sum due to them, the trustee in the farmer's sequestration brought an action against them to recover this sum on the ground that they had obtained a preference contrary to the Act 1696, cap. 5. *Held* that, as the transaction was entered into in the ordinary course of trade and without any intention of conferring a preference, it was not struck at by the statute ; and defenders *assolized*. *Crockart's Trustee v. Hay & Co., Limited*, p. 509.

Sequestration—Trustee—Personal liability—Adoption of bankrupt's contract by trustee.

3. The trustee on a bankrupt estate sued the former partner of a dissolved firm, of which the bankrupt had been a member, for a debt due to the bankrupt under the agreement of dissolution. The defender was assolized on the ground that the pursuer refused to implement the obligations of the bankrupt under the agreement. *Held* that the trustee, by thus raising an action founded on the agreement, had not adopted the agreement so as to make himself personally liable for the obligations of the bankrupt under the agreement. *Sturrock v. Robertson's Trustee*, p. 582.

Sequestration—Trustee—Transaction—Discharge of Bankrupt's co-cautioner with consent of trustee—Commissioners—Necessity for consent of commissioners—Bankruptcy (Scotland) Act, 1856, sec. 176.

4. A cautioner under a letter of guarantee was discharged by the creditor with the consent of the trustee on the sequestered estate of a co-cautioner. *Held* that the consent of the trustee to the discharge was an act of management to which sec. 176 of the Bankruptcy (Scotland) Act, 1856, did not apply, and that the concurrence of the commissioners was accordingly unnecessary. *Hamilton's Executor v. Bank of Scotland*, p. 743.

See Marriage-Contract.

BETTING. *See Justiciary Cases, 3-5, 24.*

BURGH. *Jurisdiction of Burgh Police Court—Fortune-telling—Vagrancy Act, 1824, sec. 4—Prevention of Crime Act, 1871, secs. 15 and 17.*

1. *Held* that a magistrate sitting in a Burgh Police Court had jurisdiction to try a charge of professing to tell fortunes by palmistry with intent to deceive. *Gerald v. McIntyre, (J.)* p. 59.

BURGH—Continued.

- Jurisdiction of Burgh Police Court—Keeping a brothel—Whether charge triable by a single magistrate—Sentence—Criminal Law Amendment Act, 1885, sec. 13—Burgh Police (Scotland) Act, 1892, secs. 403 and 431.*
2. *Held* that a charge of keeping a brothel contrary to section 13 of the Criminal Law Amendment Act, 1885, may be tried under section 431 of the Burgh Police (Scotland) Act, 1892, before a single police magistrate; and that the magistrate is entitled to impose on the accused, if found guilty, a sentence of imprisonment for three months. *Observed* that proceedings for the offence of keeping a brothel may also be taken under section 403 of the Burgh Police (Scotland) Act, 1892, which provides for trial before the Sheriff, or two police magistrates, and limits the sentence of imprisonment to one of sixty days. *M'Laren v. Macleod*, (J.) p. 61.
- Jurisdiction of Burgh Police Court—Living on earnings of prostitution—Immoral Traffic (Scotland) Act, 1902, sec. 1 (1).*
3. *Held* that a police magistrate sitting in a Burgh Police Court has jurisdiction to try an offence against the Immoral Traffic (Scotland) Act, 1902. *Hall v. Macpherson*, (J.) p. 100.
- Liabilities of magistrates—Flooding of land in burgh—Responsibility of drainage and road authority—Edinburgh Municipal and Police Act, 1879, sec. 179—Edinburgh Corporation Act, 1900, sec. 28.*
4. *On two occasions in 1909, after heavy rainfalls, a market garden, on the estate of Craigentenny in the burgh of Edinburgh, bounded by the Craigentenny burn was flooded owing to a culvert which carried the burn under a road being of insufficient capacity to admit free passage of the water, which in consequence overflowed on to the road, whence it found its way into the garden. In an action of damages at the instance of the tenant of the market garden against the Corporation, held that sec. 28 of the Edinburgh Corporation Act, 1900, which inter alia made it unlawful for the Corporation to diminish the supply of sewage water flowing through the burn or to deepen or otherwise interfere with the burn, did not affect the obligation of the defenders at common law, and under sec. 179 of the Edinburgh Municipal and Police Act, 1879, to make and keep the drainage system of the burgh effective, and that accordingly they were liable in damages. Hanley v. Magistrates of Edinburgh*, (H. L.) p. 27.
- Powers of magistrates—Use of streets—Proclamation prohibiting holding meetings in streets—Act for staying unlawful conventions (Act 1606, cap. 17).*
5. The Magistrates of Edinburgh issued a proclamation prohibiting the holding of meetings in certain streets of the city, unless a licence to do so had been previously obtained, and imposing penalties for a breach of the proclamation. The form of licence granted by the magistrates bore to be issued in virtue of the powers conferred by the Act 1606, cap. 17. A street orator, who had been convicted of a breach of the proclamation, brought an action for declarator, *inter alia*, that the magistrates had no authority to issue the proclamation, and that he was not bound to obey it. The Court *granted* the declarator, *holding* (1) that the Act 1606, cap. 17, was in desuetude, and (2) that the magistrates were not empowered by common law or by any other statute to issue such a proclamation. *Observations* (*per* the Lord President) as to the powers of magistrates to prevent, by means of the police, any conduct tending to interfere with the paramount use of the streets for passage or to lead to a breach of the peace; and as to the right of the public to hold meetings in the streets. *M'Ara v. Magistrates of Edinburgh*, p. 1059.

BURGH—Continued.

Street—New street—Intention to form a new street—Burgh Police (Scotland) Act, 1903, sec. 11.

6. *Held* that a proprietor in a burgh who proposed to build upon his own property a block of three-storey tenements, fronting upon and having access to a public footpath or esplanade lying without the boundary of his property, did not thereby propose to form the public footpath into a new street in the sense of the Burgh Police (Scotland) Act, 1903, sec. 11; and, accordingly, that the Dean of Guild was not justified in refusing his sanction to the proposed buildings until warrant for the formation of a new street had been obtained. *Mason v. Roger*, p. 52.

Street—Public or private street—Removal of barricade on private street by town-council—Duty of adjoining proprietors to pave the street—Personal objection—Burgh Police (Scotland) Act, 1903, secs. 103 (5) and 104 (2) (d).

7. A barricade, which had been erected across an unpaved private street in a burgh by the adjoining proprietors to prevent it being used as a thoroughfare, was removed by the town-council without the consent of these proprietors, who had refused their consent except on condition that they should not be called upon to pave the street. Some years after the removal of the barricade the proprietors, on being called upon by the town-council to level and pave the street under sec. 104 of the Burgh Police (Scotland) Act, 1903, maintained that the street had become a public street and so was maintainable by the town-council, or in any event that the town-council were barred from calling on them to pave it. *Held* (1) that the street had not become a public street by reason of the removal of the barricade; and (2) that the town-council were not barred by their actings from now calling on the proprietors to pave it, in respect that these actings had not prejudiced the proprietors in their obligation to pave the street. *Magistrates of Alloa v. Wilson*, p. 6.

See *Justiciary Cases*, 18—*Loan*.

BYE-LAW. See *Justiciary Cases*, 18, 19, 21.

CAUTIONER. *Partnership—Retirement of Partner—Bonds and dispositions in security granted by partners—Question whether retired partner principal debtor or cautioner.*

1. An association, formed for the purpose of acquiring heritable properties as investments, in the course of their business borrowed sums of money on the security of certain of their properties, for which the partners in the association granted bonds and dispositions in security as trustees for the association, and also as individuals. One of the members thereafter withdrew from the association, under an article of the partnership agreement which permitted any member to retire on finding a satisfactory substitute, and the remaining members granted a bond of relief undertaking to relieve him of any claim made against him by any creditor in respect of the bonds. Neither the partnership agreement nor the bond of relief made any provision for the termination of obligations undertaken during his membership. *Held* that the retiring member continued to be a principal debtor and was not a mere cautioner with a right to withdraw his cautionary obligation at any time as regarded future liability, and, accordingly, had, in the circumstances, no right of relief against the defenders except that given by the bond of relief. *Roughead v. White*, p. 162.

CAUTIONER—Continued.*Discharge—Recall of guarantee—Effect of recall—Giving time.*

2. A letter of guarantee, granted in favour of a bank in security of advances made by it to a limited company, empowered the bank to give time to the debtor without affecting the liability of the cautioners, and provided that the guarantee should continue in force until recalled. *Opinion* that the recall of the guarantee by a cautioner, while preventing further advances to the debtor on the credit of the revoking cautioner, would not in every case debar the bank from giving time to the debtor after the date of the recall. *Hamilton's Executor v. Bank of Scotland*, p. 743.

Discharge—Giving time—Creditor assuming control of debtor's business.

3. Averments by a cautioner for a limited company to the effect that the creditor, a bank, held shares in the company, and had assumed control and carried on the business in the interest of the shareholders and to the prejudice of the cautioners, *held* insufficient to support the contention that the creditor by his actings had given time to the debtor, and had so essentially altered the relation of parties as to discharge the cautioner from his obligation. *Hamilton's Executor v. Bank of Scotland*, p. 743.

See *Process*, 4.**CHURCH. Seats—Allocation—Heritor—Family pew.**

1. A right to a family pew in a parish church, created by allocation to a proprietor of lands in the parish, remains, until another allocation is made, with that proprietor and his successors, so long as they retain the major portion of the lands, whether they occupy the pew or not. *Observed* (*per* the Lord President), "When there has been legal allocation the heritor's right to his family pew is exclusive . . . as to the right to sittings in it, and the right to furnish it, and to exclude all others at least until the bell for service has ceased to toll." *Paterson v. Brown*, p. 292.

Seats—Assignment of sittings—Proof.

2. *Opinion* (*per* the Lord President), that an assignment of sittings in a family pew can only be established by writing. *Paterson v. Brown*, p. 292.

Manse—Glebe—Transportation of Manse—Sale of old site—Presumption that manse built on manse ground and not on glebe.

3. A petition was presented by the heritors of a burghal landward parish for transportation of the manse to a new site, and for authority to sell the old site. The latter part of the prayer was opposed by the minister, who maintained that, as the manse had occupied the site for many years before the right of a parish minister to half an acre of ground, over and above his glebe, as a site for his manse was recognised, the presumption was that the manse must have been built upon glebe, and accordingly that its site remained glebe land and could not be sold by the heritors. *Held* that, in the absence of any evidence to the contrary, it must be presumed that the ground on which the manse stood was dedicated as manse ground, and as such was something other than glebe; and prayer of the petition *granted*. *Heritors of Rutherglen*, p. 671.

Dissenting Churches—Trust—Administration—Allocation of trust funds by Churches (Scotland) Act Commissioners—Effect of allocation—Churches (Scotland) Act, 1905, sec. 1 (3), First Schedule, head 4.

4. A trust fund was administered by private trustees, in terms of a trust-deed which directed them to expend the annual income of the residue of the trust-estate upon the "Home Mission" in

CHURCH—*Continued.*

connection with the Free Church of Scotland, "in such way as they may think proper either through the Church or independently of it," and provided for forfeiture of the bequest in certain events. The Commission appointed under the Churches (Scotland) Act, 1905, to allocate between the Free Church and the United Free Church the "property in question" defined in the Act, which included property held for the purposes of any "mission," pronounced an order allocating to the Free Church and the Home Mission Committee thereof the whole rights and interests which the Free Church had in this trust fund, and declaring that the allocation should, to the extent of the capital value thereof, viz., £9340, be held as to account of a provision of £250,000 made by the Commission, in terms of the Act, for the support of ministers and itinerant preachers and for administration and management of the Free Church. On the trustees continuing to administer the fund independently of the Free Church, the latter brought an action to have it declared that the trustees were bound to pay over the income of the trust to them to be administered for any of the purposes for which the provision of £250,000 had been made. *Held* that the effect of the Act and of the Order of the Commission had been to alter the administrative powers of the trustees and to render it necessary that the income of the trust should be administered through the Free Church; and declarator *granted* as craved. *Free Church of Scotland v. MacKnight's Trustees*, p. 36.

COMMISSARY. See *Husband and Wife*, 1.

COMMIXTIO. See *Ship*, 3.

COMPANY. *Agreement to take shares—Rectification of register—Removal of shareholder's name on ground that shares had been taken through misrepresentation in prospectus—Quotation in prospectus of report by one of the directors—Responsibility of company for truth of statements in report—Fraud and misrepresentation—Contract.*

1. *A company, formed for the purpose of acquiring a rubber estate in the Philippines, issued a prospectus in which was quoted a report on the natural advantages of the estate by one of the directors, who was stated to be acquainted with the locality. The prospectus also bore that no portion of the price of the estate would be paid until the directors had received an independent report confirming the statements of the director. A shareholder, who had received the prospectus and had applied for and been allotted shares, brought an action against the company for removal of his name from the register of shareholders and for repayment of the price of the shares, on the ground that he had been induced to apply for them by the statements in the report quoted in the prospectus, which statements he averred were false and fraudulent. In defence it was maintained that the action was irrelevant, the directors having in the prospectus not only not vouched for, but expressly refrained from committing themselves to the truth of the statements made in the report. Held (rev. judgment of the First Division, reported p. 183) that the action was relevant in respect that, the prospectus having been put forward by the company as an inducement to take shares, the company could not take benefit from the false and fraudulent statements of their agent. Mair v. Rio Grande Rubber Estates, Limited, (H. L.) p. 74.*

Agreement to take shares—Allottee's liability on shares—Shares issued as fully paid.

2. *The partners in a foundry, with the object of forming a syndicate to acquire the business, obtained deposits of sums of money from*

COMPANY—*Continued.*

a number of persons. The project of forming the syndicate having failed, the partners floated a limited company, proposed to the depositors that their deposits should be applied in taking shares, and offered to each of them a number of shares in proportion to, but of a greater face value than, the amount of his deposits. The company having gone into liquidation, one of the depositors, who had been allotted shares and had received from the company share certificates which bore that the shares allotted to him were fully paid, though in fact they were not, was sued by the liquidators for the price of his shares. *Circumstances in which held* (by the Lord Ordinary, Cullen) that as the defender had accepted the shares in *bona fide* reliance on the statements in the certificates, the company were barred from maintaining that the shares were not fully paid, and defender assoltized. *Penang Foundry Company, Limited, v. Gardiner*, p. 1203.

Shares—"Paid-up share capital"—*Shares issued for a consideration other than cash or the equivalent of cash*—*Shares issued at a discount*—*Railway—Contractors' line.*

3. For the purpose of authorising them to construct a railway, the promoters of the Newburgh and North Fife Railway Company obtained an Act of Parliament, which incorporated the Companies Clauses Consolidation (Scotland) Act, 1845, the Companies Clauses Act, 1863, and Acts amending the same. A Schedule to the Act contained an agreement between the Company and the North British Railway Company, whereby the North British Company guaranteed a fixed dividend upon "the paid-up share capital" of the Newburgh Company. The Newburgh Company, having failed to obtain sufficient subscriptions to its shares, entered into an agreement with a syndicate, whereby the Company undertook to issue to the syndicate its whole unissued capital, and the syndicate undertook to construct the railway. It was established by proof that the cost of construction was about 60 per cent of the face value of the capital issued to the syndicate, and that the syndicate disposed of the shares so issued at less than par. *Held* that the capital so issued to the syndicate was not "paid-up share capital" of the Newburgh Company in the sense of the agreement with the North British Company, and that the North British Company was only bound to contribute to the dividend on so much of the capital of the Newburgh Company as was issued in consideration of cash or the equivalent of cash. *Opinions* that a company incorporated under the Companies Clauses Acts is not entitled to issue its original shares at a discount: *Question* whether such a company is entitled to issue shares for a consideration other than cash or the equivalent of cash. *Newburgh and North Fife Railway Company v. North British Railway Company*, p. 1166.

Reorganisation of share capital—Petition—Advertisement—Companies (Consolidation) Act, 1908, sec. 45.

4. In a petition, under sec. 45 of the Companies (Consolidation) Act, 1908, for confirmation by the Court of special resolutions passed by a limited company for reorganisation of its share capital, the Court ordered intimation of the petition without advertisement. *Robert A. Munro & Co., Limited*, p. 456, and *British Assets Trust, Limited*, p. 661.

Winding-up—Winding-up order pronounced by the Lord Ordinary on the Bills in vacation—Reclaiming note—Competency—Companies (Consolidation) Act, 1908, sec. 181.

5. It is competent to reclaim against an interlocutor pronounced by

COMPANY—*Continued.*

the Lord Ordinary on the Bills in vacation granting an order for the compulsory winding-up of a company. *Magistrates of Edinburgh v. Union Billposting Co., Limited*, p. 105.

See *Bankruptcy*, 1—*Insurance*, 1.

CONTRACT. *Breach—Damages for delay—Measure of damages—Provision for liquidate damages for delay—Failure of contractor to complete contract—Completion of contract by other parties—Applicability of provision for liquidate damages.*

1. A contract for the construction of certain works by a specified date contained a clause providing for liquidate damages at certain rates to be paid by the contractor for each week's delay beyond that date. A separate clause provided that, if the contractor should suspend the works, the employers might take possession of the plant and materials and engage others to complete the contract, and that, should the expenses thus properly incurred by the employers exceed the amount which would have been due to the contractor on completion of the work, the difference was to be paid by the latter to the former. The contractor became bankrupt and suspended the works, and the employers thereupon engaged other persons to complete them, but they were not completed until at least six weeks after the date specified in the original contract. Held that, while the employers were entitled to sue for damages for breach of contract, they could not found on the liquidate damages clause, as that clause applied only where the contractor had himself completed the contract. *British Glanzstoff Manufacturing Co., Limited, v. General Accident, Fire, and Life Assurance Corporation, Limited*, (H. L.) p. 1.

Breach—Rescission—Exclusion of arbitration clause by rescission of contract.

2. A contract between an insurance company and a firm of cattle salesmen, for the insurance of cattle sold by the firm, contained an arbitration clause providing that any dispute between the parties as to the construction of the contract should be referred to an arbitrator, and that "no action shall be maintainable against the insurers except upon" the award of such arbitrator. The insurers, having taken exception to certain actings of the firm, declined to do further business with them. The firm replied that they would continue to insure live stock on the insurer's account in terms of the contract. In an action of damages at the instance of the firm against the insurers for breach of contract, the question whether there had been breach of contract or not depended on the construction to be put upon a certain clause of the contract. The defenders maintained that the construction of this clause fell to be determined by arbitration before any action of damages could be maintained. *Circumstances*, in which held that the parties had not treated the contract as rescinded, and, accordingly, that the arbitration clause was still binding; and action *sisted* that the construction of the clause in dispute might be determined by arbitration. *Hegarty & Kelly v. Cosmopolitan Insurance Corporation, Limited*, p. 377.

See *Company*, 1—*Crown—Jurisdiction*, 1.

COUNTY. See *Justiciary Cases*, 18.

CROWN. *Volunteer forces—Liability of commanding officer for bank overdraft—Volunteer Act, 1863, sec. 25—Regulations for the Volunteer Force, 1901, Article 407—Contract—Bank.*

In October 1906, on the instructions of the commanding officer of a volunteer regiment, an account was opened with a bank, headed.

CROWN—Continued.

"R.S.F. 2nd Volunteer Battalion, Finance Committee. Cheques to be signed by any two members of the Committee." The sums paid to the credit of the account consisted mainly of sums paid directly to the bank by the War Office, while the drafts upon the account were made by cheques stamped "On His Majesty's Service," and signed by two members of the finance committee, one of whom was as a rule, though not in every instance, the commanding officer. On the transference of the corps to the Territorial Force in 1908 there was a large debit balance on the account, for which the War Office and the County Association refused to accept liability. The bank having brought an action against the commanding officer for the amount of the overdraft, the Court *assolized* the defender, *holding* (1) that neither sec. 25 of the Volunteer Act, 1863, nor the Volunteer Regulations of 1901 (which vested the property of the regiment in the commanding officer), imposed any liability upon him for such a debt; (2) that it was not proved that he had as an individual entered into any contract with the bank which could infer personal liability against himself. *National Bank of Scotland, Limited, v. Shaw*, p. 133.

See *Rates and Assessments*, 2.

CUSTOM. *Custom of trade—Implied authority of architect to employ measurer.*

Held that there is no custom of trade by which the official architect of a building company, which has not commenced operations, or approved of plans, or instructed the architect to proceed with the building, has implied authority to employ the services of a measurer to the effect of rendering the building company liable for the measurer's charges. *Knox & Robb v. Scottish Garden Suburb Co., Limited*, p. 872.

DAMAGES. See *Contract*, 1—*Expenses*, 4—*Patent—Reparation*.

DEED. See *Writ*, 2, 3.

DEPOSIT-RECEIPT. See *Trust*, 1.

DILIGENCE. *Arrestment—Maritime lien—Process—Form of process for making effective maritime lien.*

Where one vessel owing to her faulty navigation has damaged another vessel, the maritime lien over the former available to the owner of the latter cannot be made effective by arrestment of the vessel on the dependence of an action against her owner concluding for a sum of damages and *separatim* for declarator of lien and for warrant to sell. So *held* in an action for the recall of an arrestment so used. *Opinion* (*per* the Lord President) that the maritime lien could be made effective by arrestment of the vessel upon special application, *e.g.*, in the Bill Chamber, after citation of all parties interested. *Clan Line Steamers, Limited, v. Earl of Douglas Steamship Co., Limited*, p. 967.

DUTIES ON LAND VALUES. See *Revenue*, 6, 7.

ELECTION. See *Succession*, 19, 23, 24.

ELECTION LAW. *Lodger franchise—Procedure—Failure of claimant to appear after citation by objector—Discretionary power of Sheriff to refuse adjournment and admit claim.*

A person on the county register of voters for the current year as a lodger claimed to be entered on the roll for the ensuing year in respect of his occupancy of the same lodgings. His claim was

ELECTION LAW—*Continued.*

opposed, though no specific objection was stated to it ; and he was cited to appear at the Registration Court, but was not present. The agent of the objector moved for an adjournment in order that the claimant might be cited of new, but admitted that he was unable to state any change of circumstances with regard to the claim, or any new facts not before the Court when the claimant was formerly admitted. *Held* that the Sheriff was entitled, in the exercise of his discretion, to refuse the adjournment and admit the claim. *Melville v. Adamson*, p. 282.

ENTAIL. *Improvement expenditure—Obligation by heir in possession to repay improvement expenditure undertaken by tenant of entailed subjects—Action by tenant's executors against succeeding heir in possession for repayment—Title to sue—Extent of liability of succeeding heir—Entail Amendment (Scotland) Act, 1878, sec. 1.*

1. Sir A. M., an heir of entail in possession, granted a lease of the mansion-house and policies on the entailed estate, and entered into agreements with his tenant in terms of which the latter undertook to execute certain improvements upon the subjects let, Sir A. binding himself and the heirs of entail succeeding him (and *subsidiarie* his heirs, executors, and representatives whomsoever) to repay to the tenant, at the date of Sir A.'s death, a proportion of the certified cost of these improvements, the amount payable not to exceed a certain fixed sum. The tenant executed improvements, the certified cost of which exceeded the fixed sum, and predeceased Sir A. After the death of the latter the tenant's executors brought an action against the heir succeeding Sir A. in possession of the entailed estate in which, founding on sec. 1 of the Entail Amendment (Scotland) Act, 1878, they claimed payment from him of the whole of the fixed sum. *Held* (1) that the agreements in question created obligations to which sec. 1 of the Entail Amendment Act of 1878 applied, and which were accordingly, under that section, binding on the succeeding heir of entail to the extent to which Sir A., if he had himself made the improvements and had survived, could have charged them upon the estate ; (2) that the pursuers had a good title to sue the defender directly and to recover from him a sum equal to that which Sir A. could have charged upon the estate ; (3) that the sum was one representing three-fourths of the value, as at Sir A.'s death, of such of the improvements as were chargeable on the estate under the Entail Amendment (Scotland) Act, 1875. *Shepherd's Executors v. Mackenzie*, p. 144.

Improvement expenditure—Petition to charge—Competency—Obligation by heir in possession to repay improvement expenditure incurred by tenant—Competency of petition to charge at instance of tenant's executors—Entail Amendment (Scotland) Act, 1875, sec. 11—Entail Amendment (Scotland) Act, 1878, sec. 1.

2. An heir of entail in possession granted a lease of the mansion-house and policies on the entailed estate, and entered into agreements with his tenant in terms of which he bound himself and the heirs of entail in succession to him (and *subsidiarie* his heirs, executors, and representatives whomsoever) to repay, at the date of his death, certain expenditure which the tenant undertook to incur on improvements of the subjects let. In security of this obligation, and "to ensure the fulfilment of the same by the heirs of entail succeeding him," he bequeathed and assigned to the tenant and the tenant's executors the amount which was stipulated to be

ENTAIL—*Continued.*

repaid. After the heir and the tenant were both dead the executors of the latter presented a petition, under sec. 11 of the Entail Amendment (Scotland) Act, 1875, for authority to charge upon the estate the improvement expenditure which the tenant had incurred. *Held* that, as the petitioners did not represent an heir of entail who had executed or paid for the improvements, the petition was incompetent. *Shepherd's Executors v. Mackenzie*, p. 144.

Provisions to younger children—Free rent—Deductions—Interest on debt—Interest on estate-duty—Finance Act, 1894, secs. 6 (8) and 9 (1).

3. By a deed of entail power was conferred upon the successive heirs of entail in possession to make provisions for widows by way of annuities, not exceeding a certain proportion of the free rents of the estate to be computed "after deduction of all annual public and parochial burdens and interests of debts and provisions affecting the same at the time"; also to make provisions for younger children, not exceeding a certain number of years' free rent of the estate, the rent "to be computed and taken as at the date of the deed granting the provisions, after deduction of all annual public and parochial burdens affecting the same at the time," no mention being made of interest of debts as a deduction. An heir of entail, on succeeding to the estate, made provisions for younger children, the deed of provision being executed before the date arrived when, under the Finance Act, 1894, payment of certain estate-duties due in respect of the estate could actually be demanded. *Held* that in estimating the "free rent" for the purposes of the provisions to younger children there fell to be deducted: (1) Interest on debts affecting the estate, in respect that "free rent" meant rent free from such interest, and that this was not affected by the fact that in the deed of entail interest on debt was not specifically mentioned as a deduction with regard to such provisions. (2) Interest on estate-duty, in respect that, although the estate-duty was not actually payable till after the date of the deed creating the provision, it was already an existing statutory burden on the estate. *Mackintosh v. Mackintosh*, p. 31.

EQUITABLE COMPENSATION. See *Succession*, 19, 24.

ERROR. See *Repetition—Workmen's Compensation Act*, 17.

ESTATE DUTY. See *Entail*, 3—*Revenue*, 1.

EXECUTOR. *Title to sue—Damages for personal injury.*

1. *Held* that the executor of a party who had, prior to his death, intimated a claim for damages for personal injury, had a title to sue for such damages. *Leigh's Executrix v. Caledonian Railway Co.*, p. 838.

Incidence of debts—Liability of heritable bonds for debts—Debt secured on particular subjects—Succession—Jus Relictæ—Debts chargeable against jus relictæ fund.

2. A bond, which was moveable *quoad* the creditor's succession but heritable *quoad* his widow's *jus relictæ*, was assigned by him to a bank in security of advances. *Held* (1) that, in a question with his widow claiming *jus relictæ*, the ordinary moveable debts of the deceased were chargeable solely against the fund available for *jus relictæ*, no portion of them being chargeable against the bond; but (2) that advances made by the bank on the security of the assignation formed a charge against the bond. *Heath v. Grant's Trustees*, p. 78.

EXPENSES. *Nuisance—Remedial measures—Remit to ascertain effect—Expenses of remit.*

1. During the course of an action for interdict of a nuisance the existence of the nuisance was established, and the defenders then executed certain remedial measures, which, however, the pursuers maintained had been unsuccessful. The Court thereupon remitted the matter to a man of skill, who reported that the nuisance had been effectually removed. *Circumstances in which the Court allowed the defenders the expenses of the remit.* M'Ewen v. Steedman & M'Alister, p. 761.

Private prosecutor—"Prosecuting in the public interest"—Summary Jurisdiction (Scotland) Act, 1908, sec. 52.

2. The Chartered Institute of Patent Agents prosecuting, with the concurrence of the procurator-fiscal, a summary complaint charging an accused with contravening the Patents and Designs Act, 1907, sec. 84, by describing himself as a patent agent without being registered, is not "prosecuting in the public interest," and accordingly may be awarded expenses in terms of the Summary Jurisdiction (Scotland) Act, 1908, sec. 52. *Lockwood v. Chartered Institute of Patent Agents, (J.) p. 8.*

Appeal for new trial—Expenses of appeal.

3. Where a verdict for the pursuer in a jury trial in the Sheriff Court was set aside on appeal to the Court of Session, and a new trial granted, on the grounds that the verdict had been erroneously applied and was contrary to the evidence, the Court found the pursuer liable in the expenses of the appeal. *Reid v. James Nimmo & Co., Limited, p. 1002.*

Jury trial—Slander—Tender—Verdict for nominal damages—Right of defender to recover expenses prior to date of tender.

4. In an action of damages for slander, in which the pursuer refused a tender of £5 made prior to the closing of the record, the jury found for the pursuer and awarded him 6d. of damages on each of the three issues submitted to them. *Held* that the fact that the jury had returned a verdict for the pursuer and had awarded him damages, although merely nominal, excluded a motion made by the defenders for their expenses prior to the date of tender. *Bradley v. Menley & James, Limited, p. 923.*

Several defenders—Liability of unsuccessful defender for expenses of successful defender.

5. A tenement of houses was let by its proprietor to a company, and the individual houses of the tenement were sublet by the company to various subtenants. In an action originally brought against the company for damages in respect of an accident alleged to have been caused by a defect in the railings of an outside common stair leading to two of the houses, the pursuer afterwards called the proprietor as an additional defender owing to a statement in the company's defences that the proprietor was the person responsible for the condition of the outside portions of the premises. The Court having found the company liable in damages and having assoilzied the proprietor: *Held* that the company were liable in expenses both to the pursuer and to the proprietor. *Kennedy v. Shotts Iron Company and Others, p. 1143.*

Tender—Appeal for jury trial—Tender accepted immediately after order for issues—Expenses of preparing for proof while case in Sheriff Court—General Regulation No. 3 appended to Act of Sederunt 15th July 1876.

6. A Sheriff Court action, in which proof had been allowed, was remitted to the Court of Session for trial by jury. An order having

EXPENSES—Continued.

been pronounced to lodge issues within eight days, the pursuer, within that time, accepted a tender by the defenders, and was found entitled to expenses. *Held* that the defenders were liable for the expenses, charged on the Sheriff Court scale, of precognitions and medical reports obtained by the pursuer in preparation for the proof while the case was pending in the Sheriff Court. *M'Clymont v. Corporation of Glasgow*, p. 870.

Tender—Order for proof coinciding with tender—Expenses of preparation for proof—General Regulation No. 3 appended to Act of Sederunt 15th July 1876.

7. The pursuer of an action obtained an order for proof but, before the interlocutor granting the order was signed, the defender lodged a tender. The tender having been accepted decree was granted in terms thereof, the pursuer being found entitled to expenses. *Held* that, an order for proof having been pronounced, the Auditor was entitled to include among the expenses allowed to the pursuer the expense incurred by him in preparation for the proof. *Boyle v. Olsen*, p. 112.

Taxation—Fees to counsel—Statements prepared for use of counsel.

8. In a complicated action with regard to the maintenance, reconstruction, and hiring of railway wagons, the proof lasted twelve days, and there were two adjournments, each of some months' duration. The successful party having obtained decree with expenses, the Court allowed (1) fees of twenty-five guineas to senior counsel for the first day of the proof and for the first day's resumption of the proof after each adjournment; (2) charges for tabulated statements, prepared for the use of counsel, of facts and figures compiled from the books and other documents in process. *Hurst, Nelson, & Co., Limited, v. Spenser Whatley, Limited*, p. 101.

Taxation—Fees to counsel in Sheriff Court—Interlocutor of Sheriff incidentally allowing fees recalled on appeal to Court of Session and expenses awarded—Right of Auditor to allow fees.

9. The allowance of fees to counsel made by the Sheriff in the interlocutor in which he answered the questions of law in a stated case *held* to warrant the Auditor in allowing counsel's fees in the Sheriff Court to the party found entitled to expenses on appeal to the Court of Session, although the Court of Session had recalled the Sheriff's interlocutor. *Taylor v. Steel-Maitland*, p. 978.

Taxation—Fees to witness—Fees to local agent acting as witness.

10. Fees as an ordinary witness allowed to a successful party's Glasgow agent. *Hurst, Nelson, & Co., Limited, v. Spenser Whatley, Limited*, p. 101.

Taxation—Sheriff Court expenses awarded on appeal in Court of Session—Scale of taxation—Time for determination of scale—C. A. S., 1913, M. ii.

11. The C. A. S., 1913, M. ii., provides that, in actions for damages in the Sheriff Court, expenses shall be taxed on a higher or a lower scale according to whether or not the sum decerned for exceeds £50, unless the Sheriff shall direct otherwise. In an action of damages in the Sheriff Court the pursuer was awarded £100, but on appeal to the Court of Session that sum was reduced to £50 with expenses. The Auditor of the Court of Session having taxed the Sheriff Court expenses on the lower scale, *held* that he was right, and *observed* that, if the pursuer desired taxation on the higher scale, he should have moved for an instruction to the Auditor to

EXPENSES—Continued.

that effect at the time when he obtained his award of expenses.

Mickel v. M'Coard, p. 1036.

See *Jurisdiction*, 4—*Process*, 1.

FACTOR. See *Right in Security*, 1.

FACULTIES AND POWERS. See *Succession*, 17, 18.

FEE AND LIFERENT. See *Succession*, 8-10, 17, 22.

FOREIGN. See *Jurisdiction*, 1, 4—*Minor and Pupil*, 2, 3—*Trust*, 2.

FRANCHISE. See *Election Law*.

FRAUD. Forgery—Adoption—Agent and client—Fraud of agent—Adoption by client—Personal objection.

The proprietrix of certain subjects handed the title-deeds thereof to her law-agent, a nephew, at whose death it was discovered that he had utilised the title-deeds to obtain money for himself by means of a forged bond over the property. Previously the proprietrix had received a demand for payment of income-tax on "interest" and, not knowing to what such a demand could refer, she asked another nephew, a brother of the law-agent, to make inquiries, in the course of which he learnt that his brother had obtained money for himself on the security of his aunt's title-deeds. He refrained from communicating this to his aunt till after his brother's death, when she heard of the bond for the first time and at once repudiated her signature. In an action by her against the bondholders for reduction of the bond as a forgery and for delivery of the title-deeds, *held* that the knowledge of the nephew employed to make inquiries, which he had refrained from communicating, could not be imputed to the pursuer so as to bar her from subsequently repudiating the forgery; and decree *granted* as concluded for. *Question, per* the Lord President, whether the doctrine of adoption by "bar" can ever be applied where the knowledge of the person alleged to be barred is merely constructive knowledge. *Muir's Executors v. Craig's Trustees*, p. 349.

See *Agent and Client*, 2—*Company*, 1.

FRIENDLY SOCIETY. *Exclusion of Court's jurisdiction—Rule of friendly society for settlement by arbitration of disputes between society and members—Election of member to board of management contrary to rule—Declarator that election void—Competence of action—Friendly Societies Act, 1896, secs. 9 (3), 68 (1), First Schedule (8).*

In an action by a member of a friendly society against the society for declarator that the appointment of another member to the board of management was void in respect that under the rules of the society he was ineligible for election, it was pleaded that the action was excluded by a rule of the society that "all disputes between the society and any member as such . . . may be determined by arbitration." The rule was passed under the Friendly Societies Act, 1896, which provides that every dispute between a member and the society shall be decided in manner directed by the rules of the society "without appeal, and shall not be removable into any Court of law." *Held* that the action was competent in respect that the jurisdiction of the Court was not excluded in a case where the averment was that the society had acted in violation of its rules and constitution. *M'Gowan v. City of Glasgow Friendly Society*, p. 991.

See *Process*, 15.

GAME. See *Justiciary Cases*, 12-14, 28.

GAMING. See *Justiciary Cases*, 3, 4, 24.

GLEBE. See *Church*, 3.

GUARANTEE. See *Cautioner*.

HERITABLE AND MOVEABLE. See *Succession*, 2, 7.

HERITOR. See *Church*, 1-3.

HUSBAND AND WIFE. *Consistorial causes—Rules of Commissary Court.*

1. *Observed that the rules laid down with regard to consistorial causes by the Commissaries are not binding on the Court of Session. Corbridge v. Somerville, p. 858.*

Divorce for adultery—Sisting of alleged paramour—Right of party sisted to judgment as to his guilt or innocence—Act of Sederunt, 17th July 1908.

2. In an action of divorce for adultery an alleged paramour, who has not been called as a defender and against whom there are no direct conclusions, but to whom the action has been intimated in terms of the Act of Sederunt of 17th July 1908 and who has appeared and been sisted to defend, is entitled to a decision as to his guilt or innocence. *Raeside v. Raeside, p. 60.*

Divorce for adultery—Reduction of decree—Competency—Reduction on ground of no jurisdiction at instance of creditors of divorced spouse.

3. The trustee on the bankrupt estate of a husband divorced in the Court of Session, desiring to recover certain marriage-contract funds which, as a result of the divorce, had become payable to the wife, brought an action for reduction of the decree of divorce on the ground that, the husband being a domiciled Englishman, the Court which pronounced the decree had no jurisdiction. The action of divorce had been undefended, and, although brought after the date of the husband's bankruptcy, had not been intimated to the trustee. *Held that the action of reduction was competent, in respect that the pursuer was not attacking the decree on its merits, but was merely maintaining that, having been pronounced by a Court having no jurisdiction, it was of no effect; but observed that his better course would have been to bring a petitory action against the marriage-contract trustees and challenge the decree of divorce ope exceptionis in that action. Corbridge v. Somerville, p. 858.*

See *Jurisdiction*, 4—*Succession*, 1.

INCOME TAX. See *Revenue*, 2-4.

INHABITED HOUSE DUTY. See *Revenue*, 5.

INNUENDO. See *Reparation*, 3.

INSURANCE. *Transfer of company's business—Petition to sanction proposed transfer—Dispensing with transmission to policy holders of documents relating to transfer—Assurance Companies Act, 1909, sec. 13 (3) (b).*

1. In a petition under the Assurance Companies Act, 1909, for sanction of the transfer of the business of a life insurance company to another insurance company, the petitioners craved the Court to dispense with the transmission of the documents specified in sec. 13 of the Act to the policy-holders of the transferee company, who numbered 30,000, in respect that the life insurance funds of the transferee company would not, under the transfer, become

INSURANCE—Continued.

liable for the sums due under the policies of the transferring company, and that the transmission would cause considerable trouble and expense. The Court dispensed with the transmission of the documents. *City of Glasgow Life Assurance Co.*, p. 999.

National Insurance—Employment—Contract of service—Medical staff of infirmary—Master and servant—National Insurance Act, 1911, sec. 1 (1) and (2), and First Schedule, Part 1 (a).

2. *Held* that persons appointed to act in an infirmary (1) as resident physicians and resident surgeons; (2) as non-resident house physicians, non-resident house surgeons, and clinical assistants; and (3) as supervisors of the administration of anæsthetics, were not persons employed within the meaning of the National Insurance Act, 1911, in respect that, as the managers of the infirmary had no control over the manner in which these members of the staff carried out their treatment of the patients, no contract of service existed between them. *Scottish Insurance Commissioners v. Edinburgh Royal Infirmary*, p. 751.

National Insurance—Rates of contributions—Determination by Commissioners—Competency of reducing determination—National Insurance Act, 1911, sec. 66 (1).

3. The National Insurance Act, 1911, enacts, by sec. 66 (1) (c), that questions as to the rates of contributions to be paid by an employer and his employee respectively shall be determined by the Commissioners. An appeal is provided with regard to certain determinations of the Commissioners, but not with regard to their determinations under sec. 66 (1) (c). The Court *dismissed* an action for the reduction of a determination by the Commissioners under this subsection, *holding* that, in the absence of averments that they had acted *ultra vires*, the Court had no jurisdiction to interfere with their decision. *Don Brothers, Buist, & Co., Limited, v. Scottish Insurance Commissioners*, p. 607.

See *Justiciary Cases*, 27.

INTERDICT. Property in soda-water bottles—Participation in illegal use of property.

An aerated water manufacturer sought to interdict a drysalter from putting paraffin oil into bottles belonging to the pursuer. The pursuer averred that bottles belonging to him, and marked with his name, were lent by him to his customers in the course of his trade, and were brought to the defender by persons coming to purchase paraffin oil, and that at their request the defender put paraffin oil into the bottles, in the knowledge that the bottles were the property of the pursuer and that the pursuer objected to such a practice since it injured them for use in his business. *Held* that the pursuer had relevantly averred participation by the defender in a wrongful use of the pursuer's property, which, if proved, would form a good ground for interdict against him; and proof *allowed*. *Wilson v. Shepherd*, p. 300.

INTEREST. Entail—Obligation by heir in possession to repay improvement expenditure undertaken by tenant of entailed subjects—Decree in favour of tenant's executors against succeeding heir in possession for repayment.—Interest.

1. Sir A. M., an heir of entail in possession, granted a lease of the mansion-house and policies on the entailed estate, and entered into agreements with his tenant in terms of which the latter undertook to execute certain improvements upon the subjects let, Sir A. binding himself and the heirs of entail succeeding him (and

INTEREST—Continued.

subsidiarie his heirs, executors, and representatives whomsoever) to repay to the tenant, at the date of Sir A.'s death, a proportion of the certified cost of these improvements, the amount payable not to exceed a certain fixed sum. The tenant executed improvements, the certified cost of which exceeded the fixed sum, and predeceased Sir A. After the death of the latter the tenant's executors, founding on sec. 1 of the Entail Amendment (Scotland) Act, 1878, brought an action against the heir succeeding Sir A. in possession of the entailed estate in which they obtained decree for a sum equal to that which Sir A. could have charged upon the estate. *Held* that, as the defender was not in delay in paying until the sum due by him had been proved, interest on the sum decerned for should run only from the date of decree. *Shepherd's Executors v. Mackenzie*, p. 144.

Rate where trustees personally liable.

2. Circumstances in which the representatives of a trustee, who were found liable to refund to the trust-estate a sum of money which had been lost through his negligence, were ordained to pay interest thereon at the rate of three and a half per cent. *Lees's Trustees v. Dun*, (H. L.) p. 12.

See *Entail*, 3—*Repetition—Succession*, 8.

ISSUE. *Illegal apprehension "without reasonable grounds of suspicion" —Malice and want of probable cause.*

1. In an action of damages for wrongous arrest brought against two Glasgow constables who had apprehended the pursuer without a warrant, the defenders maintained that, as they had *bona fide* suspected the pursuer of a crime and as, in their judgment, their grounds of suspicion were reasonable, they were protected by section 88 of the Glasgow Police Act, 1866, which empowers constables to arrest without warrant persons "reasonably suspected of having committed" a penal offence. *Held* that malice and want of probable cause need not be put in issue: and an issue whether the defenders "wrongfully and illegally, and without reasonable grounds of suspicion, apprehended the pursuer," *approved*. *Shields v. Shearer*, p. 1012.

Verdict—Latitude of time—"On or about".

2. In an action of damages for slander the issue submitted to the jury was whether "on or about 12th March 1912" the defender at or near a shop occupied by the pursuer and in presence and hearing of one of the pursuer's neighbours had made a slanderous statement concerning the pursuer which imported that he was a thief. The jury having found that the slander had been uttered by the defender at the place and in the circumstances set forth in the issue but that it had been so uttered in February 1912 the Lord President directed that the verdict should be entered for the defender. *Smith v. Paton*, p. 1203.

JUDICIAL FACTOR. *Powers—Power to grant lease of urban subjects—Application for special powers.*

Apart from special circumstances it is unnecessary for a judicial factor who desires to grant a lease of urban subjects to apply to the Court for authority to do so, the granting of such a lease, if the approval of the Accountant of Court has been obtained, being within his ordinary powers of administration. *Observations, per the Lord President*, on the meaning of an application by a judicial factor for special powers. *Tosh's Judicial Factor*, p. 242.

JURISDICTION. *Arrestment jurisdictionis fundandæ causa—Action for delivery of goods in terms of contract and failing delivery for damages—Foreign—Contract.*

1. *Held* that jurisdiction in an action concluding for delivery of goods in terms of a contract between the parties, and failing delivery for damages was competently founded by arrestments *ad fundandam jurisdictionem*. *Union Electric Co., Limited, v. Holman & Co.*, p. 954.

Exclusion of jurisdiction—Rule of friendly society for settlement by arbitration of disputes between society and members.

2. *Held*, in an action by a member of a friendly society against the society, that the jurisdiction of the Court was not excluded by a rule of the friendly society for the settlement of disputes between the society and its members by arbitration, in respect that the pursuer's averment was that the society had acted in violation of its rules and constitution. *M'Gowan v. City of Glasgow Friendly Society*, p. 991.

Exclusion of jurisdiction by statutory remedy—National Insurance Act, 1911, sec. 66 (1).

3. The National Insurance Act, 1911, enacts, by section 66 (1) (c), that questions as to the rates of contributions to be paid by an employer and his employee respectively shall be determined by the Commissioners. An appeal is provided with regard to certain determinations of the Commissioners, but not with regard to their determinations under sec. 66 (1) (c). The Court *dismissed* an action for the reduction of a determination by the Commissioners under this subsection, *holding* that, in the absence of averments that they had acted *ultra vires*, the Court had no jurisdiction to interfere with their decision. *Don Brothers, Buist, & Co., Limited, v. Scottish Insurance Commissioners*, p. 607.

Petition for access to children where spouses have foreign domicile—Expenses—Parent and child—Husband and wife.

4. In an action at the instance of a husband for divorce on the ground of his wife's desertion, the Lord Ordinary repelled a plea of no jurisdiction and granted decree. Thereupon the wife, who resided in England, presented a petition for access to the minor children of the marriage, whose residence was with their father in Scotland. While the petition was still pending, the Court, on a reclaiming note, recalled the Lord Ordinary's interlocutor in the action of divorce and sustained the plea of no jurisdiction, on the ground that the husband's domicile was English. Thereafter they *dismissed* the petition for access, *holding* that it followed from the previous decision that they had no jurisdiction to entertain it; but *allowed* the wife her expenses in the petition, on the ground that, at the time she presented it, she was entitled to do so. *Barkworth v. Barkworth*, p. 759.

See *Justiciary Cases*, 5-7, 11, 23—*Husband and Wife*, 3—*Sheriff*, 2.

JUS RELICTÆ. See *Executor*, 2—*Succession*, 2, 23, 24.

JUSTICIARY CASES. *Crime—Habitual Criminality—Proof of age—Prevention of Crime Act, 1908, sec. 10 (2).*

1. *Held* that in proceedings under the Prevention of Crime Act, 1908 the evidence of a police officer that an accused person had, after his apprehension, stated his age to be forty-four, was not, without corroboration, sufficient proof of the accused's age; and a verdict of habitual criminality obtained on that evidence alone as to age *recalled*. *M'Court v. H. M. Advocate*, (J.) p. 6.

JUSTICIARY CASES—Continued.

Crime—Theft—Stealing book in order to copy contents.

2. *Held* that the taking of a book in order to copy its contents for an illegitimate purpose is theft, although there may be no intention to retain the book. *H. M. Advocate v. Mackenzie, (J.) p. 107.*

Statutory offences—Betting—Use of rooms for the receipt of money for purposes of betting—Betting Acts, 1853, secs. 1 and 3, and 1874, sec. 4.

3. An accused was charged with contravening the Betting Acts by keeping a room at one address and a room at another address "for the purpose of money . . . being received . . . as the consideration for an undertaking . . . to pay thereafter money on events . . . relating to games. . . ." He was found guilty as libelled. *Held* that the conviction was good, although all the money was received and all the correspondence relating to bets was conducted at one room, while the other was used exclusively for settling up accounts. *Hodgson v. Macpherson, (J.) p. 68.*

Statutory Offences—Betting—Betting-house—Search of suspected houses—Warrant for seizure of documents—Postal orders—Admissibility as evidence—Betting Act, 1853, sec. 11.

4. *Held* that a search warrant granted under sec. 11 of the Betting Act, 1853, authorising a constable to seize "all lists, cards, or other documents relating to betting" found in certain premises suspected of being kept as a betting-house, covered postal orders, and that postal orders seized thereunder were admissible as evidence in a case where a person was charged with being the keeper of the betting-house. *Hodgson v. Macpherson, (J.) p. 68.*

Statutory Offences—Betting—Sending postcards inviting to bet—Jurisdiction of Sheriff in Sheriffdom where cards received—Summary Jurisdiction (Scotland) Act, 1908, sec. 10 (4).

5. *Held* that the Sheriff-substitute at Dundee had jurisdiction to try a Glasgow bookmaker charged with a contravention of the Betting Acts by sending by post to persons in Dundee cards inviting them to bet. *Lipsey v. Mackintosh, (J.) p. 104.*

Statutory Offences—Brothel—Keeping a brothel—Jurisdiction—Whether charge triable by a single magistrate—Sentence—Criminal Law Amendment Act, 1885, sec. 13—Burgh Police (Scotland) Act, 1892, secs. 403 and 431.

6. *Held* that a charge of keeping a brothel contrary to sec. 13 of the Criminal Law Amendment Act, 1885, may be tried under sec. 431 of the Burgh Police (Scotland) Act, 1892, before a single police magistrate; and that the magistrate is entitled to impose on the accused, if found guilty, a sentence of imprisonment for three months. *Observed* that proceedings for the offence of keeping a brothel may also be taken under sec. 403 of the Burgh Police (Scotland) Act, 1892, which provides for trial before the Sheriff, or two police magistrates, and limits the sentence of imprisonment to one of sixty days. *M'Laren v. Macleod, (J.) p. 61.*

Statutory Offences—Living on earnings of prostitution—Jurisdiction of Burgh Police Court—Immoral Traffic (Scotland) Act, 1902, sec. 1 (1).

7. *Held* that a police magistrate sitting in a Burgh Police Court has jurisdiction to try an offence against the Immoral Traffic (Scotland) Act, 1902. *Hall v. Macpherson, (J.) p. 100.*

Statutory Offences—Coal mine—Maximum period of consecutive underground employment—Exceptions—Meeting danger or apprehended danger—Coal Mines Regulation Act, 1908, sec. 1.

8. The Coal Mines Regulation Act, 1908, enacts, sec. 1 (1), that a workman shall not be below ground for more than eight hours during any consecutive twenty-four, but (2) that no contravention

JUSTICIARY CASES—*Continued.*

of this provision shall be deemed to take place in the case of any workman who is below ground for the purpose *inter alia* of meeting any danger or apprehended danger. *Held* that "danger" was limited to danger arising out of some abnormal occurrence, and accordingly that workmen engaged on a Sunday night and Monday morning in repairing falls, such as were expected to occur, and normally did occur, every week when the pit was idle between Saturday and Monday, did not fall within the exception. *Thorneycroft v. Archibald*, (J.) p. 45.

Statutory Offences—Coal mine—Maximum period of consecutive underground employment—Coal Mines Regulation Act, 1908, sec. 1 (1) (2) and (7)—Workmen working in shifts—Applicability of provisions to firemen.

9. *Held* that the provisions of sec. 1, subssecs. 1 and 2 of the Coal Mines Regulation Act, 1908, which enact that a workman shall not be underground for more than eight hours in any consecutive twenty-four with a certain modification in the case of workmen working in "shifts," apply to firemen with the substitution in their case of nine and a half hours in each subsection for eight hours. *Observed* that the question whether men are working in shifts or not is a question of fact for the Judge who tries the case, and is to be determined on a strict view of the definition of a shift contained in sec. 1 of the Act. *Roger v. Stevenson*, (J.) p. 30.

Statutory Offences—Coal mine—Regulations for safety of miners—"Mechanical haulage"—Whether expression applicable to haulage worked by gravity—Coal Mines Act, 1911, sec. 46 (4).

10. *Held* that a system of haulage in use in a mine by which an empty tub was drawn up an incline by the weight of a loaded tub descending on a parallel set of rails and attached to the empty tub by a chain passing round a pulley situated at the top of the incline, was not a system of "mechanical haulage" in the sense of sec. 46 (4) of the Coal Mines Act, 1911, and that accordingly the mine-owners were not bound to provide certain safeguards which under the section were compulsory "on every haulage road where mechanical haulage . . . is used." *Soutar v. Reid*, (J.) p. 84.

Statutory Offences—Fortune-telling—Jurisdiction—Magistrate in Burgh Police Court—Vagrancy Act, 1824, sec. 4—Prevention of Crime Act, 1871, secs. 15 and 17.

11. By the Vagrancy Act, 1824, which applies only to England, it is made an offence, under sec. 4, to profess to tell fortunes by palmistry with intent to deceive. The Prevention of Crime Act, 1871, enacts, sec. 15, that the provisions of the section above mentioned "as amended by this section, shall be in force in Scotland," and sec. 17, that "any offence against this Act" may be prosecuted before a Court of summary jurisdiction. *Held* that the expression in the latter section "any offence against this Act" did not apply exclusively to offences contained in the body of the Prevention of Crime Act, but included offences against sec. 4 of the Vagrancy Act, and that accordingly a magistrate sitting in a Burgh Police Court had jurisdiction to try a charge of professing to tell fortunes by palmistry with intent to deceive. *Gerald v. M'Intyre*, (J.) p. 59.

Statutory Offences—Game—Dealing in game without licence—Time within which prosecution may be brought—Game Licences Act, 1860, secs. 3, 13, 14—Game Act, 1831, sec. 41—Excise Act, 1848, sec. 3.

12. *Held* that prosecutions for dealing in game without a licence in contravention of the Game Licences Act, 1860, and for the recovery of the penalties imposed by the Act, are timeously brought if

JUSTICIARY CASES—*Continued.*

instituted within six months of the alleged offences. *M'Lean v. Johnston*, (J.) p. 1.

Statutory Offences—Game—Trespass in pursuit of game—Retrieving dead or wounded game—Game (Scotland) Act, 1832, sec. 1.

13. *Held* that where a rabbit after being shot on the public road ran into private ground and there fell dead or moribund, the shooter, in sending his dog into the private ground to retrieve it, did not commit a trespass "in search or pursuit of" game within the meaning of sec. 1 of the Game (Scotland) Act, 1832. *Nicoll v. Strachan*, (J.) p. 18.

Statutory Offences—Game—Trespassing in pursuit of game or rabbits—Complaint—Relevancy—Alternative charge—Game (Scotland) Act, 1832, sec. 1—Summary Jurisdiction (Scotland) Act, 1908, sec. 18, and Schedule C.

14. *Held* that a complaint brought under the Summary Jurisdiction (Scotland) Act, 1908, charging an accused with trespassing in pursuit of "game or rabbits," contrary to the Game (Scotland) Act, 1832, sec. 1, was relevant, and not open to the objection that it libelled alternative charges. *Morrison v. Anderson*, (J.) p. 114.

Statutory Offences—Motor car—Charge of driving "recklessly or negligently"—Motor Car Act, 1903, sec. 1—Complaint—Relevancy—General conviction on alternative charges.

15. The driver of a motor car was charged on a summary complaint with driving his car "recklessly or negligently," whereby it collided with another car, contrary to the Motor Car Act, 1903, sec. 1. The accused was found "guilty as libelled." *Held* that the complaint was irrelevant, in respect that, not being in the form provided by the Summary Jurisdiction (Scotland) Act, 1908, Schedule C, it contained alternative charges without adequate specification; and that a general conviction following on such charges was bad. *Observed* (per the Lord Justice-Clerk) that while it is open to a prosecutor to select one or other of the wrongous ways of driving mentioned in the Motor Car Act, or to charge more than one of them cumulatively, he cannot insert them disjunctively in a complaint and charge the accused generally with driving in one or other of these wrongous ways. *Connell v. Mitchell*, (J.) p. 13.

Statutory Offences—Patent—Patents and Designs Act, 1907, sec. 84—Unregistered person describing himself as patent agent—Complaint—Instance—Private prosecutor—Title to prosecute—Expenses—Summary Jurisdiction (Scotland) Act, 1908, sec. 52.

16. The Chartered Institute of Patent Agents has an interest, and therefore a title, to prosecute, with the concurrence of the procurator-fiscal, a summary complaint charging an accused with contravening the Patents and Designs Act, 1907, sec. 84, by describing himself as a patent agent without being registered; and, as the Institute in such proceedings is not "prosecuting in the public interest," expenses may be awarded to it in terms of the Summary Jurisdiction (Scotland) Act, 1908, sec. 52. *Lockwood v. Chartered Institute of Patent Agents*, (J.) p. 8.

Statutory Offences—Patent—Patents and Designs Act, 1907, sec. 84—Unregistered person describing himself as patent agent—Person calling himself "British and Foreign" patent agent.

17. The Patents and Designs Act, 1907, sec. 84, prohibits under a penalty any person from describing himself as a patent agent unless he is registered as such agent in pursuance of the Act; and provides that "in this section 'patent agent' means exclusively an agent for obtaining patents in the United Kingdom." *Held*

JUSTICIARY CASES—*Continued.*

that a person who, without being registered, had used the title of "British and Foreign" patent agent, had described himself as a patent agent within the meaning of the section; and accordingly was guilty of a contravention thereof. *Lockwood v. Chartered Institute of Patent Agents, (J.)* p. 8.

Statutory Offences—Places of refreshment—Keeping open contrary to bye-law—Ice-cream shops—Respective powers of town and county councils to make bye-laws and impose penalties—Burgh—County—Burgh Police (Scotland) Act, 1892, secs. 316 and 317—Burgh Police (Scotland) Act, 1903, secs. 82 and 97—Burgh Police (Scotland) Amendment Act, 1911, sec. 1—Local Government (Scotland) Act, 1889, sec. 57.

18. *Held* that, whereas under the Burgh Police (Scotland) Acts, 1892, 1903, and 1911, town-councils are empowered to make bye-laws in regard to the hours of opening and closing ice-cream shops and other places of public refreshment in burghs, and to impose a penalty for each breach not exceeding forty shillings, county councils under the same Acts and under the Local Government (Scotland) Act, 1889, are empowered to make like bye-laws for counties, but to impose a penalty not exceeding five pounds. *Lena v. Davidson, (J.)* p. 76.

Statutory Offences—Places of refreshment—Keeping open contrary to bye-law—Complaint—Form of complaint—Specification of purposes for which kept open.

19. A bye-law of a county council made it an offence to keep premises open later than an hour specified. *Held* that a complaint which simply set forth that the accused kept his premises open after the hour specified contrary to the bye-law was relevant, and an objection that the purposes for which they were kept open ought to have been stated *repelled*. *Lena v. Davidson, (J.)* p. 76.

Statutory Offences—Revenue—Obstructing Revenue Officer—Inland Revenue Regulation Act, 1890, sec. 11—Complaint—Relevancy—Specification of statutes.

20. A licensed dealer in motor spirit was charged under a summary complaint which set forth that the accused did, contrary to the Inland Revenue Act, 1890, sec. 11, obstruct an officer of customs and excise in the execution of his duty by refusing to show him the motor spirit stock-book kept by the accused. The Sheriff-substitute having dismissed the complaint as irrelevant, in respect that the Finance (1909-10) Act, 1910, and relative regulations which deal with motor spirit were not libelled: *Held* that it was unnecessary to libel these; and that, as the section creating the offence and the manner in which the offence had been committed were set forth, the complaint was relevant. *Tighe v. Wilson, (J.)* p. 26.

Statutory Offences—Tramways—Refusal to pay tramway fare—Glasgow Corporation Tramways Acts—Breach of bye-laws of Glasgow Corporation—Complaint—Relevancy.

21. The bye-laws and regulations made by the Town-Council of Glasgow in terms of their Tramways Acts contain the following provisions: Bye-law No. 3 provides that every passenger shall pay his legal fare to the tramway conductor, but imposes no penalty for failure to do so. Bye-law No. 4 provides that any person evading or attempting to evade payment of his fare shall be liable to the penalties prescribed in these bye-laws. Bye-law No. 26 provides that any person committing a breach of the bye-laws shall be liable to a specified fine. A complaint charging the accused with failing

JUSTICIARY CASES—*Continued.*

or refusing to pay a tramway fare contrary to bye-law No. 3 was dismissed as irrelevant by the magistrate, on the ground that no offence was constituted by that bye-law, the only offence as to fares being evasion of payment under bye-law No. 4. *Held* that bye-law No. 3, read, as it must be, along with bye-law No. 26, constituted an offence, and that the complaint was relevant. *M'Intyre v. M'Pherson*, (J.) p. 21.

Statutory Offences—Truck Act, 1831, secs. 2, 3, and 23—Contract authorising retention of wages for sums to become due for occupation of house after right of occupation ceases—Master and Servant.

22. A company let to its employees houses for the period of their employment with the company. At each fortnightly pay-day the employees signed receipts for their wages, which contained a clause authorising the deduction of their house rent from their future wages, and also this clause:—"In the event of my leaving your employment I authorise you to retain whatever moneys are in your hands until I remove from your house." On 1st March 1912 the employees left the employment owing to a strike, and from the wages payable on that day the company, in virtue of the authority granted in the receipts signed on the preceding pay-day (16th February), withheld in the case of each employee a sum as against what might thereafter become due for the occupation of his house. *Held* that the contract of 16th February, and the retention of part of the wages on 1st March, were both illegal under the Truck Act, 1831. *Summerlee Iron Co., Limited, v. Thomson*, (J.) p. 34.

Complaint—Relevancy—Jurisdiction—Necessity of setting forth statute giving jurisdiction.

23. *Held* that it is unnecessary to set forth in a complaint the particular statutory enactment which gives jurisdiction to the Court which tries the accused. *M'Laren v. Macleod*, (J.) p. 61.

Complaint—Relevancy—Statutory offence—Specification of statutes—Inclusion of statutes creating different offence from offence charged—General conviction—Betting.

24. A bookmaker was tried on a complaint charging him with sending by post cards containing invitations to bet, "contrary to" certain specified sections of the Betting Act, 1853, which deal with the offence of owning, occupying, or advertising betting houses, and certain sections of the Betting Act, 1874, which deal with the offence of inviting to bet. He was found "guilty as libelled." The Court *quashed* the conviction, in respect that the sections of the Betting Act, 1853, libelled were not directed against the offence set forth in the complaint but against entirely different offences. *Lipsev v. Mackintosh*, (J.) p. 104.

Complaint—Latitude in time.

25. *Observations (per the Lord Justice-Clerk) on the duty of a prosecutor to set forth special reasons to justify an exceptional latitude of time taken in an indictment.* *H. M. Advocate v. Mackenzie*, (J.) p. 107.

Procedure—Bail—Refusal of bail—Charge of administering poison with intent to murder.

26. A person charged with administering poison with intent to murder presented a petition to be liberated on bail. The application was opposed by the prosecutor on the ground, *inter alia*, that the precognitions disclosed an aggravated case. The Sheriff-substitute having *refused* the petition, *held*, on appeal to the High Court of Justiciary, that the petition was rightly refused. *H. M. Advocate v. Saunders*, (J.) p. 44.

JUSTICIARY CASES—*Continued.*

Procedure—Instance—Public or private prosecution—Statutory offence—National Insurance Act, 1911—Failure to pay contributions—Title of Commissioners to prosecute.

27. *Held* (in a case prior to the National Insurance Act, 1913) that the Scottish Insurance Commissioners, established under the National Insurance Act, 1911, had no title under that Act or otherwise to prosecute a complaint under sec. 69 (2) in respect of failure to pay contributions under the Act; and that the prosecution should have been at the instance of the public prosecutor. *Observations* on the various qualifications which in Scotland confer a right to prosecute, and in particular on the law regarding the implied grant by statute of such a power to private persons. *Rintoul v. Scottish Insurance Commissioners, (J.) p. 120.*

Procedure—Trial—Administration of Justice—Emergence of question of civil right—Prosecution under Game (Scotland) Act, 1832.

28. In a prosecution in the Sheriff Court for trespassing in pursuit of game or rabbits contrary to the Game (Scotland) Act, 1832, sec. 1, the question arose whether one of five joint tenants of a common pasturage had the right to authorise the accused to kill rabbits upon the land. *Held* that a question of civil right had emerged, and accordingly that the complaint fell to be dismissed. *Morrison v. Anderson, (J.) p. 114.*

Procedure—Indictment—Relevancy of indictment—Charge of stealing book containing trade secrets and making copies and appropriating secrets.

29. An indictment against a husband and wife charged the husband (1) with stealing between 3rd July 1907 and 2nd April 1913 a book of recipes of chemical secrets belonging to his employers, and (2) with making during the same period copies of the recipes with intent to dispose of them for profit in breach of an agreement of secrecy with his employers; and charged the wife with offering to dispose of these or other copies to the employers' trade rivals, in the knowledge that the copies had been fraudulently made by her husband, and with thus appropriating to her own profit trade secrets which were the exclusive property of the employers. *Held* with regard to the charges against her husband, that the first was relevant in respect that the taking of a book in order to copy its contents for an illegitimate purpose was theft, although there might be no intention to retain the book, but that the second was irrelevant as it merely charged the accused with the preparation for, and not with the perpetration of, a crime. *Held* further, that the charge against the wife being dependent on the second charge against the husband fell with it, and in any event was irrelevant in respect that it set forth no overt or accomplished criminal act. *H. M. Advocate v. Mackenzie, (J.) p. 107.*

Procedure—Objections—Noting of objections in the record—Summary Jurisdiction (Scotland) Act, 1908, sec. 41.

30. *Held* that failure to note objections taken in the course of proceedings under a summary complaint, as provided for by sec. 41 of the Summary Jurisdiction (Scotland) Act, 1908, vitiates the whole proceedings following on the complaint. *Question* whether objections can be competently noted, not in the minutes of procedure, but by a reference in the minutes to a paper apart. *Connell v. Mitchell, (J.) p. 13.*

Procedure—Proof—Statements of panel—Voluntary statement to police officer.

31. *Opinions* that a statement voluntarily made to a police officer by a

JUSTICIARY CASES—*Continued.*

person suspected of a crime, who has not been cautioned that what he says may be used against him, is not open to the same objections with regard to its admissibility as evidence against the accused as is a statement made by him in answer to questions put by the officer. *Hodgson v. Macpherson*, (J.) p. 68.

Procedure—Proof—Admissibility of evidence—Hearsay—Evidence of overheard conversations—Conversations part of res gestæ.

32. In a prosecution for keeping a house as a brothel the prosecutor examined as witnesses two policemen who repeated conversations overheard by them in the house in question. The accused objected to the evidence on the grounds that she was not present when the conversations took place, and that the persons whose conversations were overheard were not examined as witnesses. *Held* that the evidence was competent, in respect that it was not led to prove the truth of the matters stated in the conversations, but merely to prove the fact that such conversations took place. *M'Laren v. Macleod*, (J.) p. 61.

Procedure—Proof—Oppression—Sentence—Magistrate asking for information from person not witness in case before pronouncing sentence.

33. In a prosecution in the Police Court for reckless driving it was proved that a lorry driven by the accused had collided with a tramway car. After finding the accused guilty of the offence charged the magistrate inquired of the manager of the tramway company, who was present in Court but who had not been examined as a witness in the case, what was the amount of the damage done to the tramway car, and, after the manager had stated the amount, the magistrate fined the accused 30s. with the alternative of imprisonment for fifteen days. Conviction *quashed* on the ground that the information given by the manager was not competently before the magistrate, and that it was impossible to say that his mind might not have been affected thereby in fixing the penalty. *Question* whether the same result would have followed had the question been put to the prosecutor. *Leavack v. Macleod*, (J.) p. 51.

Sentence—Fine with alternative sentence of imprisonment for period exceeding statutory maximum—Alteration of sentence—Summary Jurisdiction (Scotland) Act, 1908, secs. 48, 57.

34. An accused person was tried summarily by a Justice of Peace Court, and, on conviction, the presiding Justice intimated the sentence of the Court to be a fine of £1, with £1, 11s. of expenses, and in default of payment one month's imprisonment. The offender paid the fine, and he and certain of the Justices left the Court. Immediately thereafter, and before the sentence was recorded, it was noticed that under sec. 48 of the Summary Jurisdiction (Scotland) Act, 1908, the maximum period of imprisonment appropriate to the fine was only twenty days. The offender was recalled, and the same presiding Justice intimated to him that the sentence would be a fine of £1, with £1, 11s. of expenses, and, in default of payment, imprisonment for twenty days, and it was so recorded in the record of proceedings. *Held* that the sentence as recorded was not a new sentence, but was a correction of the sentence originally pronounced, which, as a mere executorial act, could, under the statute, be competently made by the presiding Justice in the absence of the other Justices who tried the cause, and suspension of the sentence *refused*. *Renwick v. M'Dougall*, (J.) p. 53.

JUSTICIARY CASES—*Continued.*

Sentence—Statutory Offence—Increase in penalty by amending Act—Conviction of offence in period extending from before till after date of amending Act—Imposition of increased penalty—Amendment of sentence—Immoral Traffic (Scotland) Act, 1902, sec. 1 (1)—Criminal Law Amendment Act, 1912, sec. 7 (2)—Summary Jurisdiction (Scotland) Act, 1908, sec. 75.

35. An accused was convicted of living on the earnings of prostitution contrary to the Immoral Traffic (Scotland) Act, 1902, and the Criminal Law Amendment Act, 1912, the offence being libelled as having been committed between 1st October 1912 and 15th March 1913. *Held*, in a suspension, that a sentence of six months' imprisonment could not stand in respect that the offence might have been committed in whole or in part prior to 13th December 1912, the date at which the Act of 1912, which raised the penalty from three to six months, came into force; and sentence *reduced*, under the provisions of the Summary Jurisdiction (Scotland) Act, 1908, sec. 75, to one of three months' imprisonment. *Hall v. Macpherson*, (J.) p. 100.

Sentence—Amendment of sentence—Summary Jurisdiction (Scotland) Act, 1908, sec. 75.

36. The High Court having *quashed* a conviction, in respect that the sections of the Betting Act, 1853, libelled were not directed against the particular offence set forth in the complaint but against entirely different offences, *held* that this was not a case in which the Court should amend the conviction under sec. 75 of the Summary Jurisdiction (Scotland) Act, 1908. *Lipsey v. Mackintosh*, (J.) p. 104.

See *Sheriff*, 8.

LAND COURT. See *Lease*, 6-8.

LAW-AGENT. See *Agent and Client—Expenses*, 10—*Right in Security*, 1.

LEASE. *Occupation—Tenant's duty to preserve subject let from injury—Duty to turn off water when leaving house empty.*

1. *Held* that the tenant of a villa, who left it unoccupied for a month in winter without having either turned off the water and emptied the cisterns or informed the landlord of her intended absence, was liable to the landlord for damage caused by the bursting of the water-pipes owing to frost. *Mickel v. M'Coard*, p. 896.

Subjects—Market garden—Agricultural Holdings (Scotland) Act, 1908, secs. 29 (2), and 35 (1)—Varying portions of arable farm cultivated as market garden—Whether market garden in sense of Act.

2. Under a lease, dated May 1892, of a farm of 150 acres let "primarily as an agricultural subject" the tenant was "entitled to use all or so much of the land" as he might think proper for the purposes of a market garden, but subject to conditions including a condition as to rotation of crop, which permitted only two years' continuous cultivation of market-garden produce. The tenant annually kept 50 acres, but not always the same 50 acres, under cultivation as a market garden. *Held* that the fact that the ground cultivated had varied from time to time did not prevent the 50 acres under cultivation at the expiry of the lease from being a market garden within the meaning of sec. 29 of the Agricultural Holdings Act, 1908, for the purpose of a claim for compensation for improvements. *Taylor v. Steel-Maitland*, p. 562.

Conditions—Restrictions as to rotation of crops—Market garden—Agricultural Holdings (Scotland) Act, 1908, secs. 23 (1), 35 (1).

3. *Held* that sec. 23 (1) of the Agricultural Holdings (Scotland) Act,

LEASE—*Continued.*

1908, which provides, *inter alia*, that, notwithstanding the provisions of any lease respecting the method of cropping of arable lands, a tenant of a holding shall have full right to practise any system of cropping of the arable land on the holding, applies only to arable land, and that accordingly, where a farm was let primarily as an agricultural subject but with right to the tenant to cultivate such portion as he thought fit as a market garden, a condition permitting only two years' continuous cultivation of market-garden produce was valid. *Taylor v. Steel-Maitland*, p. 562.

Outgoing—Compensation for improvements—Market garden—Agricultural Holdings (Scotland) Act, 1908, sec. 29 (2)—“Written notice of dissent.”

4. In a claim by a tenant for compensation for improvements to land cultivated as a market garden (1) *terms* of a letter from the landlord's factor held to constitute a “notice of dissent” within the meaning of sec. 29 (2) of the Agricultural Holdings (Scotland) Act, 1908, in so far as the improvements claimed for were in contravention of the lease; and (2) *circumstances* in which held that the tenant was entitled to compensation for rhubarb stools left in the ground at the termination of his tenancy, but only if and in so far as their cultivation had not been in contravention of the terms of the lease, and for a forcing-house erected by him, but only if and in so far as it constituted an improvement in connection with such a cultivation. *Taylor v. Steel-Maitland*, p. 562.

Outgoing—Compensation for improvements—Market garden—Agricultural Holdings (Scotland) Act, 1908, sec. 29 (2)—Improvements “then executed.”

5. The Agricultural Holdings (Scotland) Act, 1908, sec. 29 (2), which makes certain provisions with regard to improvements on market gardens, begins with these words:—“Where under a lease current on the first day of January 1898 a holding was at that date in use or cultivation as a market garden . . . and the tenant thereof has then executed thereon . . . any improvement . . .” Held that the word “then” means “thereafter.” *Taylor v. Steel-Maitland*, p. 562.

Small holdings—Statutory small tenant—Joint tenants—Small Landholders (Scotland) Act, 1911, secs. 2 (1) (iii.) (b) and 26 (8).

6. Held that the provisions of sec. 32 of the Small Landholders (Scotland) Act, 1911, as to statutory small tenants applied to the case of a holding which at the commencement of the Act was held by joint tenants, and which continued to be held by the same tenants at the date of their application to the Land Court. *Carmichaels v. Maccoll*, p. 916.

Small holdings—Statutory small tenant—Right to renewal of lease on determination of tenancy—Application to Land Court to renew lease and fix rent—Objection that tenancy not determined owing to tacit relocation—Small Landholders (Scotland) Act, 1911, sec. 32 (4).

7. In August 1912 a tenant in occupation of a holding, whose lease had expired at Whitsunday without notice of removal either on his part or on that of the landlord, applied to the Land Court as a statutory small tenant under the Small Landholders (Scotland) Act, 1911 (which came into operation in April 1912), for an order renewing his lease and fixing an equitable rent. The Land Court fixed the period of renewal as from Whitsunday 1912. In an appeal by special case the landlord contended that the Land Court could only renew the lease as from Whitsunday 1913, in respect that under sec. 32 (4) of the Act, renewal could only be granted “on

LEASE—Continued.

any determination of the tenancy," and that in the present case the tenancy did not terminate until Whitsunday 1913, having been continued to that date by tacit relocation. *Held* that the determination of the Land Court was right, in respect that the Act itself, at the date when it came into operation, gave the tenant a right to a renewal of his tenancy at the expiry of his lease at Whitsunday 1912. *Clyne v. Sharp's Trustees*, p. 907.

Small holdings—Tenant from year to year—Application to Land Court by tenant who, before passing of Act, received notice to quit after Act came into operation—Competency—Small Landholders (Scotland) Act, 1911, sec. 2 (1) (ii.).

8. A yearly tenant in possession of a holding at 1st April 1912, when the Small Landholders (Scotland) Act, 1911, came into operation, had, before the passing of that Act, received notice to remove at Whitsunday 1912. In an application by him to the Land Court for an Order fixing the rent and the period of renewal of his tenancy, *Held* that the service of the notice of removal did not exclude the application as incompetent. *Morison's Trustees v. Grant*, p. 919.

Game—Ground game—Right of a tenant in common to give authority to kill rabbits—Ground Game Act, 1880.

9. Question whether the common law right of the tenant of a farm verbally to authorise another to kill rabbits for the preservation of his crops was available to a tenant of pasture ground common to several tenants; and *opinion reserved* upon the applicability of the Ground Game Act, 1880, to such a tenancy. *Morrison v. Anderson*, (J.) p. 114.

Wife of tenant of house on common stair injured owing to defect in stair—Title to sue landlord.

10. The wife of the tenant of a dwelling-house on a common stair brought an action of damages against the landlord for injuries sustained by her owing to the defective condition of the stair. The defender pleaded that the pursuer had no title to sue, in respect that she was not a party to the contract of lease. *Held* (by the Lord Ordinary, Hunter) that the pursuer had a good title to sue, in respect that the stair was not included in the lease, but remained under the control of the landlord, who was bound to keep it reasonably safe for tenants and other persons using it as a means of access to the houses. *Mellon v. Henderson*, p. 1207.

See *Reparation*, 11.

LEGACY. See *Succession*, 12, 21.

LEGITIM. See *Succession*, 1, 19.

LEX LOCI CONTRACTUS. See *Minor and Pupil*, 2.

LIEN. See *Retention—Ship*, 1.

LIQUIDATE DAMAGES. See *Contract*, 1.

LOAN. *Issue of redeemable stock by a municipality—"Redeemable"—Edinburgh Corporation Stock Act, 1894, sec. 5—Edinburgh Improvement and Tramways Act, 1896, sec. 83—Borough.*

In 1897 the Corporation of Edinburgh, under powers conferred by Acts of Parliament, issued corporation stock, the certificates of which bore that the holders were the proprietors of a certain value "of Edinburgh Corporation Two and a half per cent Redeemable Stock,

LOAN—Continued.

subject to the Acts of Parliament relating thereto. . . . Redeemable at par after Whitsunday 1927." The Act under which the issue in question was directly made was the Edinburgh Improvement and Tramways Act, 1896, which by sec. 83 authorised the issue of a new class of stock "redeemable at the option of the Corporation at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock." Held on a construction of the statutes that the Corporation were not bound, on the application of the holders, to redeem the stock at par at Whitsunday 1927, but had merely an option of so doing. *British Linen Bank v. Magistrates of Edinburgh*, (H. L.) p. 4.

LOCAL GOVERNMENT. County—Powers of county council—Regulation of places of public refreshment.

1. Held that county councils are possessed of statutory powers to make bye-laws in regard to the hours of opening and closing ice-cream shops and other places of public refreshment in counties and to impose a penalty not exceeding five pounds for each breach. *Lena v. Davidson*, (J.) p. 76.

Issue of redeemable stock by a municipality—"Redeemable"—Edinburgh Corporation Stock Act, 1894, sec. 5—Edinburgh Improvement and Tramways Act, 1896, sec. 83.

2. In 1897 the Corporation of Edinburgh, under powers conferred by Acts of Parliament, issued corporation stock, the certificates of which bore that the holders were the proprietors of a certain value "of Edinburgh Corporation Two and a half per cent Redeemable Stock, subject to the Acts of Parliament relating thereto. . . . Redeemable at par after Whitsunday 1927." The Act under which the issue in question was directly made was the Edinburgh Improvement and Tramways Act, 1896, which by sec. 83 authorised the issue of a new class of stock "redeemable at the option of the Corporation at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock." Held on a construction of the statutes that the Corporation were not bound, on the application of the holders, to redeem the stock at par at Whitsunday 1927, but had merely an option of so doing. *British Linen Bank v. Magistrates of Edinburgh*, (H. L.) p. 4.

See *Reparation*, 4.

LOCH. See *Property*, 1, 2.

MAILS AND DUTIES. See *Right in Security*, 2.

MALICE. See *Issue*, 1—*Reparation*, 2, 4-6.

MANDATORY. See *Process*, 2.

MANSE. See *Church*, 3.

MARRIAGE-CONTRACT. *Provisions for children—Obligation by father to pay "at such times and in such sums as he finds it convenient"—Jus crediti or right of succession—Bankruptcy of father—Competition with father's creditors.*

- A husband, by antenuptial contract of marriage, bound himself to pay to the trustees thereunder "before his death, at such times and in such sums as he finds it convenient," a sum of £4000, and, until it was paid over, to pay interest thereon to the trustees or to his wife. The trustees were directed to hold this sum and the profits thereof for the liferent alimentary use alienably of his wife, and on her death, in the event of her predeceasing him, then for

MARRIAGE-CONTRACT—Continued.

himself as an alimentary liferent provision for himself and the children of the marriage, and on the death of the survivor of the spouses to hold the sum for, or pay it over to, the children of the marriage. No part of the sum having been paid to the trustees, and the father having become bankrupt, the trustees claimed to be ranked as creditors for this sum in the bankruptcy. *Held* that, as the father had come under no obligation in favour of his children which involved his parting with the control of this sum, the children's right therein was not a *jus crediti*, but only a right of succession; and claim for the trustees *rejected*. *Mackinnon's Trustees v. Dunlop*, p. 232.

See *Succession*, 11, 14.

MASTER AND SERVANT. Master's liability for servant's slander—Privilege—Sufficiency of averments of malice.

1. In an action of damages for slander, brought against a limited company owning a music hall, the pursuer averred that, while he was present at a performance in the hall, he was falsely accused by an attendant of indecent conduct towards a member of the audience. *Held* that the occasion was privileged, and that, as there was no sufficient averment of facts inferring malice, the action was irrelevant. *Gorman v. Moss' Empires, Limited*, p. 1.
Master's liability for servant's slander—Privilege—Personal malice of servant.

2. An action of damages brought against a railway company on account of a verbal slander uttered by the manager of one of their station bars on a privileged occasion *held* irrelevant, in respect that the pursuer's averments disclosed that the malice alleged as actuating the slander was personal to the manager and in no way connected with the business of the defenders, and, accordingly, that the defenders could not be held responsible. *Aiken v. Caledonian Railway Co.*, p. 66.

See *Insurance*, 2—*Justiciary Cases*, 8-10, 22—*Workmen's Compensation Act*.

MINES AND MINERALS. See Justiciary Cases, 8-10.**MINOR AND PUPIL. Access to children—Jurisdiction to entertain petition for access where spouses have foreign domicile.**

1. Where a husband's domicile was English *held* that the Court had no jurisdiction to entertain a petition by the wife for access to the children who were residing with their father in Scotland. *Barkworth v. Barkworth*, p. 759.

Capacity to contract—Foreign—Lex loci contractus—Minor with foreign domicile contracting in Scotland—Forisfamiliar minor—Termination of father's guardianship.

2. A minor, whose domicile was Irish and whose father resided in Ireland, took service as a labourer with a firm in Scotland. He was injured by an accident in the course of his employment, for which he agreed, without consulting his father, to accept compensation under the Workmen's Compensation Act, 1906. After compensation had been paid for some time he brought an action of damages for his injury at common law, in which he averred that he had accepted the statutory compensation in ignorance of his common law claim; and contended that, being a minor, he was not bound by the agreement, and that, in any event, it should be reduced on the ground of minority and lesion. *Held* (1) that the pursuer's capacity as a minor to enter into the agree-

MINOR AND PUPIL—*Continued.*

ment fell to be determined not by the *lex domicilii* (Irish law) but by the *lex loci contractus* (Scots law); (2) that, as the pursuer was forisfamiated and his father was in Ireland, the agreement was to be regarded as made by a minor who had no curator, and was, therefore, not null and void but reducible if enorm lesion resulted. *M'Feetridge v. Stewarts & Lloyds, Limited*, p. 773.

See *Workmen's Compensation Act*, 21, 22, 32,

MORA. See *Trust*, 4.

MOTOR CAR. See *Justiciary Cases*, 15.

NATIONAL INSURANCE. See *Insurance*, 2, 3—*Justiciary Cases*, 27.

NEWSPAPER. Slander—*List of decrees in absence*—*Erroneous entry.*

An erroneous inclusion of a tradesman's name in a list of decrees in absence granted in the Small Debt Court, held, when read in conjunction with an explanatory note prefixed to the list, not to be slanderous. *Russell v. Stubbs, Limited*, (H. L.) p. 14.

NOBILE OFFICIUM. See *Trust*, 5.

NUISANCE. See *Expenses*, 1.

ONUS. See *Presumption*.

PARENT AND CHILD. *Filiation—Period of Gestation.*

1. In an action of filiation and aliment, where 306 days had elapsed between the last act of intercourse between the parties and the birth of the child, held that that was not an impossible period of gestation, and decree granted. *Williamson v. M'Clelland*, p. 678.

Filiation—Corroboration of pursuer's evidence—Act of connection subsequent to conception of child—False denial by defender.

2. In support of the pursuer's evidence in an action of filiation, it was proved, *inter alia*, that the parties were on terms of intimacy and that at a date corresponding to the time of conception they were in the same neighbourhood, though there was no proof of an actual meeting. It was further proved, though denied by the defender, that the parties had connection at a subsequent date on which they admittedly met. *Circumstances in which held*, having regard in particular to the defender's false denial of the later act of connection and of the facts establishing it, that there was sufficient corroboration of the pursuer's testimony, and decree granted. *Florence v. Smith*, p. 978.

See *Jurisdiction*, 4.

PARTNERSHIP. *Retirement of partner—Bonds and dispositions in security granted by partners—Duration of liability of retired partner—Bond of relief—Cautioner—Liberation.*

An association, formed for the purpose of acquiring heritable properties as investments, in the course of their business borrowed sums of money on the security of certain of their properties, for which the partners in the association granted bonds and dispositions in security as trustees for the association, and also as individuals. One of the members thereafter withdrew from the association, under an article of the partnership agreement which permitted any member to retire on finding a satisfactory substitute, and the remaining members granted a bond of relief undertaking to relieve him of any claim made against him by any creditor in respect of the bonds. Neither the partnership agreement nor the bond of relief made any provision for the termination of obligations undertaken during his membership. Ten years after

PARTNERSHIP—Continued.

his withdrawal he brought an action against the members of the association to compel them, by paying up the amounts of the bonds or by obtaining discharges of his liability from the bondholders, to relieve him of all liabilities undertaken by him under the bonds. He founded his claim upon the long lapse of time, changes in the partnership, extension of the loans for further periods and their assignation to new creditors, and, *separatim*, upon the right which he contended he had as a mere cautioner at any time to withdraw his cautionary obligation as regarded future liability. *Held* that he was a principal debtor and not a cautioner, and had, in the circumstances, no right of relief against the defenders except that given by the bond of relief; and action dismissed as irrelevant. *Roughhead v. White*, p. 162.

PATENT. Infringement—Measure of damages.

In an action by a patentee for damages in respect of the sale of articles infringing his patent, the measure of damages may *prima facie* be taken to be the amount of profit which the pursuer would have obtained if he had himself effected the sales wrongfully effected by the defender. But the amount of damages so ascertained will be diminished if, and to the extent to which, it appears on a consideration of circumstances such as the nature of the trade, the area of its exercise, the volume of competition, and the defender's energy and skill in pushing trade upon the market, that the pursuer would not have effected these sales himself. *Opinions* (per Lord Dundas and Lord Salvesen) that there may be circumstances in which a pursuer may also fairly claim, as an item of damages, that he has been compelled, owing to the defender's illegal competition, to sell some of his patented articles at a lower price than formerly. *Watson, Laidlaw, & Co., Limited, v. Pott, Cassels & Williamson*, p. 762.

See *Justiciary Cases*, 16, 17.

PERSONAL OBJECTION. Company—Shares issued as fully paid—Subsequent calls on liquidation.

1. *Circumstances* in which *held* that, as an allottee of shares had accepted the shares in *bona fide* reliance on statements in the certificates to the effect that the shares were fully paid, the company, having gone into liquidation, was barred from maintaining that the shares were not fully paid. *Penang Foundry Company, Limited, v. Gardiner*, p. 1203.

Negligence of original trustee—Action by assumed trustees—Alleged delay and contributory negligence of pursuers—Right to maintain action for behoof of beneficiaries.

2. *Assumed trustees brought an action against the representatives of a deceased trustee for recovery of funds which they alleged had been lost to the trust-estate through his negligence. The defenders pleaded that the pursuers were barred by mora, and by the fact that they had themselves been guilty of negligence which had contributed to the loss. Held that, as the pursuers were suing as trustees for behoof of the beneficiaries whom they represented, the plea of bar stated against them was unavailing. Lees's Trustees v. Dun, (H. L.) p. 12.*

Note of suspension—Offer of caution—Note passed on caution—Appeal on contention that note should be passed without caution.

3. The complainer in a note of suspension pleaded that the note should be passed without caution or consignment, but subsequently amended the note by adding an offer to find caution "if your Lordships shall so appoint." The Lord Ordinary then passed the

PERSONAL OBJECTION—*Continued.*

note "on caution as offered." *Held* that the complainer was not barred by the offer of caution from reclaiming for the purpose of maintaining that the note should have been passed without caution. *Cumming v. Hendry*, p. 472.

See *Burgh*, 7—*Fraud*—*Res Judicata*.

POLICE FORCE. See *Reparation*, 1.

POOR. *Settlement—Residential settlement—Continuity of residence—Poor Law (Scotland) Act, 1898, sec. 1.*

In September 1906 a workman obtained employment as a coal-heaver in the parish of A, which was not the parish of his birth settlement. In the summer of 1907, when his employment became slack, he left the parish and went into training with the militia and thereafter worked as an agricultural labourer. After an absence of nearly three months he returned to the parish of A and resumed his former employment. In the summer of 1908 he again absented himself for militia training and agricultural employment, his absence on this occasion lasting for over three months. He then returned to work in the parish of A, and remained there till June 1910, when he became chargeable as a pauper. *Held* that he had not "resided for three years continuously" in the parish of A in the sense of sec. 1 of the Poor Law (Scotland) Act, 1898, and accordingly had not acquired a residential settlement in that parish. *Ayr Parish Council v. Wigtown Parish Council*, p. 13.

See *Rates and Assessments*, 3.

POOR'S ROLL. *Sheriff—Reporters on probabilis causa litigandi—Applicant's agent acting as reporter on her application.*

It is incompetent for a procurator for the poor in the Sheriff Court, who is acting as agent for an applicant for the benefit of the poor's-roll, to act as a reporter on *probabilis causa litigandi* with regard to that application. *M'Kean v. Herbison*, p. 548.

PRESCRIPTION. *Positive—Admissibility of referring to titles prior to title forming basis of prescription.*

In a question of prescription it is not permissible to refer to titles prior to the title or series of titles which forms the basis of the prescription for the purpose of explaining away, or altering, or qualifying the investiture secured by prescription. *Meacher v. Blair-Oliphant*, p. 417.

See *Property*, 1.

PRESUMPTION. See *Workmen's Compensation Act*, 31.

PROCESS. *Record—Amendment—Failure to pay opponent's expenses—Absolvitor or dismissal.*

1. In an action of damages for personal injury brought in the Sheriff Court and remitted to the Court of Session for jury trial under sec. 30 of the Sheriff Courts (Scotland) Act, 1907, the Second Division, on 15th November 1912, allowed the pursuer to amend his record, found the defenders entitled to the expenses connected with the amendment, and allowed the pursuer "to proceed in the cause only on payment" of the expenses found due. The pursuer having subsequently intimated that he did not intend to pay the expenses and proceed in the cause, the defenders moved for absolvitor. The pursuer maintained that the appropriate decree was one of dismissal. Decree of absolvitor *granted*. *Dougall v. Caledonian Railway Co.*, p. 349.

PROCESS—*Continued.*

Mandatory—Defender and Respondent in appeal abroad but within British Dominions.

2. The pursuer in an action of affiliation and aliment appealed to the Court of Session, and thereafter lodged a note in which she stated that "the defender and respondent has been out of the country for some weeks," and craved the Court to ordain him to find caution or to sist a mandatory. The Court in view of the facts that the respondent (1) had been assoilzied in the Sheriff Court, (2) had left the country *bona fide* for the purpose of his business, and (3) was within the jurisdiction of a Court of the British Dominions *refused* the prayer of the note *hoc statu*. *Florence v. Smith*, p. 393.

Reclaiming note—Competency—Timeous lodging of reclaiming note—Final interlocutor—Court of Session (Scotland) Act, 1850, sec. 11—Court of Session Act, 1868, sec. 53.

3. An action reclaimed to the Inner House was settled by a joint minute in terms of which the Division pronounced an interlocutor decerning against the defenders for payment of a certain sum, finding the pursuers entitled to expenses up to and including the date of the Lord Ordinary's interlocutor, remitting the account thereof to the Auditor to tax and to report to the Lord Ordinary, and remitting the cause to his Lordship with power to decern for the taxed amount of the account. The Lord Ordinary thereafter pronounced an interlocutor in which he repelled objections by the pursuers to the Auditor's report, decerned against the defenders for the taxed amount of the account, and found the pursuers liable in the expenses of discussing the note of objections. A reclaiming note against this interlocutor *held* not to have been timeously lodged in respect that it had not been lodged within ten days, and *refused*. *M'Alley v. Marshall's Trustees*, p. 890.

Reclaiming note—Competency—Note of suspension—Offer of caution—Note passed on caution—Appeal on contention that note should be passed without caution.

4. The complainer in a note of suspension pleaded that the note should be passed without caution or consignment, but subsequently amended the note by adding an offer to find caution "if your Lordships shall so appoint." The Lord Ordinary then passed the note "on caution as offered." *Held* that the complainer was not barred by the offer of caution from reclaiming for the purpose of maintaining that the note should have been passed without caution. *Cumming v. Hendry*, p. 472.

Reclaiming note—Competency—Winding-up order pronounced by the Lord Ordinary on the Bills in vacation—Companies (Consolidation) Act, 1908, sec. 181.

5. It is competent to reclaim against an interlocutor pronounced by the Lord Ordinary on the Bills in vacation granting an order for the compulsory winding-up of a company. *Magistrates of Edinburgh v. Union Billposting Co., Limited*, p. 105.

Diligence for recovery of writs—Confidentiality—Letters by party's law-agents to arbiters and employees of party—Corresponding business-book entries.

6. In an action of suspension and interdict by a railway company against a quarrymaster, the question at issue being whether the freestone on a certain estate was a mineral, the respondent averred that more than sixty years before the present dispute had arisen the freestone was regarded and treated as a mineral by the complainers in claims and arbitration proceedings between them and

PROCESS—Continued.

the proprietors from whom they acquired the lands. A proof having been allowed, the respondent applied for a diligence to recover (1) letters from the complainers' law-agents to arbiters, engineers, contractors, and officials employed by, or acting on behalf of, the complainers in such claims and arbitrations, and tending to show whether the complainers regarded the freestone as a mineral or otherwise, and (2) entries in the business-books of the complainers' law-agents referring to the same transactions. *Circumstances* in which the Court granted the diligence, expressly reserving all questions of confidentiality. *Caledonian Railway Co. v. Symington*, p. 885.

Proof or jury trial—Averments of pursuer stating competent and incompetent grounds of action—Danger of jury being misled—Several pursuers—Non-community of interest.

7. In an action of damages brought against a doctor by the widow and children of a deceased miner the pursuers averred (1) that the defender had made an unauthorised post-mortem examination of the body of the deceased ; and (2) that, in consequence of the method in which it had been performed and of certain other actings of the defender, difficulty, delay, and expense had been incurred in prosecuting a claim under the Workmen's Compensation Act. Some of the pursuers were not persons entitled to compensation under the Act. *Held* that, while the action was competent (and was appropriate for jury trial) in so far as founded on the wrong done to all the pursuers jointly by the unauthorised post-mortem examination, it was incompetent in so far as founded on the second wrong which affected certain of them only ; and issue *refused* and case *sent* to trial before a Judge, in view of the likelihood of a jury confusing the competent and incompetent grounds of action. *Hughes v. Robertson*, p. 394.

Proof or jury trial—Action by workman for reduction of agreement to accept compensation, and for damages for injury.

8. A minor injured by an accident in the course of his employment, for which he agreed, without consulting his father, to accept compensation under the Workmen's Compensation Act, 1906, subsequently brought an action of damages for his injury at common law, in which he averred that he had accepted the statutory compensation in ignorance of his common law claim ; and contended that, being a minor, he was not bound by the agreement, and that, in any event, it should be reduced on the ground of minority and lesion. *Held* that the case was unsuitable for jury trial, and that the inquiry should be by a proof. *M'Feetridge v. Stewarts & Lloyds, Limited*, p. 773.

Jury trial—Transmission of cause for trial at sittings—Failure to lodge papers within time specified in Rolls of Court—Act of Sederunt, 19th November 1910, sec. 3.

9. A Lord Ordinary having on 20th February ordered a cause to be tried at the sittings, the agent responsible tendered the necessary papers to the Keeper of the Rolls on the afternoon of 5th March, but the Keeper refused to accept them, on the ground that, under a notice inserted in the Rolls of Court, midday of 5th March was the latest time at which they could be received. On a note for authority to the Keeper to receive the papers and include the cause among those to be taken at the sittings, the Court *refused* to grant that authority, but instead thereof *discharged* the Lord Ordinary's order, and *remitted* to him to proceed. *Campbell v. Osborne & Hunter*, p. 758.

PROCESS—*Continued.**Jury trial—Motion for new trial.*

10. *Circumstances* in which the Court refused to set aside, on the ground of excess of damages, the verdict of a jury awarding £4000 to a farmer (the profit of whose farm amounted to about £350 a year) in respect of personal injuries sustained by him in a railway accident. *Thoms v. Caledonian Railway Co.*, p. 804.

Jury trial—Motion for new trial—Entering judgment for party unsuccessful at trial—Jury Trials Amendment (Scotland) Act, 1910, sec. 2.

11. *Circumstances* in which, in an action for damages against a tramway company at the instance of a passenger who had been knocked down and injured by a car, the Court set aside a verdict for the pursuer and assoilzied the defenders, *holding* that, even on the assumption that the company's driver was to blame, the pursuer's evidence showed that the accident was due to her own negligence. *Macleod v. Edinburgh and District Tramways Co., Limited*, p. 624.

Jury trial—Verdict set aside and judgment entered for party unsuccessful at trial—Jury Trials Amendment (Scotland) Act, 1910, sec. 2.

12. *Circumstances* in which the Court, in an action of damages by an employee against his employer for wrongous information given to the police and slander, set aside the verdict of a jury on the ground that there was no evidence before the jury either of want of probable cause or of malice; and instead of allowing a new trial entered judgment for the defenders, in respect that all the relevant evidence which could be reasonably expected to be obtained was before them. *Mills v. Kelvin & James White, Limited*, p. 521.

Divorce for adultery—Sisting of alleged paramour—Right of party sisted to judgment as to his guilt or innocence—Act of Sederunt, 17th July 1908.

13. In an action of divorce for adultery an alleged paramour, who has not been called as a defender and against whom there are no direct conclusions, but to whom the action has been intimated in terms of the Act of Sederunt of 17th July 1908 and who has appeared and been sisted to defend, is entitled to a decision as to his guilt or innocence. *Circumstances* in which the Lord Ordinary, while granting decree of divorce, *assolizied* an alleged paramour, thus appearing, from the conclusions of the summons so far as implicating him. *Raeside v. Raeside*, p. 60.

Petition—Advertisement—Company—Reorganisation of share capital—Companies (Consolidation) Act, 1908, sec. 45.

14. In a petition, under sec. 45 of the Companies (Consolidation) Act, 1908, for confirmation by the Court of special resolutions passed by a limited company for reorganisation of its share capital, the Court ordered intimation of the petition without advertisement. *Robert A. Munro & Co., Limited*, p. 456, and *British Assets Trust, Limited*, p. 661.

Reduction—Necessity for reduction—Friendly Society—Election of member to board of management—Declarator that election void—Necessity for reduction of minutes of meeting at which election made.

15. The rules of a friendly society provided that members should be represented by delegates elected by themselves, and that minutes of the district meetings at which the election took place should be kept and transmitted to the secretary of the society. It was further provided that the delegates should elect from among themselves a board of management. *Held* that an action for declarator that the election of a member to the board of management was void, in respect that he was ineligible to act as a delegate, could

PROCESS—*Continued.*

competently be brought without reduction of the minutes of the meeting at which he was appointed a delegate, or of those of the meeting at which he was elected to the board. *M'Gowan v. City of Glasgow Friendly Society*, p. 991.

Appeal—Competency—Appeal against interlocutory judgment under Rivers Pollution Prevention Act, 1876, sec. 11—Leave to appeal—Sheriff Courts (Scotland) Act, 1907, sec. 28.

16. *Held* that the provisions of sec. 28 of the Sheriff Courts (Scotland) Act, 1907, apply to appeals in proceedings under the Rivers Pollution Prevention Act, 1876; and that, accordingly, an appeal by special case against a decision of the Sheriff repelling certain preliminary pleas in such proceedings was incompetent as, although the Sheriff had himself stated the special case, leave to appeal had not been formally obtained. *Dumfries County Council v. Langholm Magistrates*, p. 307.

Removal to Court of Session for jury trial—Refusal to remit back to Sheriff—Averments of substantial damage—Sheriff Courts (Scotland) Act, 1907, sec. 30.

17. A Sheriff Court action for £300 as damages for injury to the pursuer's person and property having been remitted to the Court of Session under sec. 30 of the Sheriff Courts (Scotland) Act, 1907, the Court *refused* to exercise the power given by that section of remitting the case back to the Sheriff, as the record disclosed that the alleged injuries were of a serious nature, and that the pursuer's claim was substantial. *Mackie v. Davidson*, p. 675.

Removal to Court of Session for jury trial—Remit to Sheriff—Trifling nature of cause—Sheriff Courts (Scotland) Act, 1907, sec. 30.

18. The pursuer, in a Sheriff Court action of damages at common law for £100 for personal injury, required the case, under sec. 30 of the Sheriff Courts Act, 1907, to be remitted to the Court of Session for trial by jury. The Court *refused* the application and, under the powers conferred on them by that section, remitted the case back to the Sheriff, *holding* that it was unsuitable for jury trial in respect of the trifling nature of the injuries averred. *Barclay v. Smith & Co.*, p. 473.

See *Diligence—Entail*, 2.

PROOF. *Admissibility of evidence—Hearsay—Evidence of overheard conversations—Conversations part of res gestæ.*

1. In a prosecution for keeping a house as a brothel the prosecutor examined as witnesses two policemen who repeated conversations overheard by them in the house in question. The accused objected to the evidence on the grounds that she was not present when the conversations took place, and that the persons whose conversations were overheard were not examined as witnesses. *Held* that the evidence was competent, in respect that it was not led to prove the truth of the matters stated in the conversations, but merely to prove the fact that such conversations took place. *M'Laren v. Macleod*, (J.) p. 61.

Admissibility of extrinsic evidence to negative revocation of prior testamentary writing.

2. *Circumstances* in which *held* that extrinsic evidence (consisting chiefly of correspondence between a testatrix and her law-agents) was not competent for the purpose of establishing that she intended, notwithstanding a clause of revocation in a will of later date, that a document of prior date should form part of her testamentary writings. *Hannay's Trustees v. Keith*, p. 482.

PROOF—Continued.

Admissibility of extrinsic evidence—Ambiguity in designation of beneficiary.

3. A Scotsman living in Scotland left, among other legacies to charities all of which were Scottish, a legacy to "The National Society for the Prevention of Cruelty to Children." In a competition between "The National Society for the Prevention of Cruelty to Children" (London) and "The Scottish National Society for the Prevention of Cruelty to Children" (Edinburgh), *held* that the designation in the will was ambiguous, and proof allowed of extrinsic facts to show which of the Societies the testator meant. *Nasmyth's Trustees v. National Society for Prevention of Cruelty to Children*, p. 412.

Proof of trust—"Deed of trust"—Deposit-receipt—Act 1696, cap. 25.

4. A deposit-receipt is not a "deed of trust" within the meaning of the Act 1696, cap. 25; and accordingly parole proof *allowed* in an action by a party for declarator that the sum contained in a deposit-receipt in the names of others truly belonged to him. *Cairns v. Davidson*, p. 1054.

Facts subsequent to raising of action—Damages for injuries caused by dog—Proof of dog's conduct subsequent to raising of action.

5. In an action of damages brought by a person bitten by a dog against its owner, *observed* (per the Lord Justice Clerk) that evidence of attacks made by the dog on other persons after the date of the raising of the action was admissible for the purpose of showing that the dog was of a vicious disposition. *Gordon v. Mackenzie*, p. 109.

Church—Seats—Assignment of sittings.

6. *Opinion* (per the Lord President), that an assignment of sittings in a family pew can only be established by writing. *Paterson v. Brown*, p. 292.

Witnesses—Credibility—Opinion of Judge who heard witnesses—Duty of Court of appeal.

7. *Observations* as to the duty of a Court of appeal to form an opinion for itself upon questions of fact submitted to review, and as to the weight to be attached to the opinion of the Judge who saw and heard the witnesses. *Christie v. Lyburn*, p. 1077.

Workmen's Compensation Act, 1906—Remit to arbitrator for further statement of fact—Power of arbitrator to hear further evidence.

8. In a case stated for appeal against the decision of the Sheriff-substitute acting as arbitrator in proceedings under the Workmen's Compensation Act, 1906, in the course of which proceedings proof had been led, the Court remitted to the Sheriff-substitute to find whether the workman had given statutory notice of his accident as soon as practicable thereafter. The Sheriff-substitute reported that he had himself re-examined the doctor who had attended the workman during his illness, and made a finding in answer to the question put by the Court. This report was objected to on the ground that it proceeded on evidence which had been taken after the proof had been closed. *Held* that the Sheriff-substitute was entitled, under the remit, to take further proof, and objection *repelled*. *Park v. Coltness Iron Co., Limited*, p. 1163.

See *Justiciary Cases*, 31, 33—*Parent and Child*, 2.

PROPERTY. *Title to Heritage—Inland loch—Riparian proprietors—Prior title to lands with parts and pertinents—Subsequent express title to loch—Prescription—Exclusive possession.*

1. In the case of a grant of lands abutting on an inland loch, with

PROPERTY—*Continued.*

parts and pertinents, there is a presumption that the grantee has a joint right of property in the loch, along with the other proprietor or proprietors whose lands abut upon it. This presumption will not be prejudiced by a subsequent express grant of the loch to another, unless that grant is followed for the prescriptive period by such exclusive possession as would be required by law for the establishment of a new and adverse right in the possessor; any lesser degree of possession, such as might be admissible for the purpose of explaining the limits of a grant or conveyance in a question with its author, being insufficient. Evidence which was held to be insufficient to establish exclusive possession of an inland loch. *Meacher v. Blair-Oliphant*, p. 417.

Title to heritage—Bounding title—Property described as lying within parish—Proof of parochial boundaries—Plans and Ordnance Survey maps.

2. In an action between two landed proprietors as to the ownership of a loch the pursuer contended that the defender was excluded from the loch by the fact that the latter's estate was described in his titles as lying within the parish of Blairgowrie, and that the loch lay outwith the parish boundaries. Evidence on which it was held that the pursuer had failed to prove that the loch lay outwith the parish boundaries. *Observations* (1) on the evidence required to prove parish boundaries, and (2) on the value of plans and Ordnance Survey maps as evidence. *Meacher v. Blair-Oliphant*, p. 417.

See *Interdict—Reparation*, 10, 11.

PUBLIC-HOUSE. *Licensing authority—Disqualification of member—Bias.*

1. Held that the mere fact of belonging to a temperance society pledged to the principal of "no licence in any form under any circumstances for the sale of liquors to be used as a beverage" did not operate as a disqualification for sitting as a member of a Licensing Court. *M'Geehen v. Knox*, p. 688.

Licensing authority—Discretion—District over-licensed—Mode of selecting certificates to be refused.

2. *Opinion* (per the Lord President) that where the Licensing Authorities of a district think that the district is over-licensed and that the number of licences should be reduced, they should obtain a report from a trustworthy source, and thereafter consider the questions raised by the report. *Goodall v. Shaw*, p. 630.

Certificate—Renewal—Objections—Title to object—Objection by mandate—Averment that objections in reality those of mandatory—Competency of general objection that district over-licensed.

3. A licence-holder, who had been refused a renewal of his certificate, brought an action for the reduction of the deliverance of the Licensing Court on the grounds (1) that the objections which had been taken to his certificate were not in reality the objections of the ostensible objectors, but those of a vigilance association (with no *locus standi*) to whose agent the objectors had been induced to give a mandate; (2) that no specific objection had been taken to his certificate, but merely a general objection that the district was over-licensed; (3) that the only objection to the pursuer's certificate being that general one, the magistrates, by the procedure which they had adopted at the Licensing Court, viz., first granting all the certificates which were not objected to by the agent, and only thereafter proceeding to consider those to which he had taken objection, had made it impossible for them to exer-

PUBLIC-HOUSE—*Continued.*

cise a proper judicial discretion with regard to the renewal of the pursuer's certificate. *Held* that none of the grounds of reduction were relevant; but *observed* with regard to number (3) that, had the Licensing Court resolved beforehand to reduce the licences in the district by a certain number, the result would have been different. *Goodall v. Shaw*, p. 630.

See *Justiciary Cases*, 18, 19.

RAILWAY. *Powers of Railway Company—Sale of whole permanent way material—Ultra vires.*

1. *Held* that a railway company which had constructed its line under statutory powers, was not entitled to sell the rails, bridges, and other materials forming its whole permanent way, although it was financially impossible for it to continue to work the undertaking; and interdict *granted* at the instance of a holder of shares and debenture stock of the company against such a sale. *Observed* that different considerations would arise in the case of a company which proposed only to sell the materials of an unremunerative branch line which was no longer in use. *Ellice v. Invergarry and Fort Augustus Railway Co.*, p. 849.

Dividend—Effect of Public Act on rights created by previous Private Act—Half-yearly or yearly calculation—North British Railway Act, 1888, sec. 47—Railway Companies (Accounts and Returns) Act, 1911, sec. 4 (1).

2. The North British Railway Company, in exercise of powers conferred by a private Act of 1888, created certain preferred and deferred ordinary stocks, the terms of the Act providing that a non-cumulative dividend of 3 per cent should be payable out of the available profits of each half year to the preferred stockholders, and that the balance of such profits should go to the deferred stockholders. By the Railway Companies (Accounts and Returns) Act, 1911, every railway company was relieved of any obligation to prepare or submit to their shareholders or auditors accounts or balance-sheets oftener than once a year. *Held* that the later Act did not relieve the railway company of the duty of calculating the dividends due to the preferred and deferred stockholders on the basis of the profits of each half year. *North British Railway Co. v. Wingate*, p. 1092.

Railway and Canal Commissioners—Arbitration—Ascertainment of quantum meruit under a contract—Competency—Railway and Canal Traffic Act, 1873, sec. 8.

3. For the purpose of authorising them to construct a railway, the promoters of the Newburgh and North Fife Railway Company obtained an Act of Parliament, which incorporated the Companies Clauses Consolidation (Scotland) Act, 1845, the Companies Clauses Act, 1863, and Acts amending the same. A Schedule to the Act contained an agreement between the Company and the North British Railway Company, whereby the North British Company guaranteed a fixed dividend upon "the paid-up share capital" of the Newburgh Company. The Newburgh Company, having failed to obtain sufficient subscriptions to its shares, entered into an agreement with a syndicate, whereby the Company undertook to issue to the syndicate its whole unissued capital, and the syndicate undertook to construct the railway. It was established by proof that the cost of construction was about 60 per cent of the face value of the capital issued to the syndicate, and that the syndicate disposed of the shares so issued at less than par. The Court having *held* that

RAILWAY—Continued.

the capital so issued to the syndicate was not "paid-up share capital" of the Newburgh Company in the sense of the agreement with the North British Company, and that the North British Company was only bound to contribute to the dividend on so much of the capital of the Newburgh Company as was issued in consideration of cash or the equivalent of cash, further *held* that it was competent for the Railway and Canal Commissioners, sitting as arbiters, to determine what amount of the capital was issued in consideration of cash or the equivalent of cash. *Newburgh and North Fife Railway Company v. North British Railway Company*, p. 1166.

See *Company*, 3.

RATES AND ASSESSMENTS. *Complaint by ratepayer to Local Authority—Liability to action for slander.*

1. *Observed* that a ratepayer is entitled to lay facts reported to him which cast aspersions on an official before the proper authorities for investigation, and is under no duty to inquire into them before doing so; and, although the facts are disproved, he is not bound to apologise or to withdraw the statements made to the authorities, although a duty of future reticence may be imposed on him. *Couper v. Lord Balfour of Burleigh*, p. 492.

Exemption—Crown—Buildings held by statutory body and occupied for public purposes—Law Courts—Buildings partly let.

2. *Held* that a statutory body of commissioners created for the purpose of holding buildings in Glasgow, which were used for certain public purposes, viz., Justiciary Courts, Sheriff Courts, and Justice of the Peace Courts, were exempt from assessment both for owners' and occupiers' rates, except with regard to certain portions of the buildings which were let to the County Council and for which rents were paid; and that in respect of these portions, seeing that they were held as mere investments, the commissioners were liable for owners' rates. *Glasgow Court Houses Commissioners v. Glasgow Parish Council*, p. 194.

Poor and School rates—House Letting and Rating (Scotland) Act, 1911, sec. 7—Small dwelling-house—Responsibility of owner for occupiers' assessments—House entered in Valuation-roll as unoccupied—Deduction of percentage for cost of collection—Method of deduction.

3. *Held* (1) that, under the House Letting and Rating (Scotland) Act, 1911 (which makes the owner of a small dwelling-house responsible for all assessments liability to pay which is imposed on the occupier thereof), a parish council is entitled to recover the occupiers' portion of the poor and school rates for the whole financial year from such an owner, even though the house is entered in the Valuation-roll as unlet and unoccupied, subject to a right of repayment for any portion of the year during which the premises are in fact unoccupied. *Held* (2) that the owner of a small dwelling-house is entitled at the time of payment to deduct from the occupiers' assessment the statutory percentage allowed him for cost of collection, but that, if he subsequently claims repayment of any portion of that assessment, he must allow a counter-deduction of the same percentage on that portion. *Glasgow Parish Council v. Graham*, p. 119.

RECONVENTION. See *Sheriff*, 2.

REDUCTION. See *Husband and Wife*, 3—*Process*, 15.

RELIEF. See *Revenue*, 1.

REPARATION. *Illegal apprehension—Arrest by constables without warrant of person "reasonably suspected of" crime—Privilege—Glasgow Police Act, 1866, sec. 88.*

1. In an action of damages for wrongous arrest brought against two Glasgow constables who had apprehended the pursuer without a warrant, the defenders maintained that, as they had *bona fide* suspected the pursuer of a crime and as, in their judgment, their grounds of suspicion were reasonable, they were protected by sec. 88 of the Glasgow Police Act, 1866, which empowers constables to arrest without warrant persons "reasonably suspected of having committed" a penal offence. *Held* that it was a question for the jury whether the grounds of the defenders' suspicion were or were not reasonable, and that the pursuer was entitled to an issue. *Shields v. Shearer*, p. 1012.

Wrongous information to the police—Want of probable cause—Slander—Privilege—Malice—Statements in trade circular.

2. In an action of damages, at the instance of a discharged employee against his former employers, a jury found for the pursuer on issues whether the defenders had maliciously and without probable cause lodged with the criminal authorities charges of theft and of fraud against the pursuer, and whether they had caused to be circulated amongst certain business firms a circular in which they maliciously represented that the pursuer had been guilty of fraudulent practices. *Circumstances* in which the Court set aside the verdict on the ground that there was no evidence before the jury either of want of probable cause or of malice. *Mills v. Kelvin & James White, Limited*, p. 521.

Slander—Innuendo—Newspaper—Trade publication—List of decrees in absence—Erroneous entry—Imputation of Insolvency.

3. *An issue of a trade journal known as Stubbs' Weekly Gazette contained a list headed "Extracts from the Court Books of Decrees in Absence in the Small-Debt Courts. Note.—It is probable that some of the decrees have been sisted, settled, or paid; and in no case does publication of the decree imply inability to pay on the part of anyone named, or anything more than the fact that the entry published appeared in the Court Books." In an action of damages for slander against the proprietors of the journal at the instance of a tradesman, whose name was erroneously included in the list in respect of a decree for £9, 19s. 6d., the facts being that the debt had been paid and the action dismissed, the Lord Ordinary approved of an issue in which the pursuer innuendoed the entry as falsely and calumniously representing that he was unable to pay his debts. Held that the entry, when read in conjunction with the explanatory note, would not bear the innuendo suggested, and that the issue fell to be disallowed. Russell v. Stubbs, Limited, (H. L.) p. 14.*

Slander—Privilege—Sufficiency of averments of malice—Complaint by ratepayer to Local Authority—Refusal to withdraw statement.

4. The matron of a hospital belonging to certain local authorities brought an action of damages against a ratepayer within the hospital district for defamatory statements contained in two letters. The first of these letters was sent by him to the clerk of one of the local authorities, reporting certain information received by him as to the pursuer's conduct as a matron (which he stated, if true, pointed, in his opinion, to criminal conduct), and demanding an inquiry. The second letter was sent by him to the Local Government Board, and expressed dissatisfaction with the result of two inquiries in which the pursuer had been absolved of blame,

REPARATION—Continued.

and made another charge, based on fresh information, against the pursuer, and craved a further inquiry. A third inquiry was held in which the pursuer was again absolved. The defender, however, refused to apologise or withdraw the charges. The defender's letters were admittedly privileged, but the pursuer maintained that malice sufficiently appeared from (1) the violent terms in which the statements in the letters were couched; (2) the fact that they were made without prior inquiry; (3) the reiteration of them; and (4) the defender's adherence to them and refusal to apologise. *Held* that these facts and circumstances were not sufficient to infer malice; and action *dismissed* as irrelevant. *Couper v. Lord Balfour of Burleigh*, p. 492.

Slander—Privilege—Sufficiency of averments of malice—Master's liability for servant's slander.

5. In an action of damages for slander, brought against a limited company owning a music hall, the pursuer averred that, while he was present at a performance in the hall, he was falsely accused by an attendant of indecent conduct towards a member of the audience, and that he was taken to a private room where the slander was repeated by the attendant and by the manager. He averred that these slanderous statements "were made and persisted in most recklessly, pertinaciously, and maliciously." *Held* that the occasion was privileged, and that, as there was no sufficient averment of facts inferring malice, the action was irrelevant. *Gorman v. Moss' Empires, Limited*, p. 1.

Slander—Privilege—Liability of master for verbal slander uttered by servant on privileged occasion—Personal malice of servant.

6. In an action of damages brought against a railway company on account of a verbal slander uttered by the manager of one of their station bars, the pursuer, who had been employed as a barmaid at this bar, averred that, on the occasion of her dismissal from this post, the manager (who had the control of the servants employed at the bar) uttered the slander complained of—a charge of appropriating the company's funds—knowing it to be false and with the object of gratifying his private ill-will towards her. The occasion was admittedly privileged. *Held* that the action was irrelevant, in respect that the pursuer's averments disclosed that the malice alleged as actuating the slander was personal to the manager and in no way connected with the business of the defenders, and, accordingly, that the defenders could not be held responsible. *Aiken v. Caledonian Railway Co.*, p. 66.

Slander—Issue—Verdict—Latitude of time—"On or about."

7. In an action of damages for slander the issue submitted to the jury was whether "on or about 12th March 1912" the defender at or near a shop occupied by the pursuer and in presence and hearing of one of the pursuer's neighbours had made a slanderous statement concerning the pursuer which imported that he was a thief. The jury having found that the slander had been uttered by the defender at the place and in the circumstances set forth in the issue, but that it had been so uttered in February 1912, the Lord President directed that the verdict should be entered for the defender. *Smith v. Paton*, p. 1203.

Negligence—Unfenced sandpit on private ground—Use of pit by children as playground—Hidden danger.

8. In an action by a father for solatium for the death of his daughter, aged seven, the pursuer averred that the defenders were the owners

REPARATION—*Continued.*

of ground abutting on a public path and separated therefrom by a hedge in which there were gaps ; that on the ground there was an unfenced sandpit 80 yards from the path ; that children were in the habit of entering the ground and using the pit as a playground ; that the defenders knew of this practice and " allowed " it ; that the pursuer's child was killed by a fall of sand while playing in the pit ; and that the defenders knew, before the accident happened, that the face of the sand was at a dangerous angle and liable to fall, but took no steps to have the danger removed or to exclude the children. *Held* that the pursuer's averments were relevant, and issue *allowed*. *Mackenzie v. Fairfield Ship-building and Engineering Co., Limited*, p. 213.

Negligence—Unfenced rubbish heap in field frequented by public—Injury to child—Liability of person using, but not owning, the field.

9. A father brought an action of damages against a burgh authority for the death of his daughter, under three years of age, who had received fatal injuries through her clothes becoming ignited at a fire burning upon a rubbish heap or " coup " where the burgh rubbish was deposited. *Circumstances* in which *held* that the pursuer's averments were irrelevant to found an issue against the defenders, in respect (1) that it appeared therefrom that the defenders were not the owners of the field or coup, and had therefore neither the right nor the duty to fence them ; and (2) that the material which they put upon the ground was not dangerous in itself but only became so when ignited, and there was no averment that the defenders, or those for whom they were responsible, had kindled the fire in question. *Johnstone v. Magistrates of Lochgelly*, p. 1078.

Negligence—Lease—Property—Common Stair—Title to sue—Wife of tenant of house on common stair injured owing to defect in stair.

10. The wife of the tenant of a dwelling-house on a common stair brought an action of damages against the landlord for injuries sustained by her owing to the defective condition of the stair. The defender contended that the pursuer had no title to sue, in respect that she was not a party to the lease. *Held*, (by the Lord Ordinary, Hunter), that the pursuer had a good title to sue, in respect that the stair was not included in the lease, but remained under the control of the landlord, who was bound to keep it reasonably safe for tenants and other persons using it as a means of access to the houses. *Mellon v. Henderson*, p. 1207.

Negligence—Property—Common Stair—Duty to repair—Possession and control—Individual houses of tenement sublet by lessee of whole tenement—Question of liability between lessee and proprietor.

11. A tenement of eight houses was let by the proprietor to a company, and the individual houses sublet by the latter to their employees. A pupil child visiting one of the houses, which was approached by an outside stair common to that and to another house, fell from the stair, in consequence of a concealed defect in the railing and was injured. *Circumstances* in which, in an action of damages at the instance of the father against the proprietor and the company, the latter were held to be alone liable, on the ground that they had possession and control of the stair and railing, and that, in consequence of their contract with their tenant, the child was on the stair on their invitation. *Kennedy v. Shotts Iron Company, Limited, and Others*, p. 1143.

REPARATION—Continued.

Negligence—Flooding of land in burgh—Responsibility of magistrates—Edinburgh Municipal and Police Act, 1879, sec. 179—Edinburgh Corporation Act, 1900, sec. 28.

12. *The tenant of a market garden on the estate of Craigentenny within the burgh of Edinburgh brought an action against the magistrates of Edinburgh for damages caused to his garden by the overflowing of the Craigentenny burn. Circumstances in which the House of Lords held the defenders liable having in view especially the Edinburgh Municipal and Police Act, 1879, sec. 179, and the Edinburgh Corporation Act, 1900, sec. 28. Hanley v. Magistrates of Edinburgh, (H. L.) p. 27.*

Negligence—Contributory negligence—Accident—Proximate cause—Tramway.

13. *In an action of damages against a tramway company the pursuer's case was that, when crossing a street, she stopped in the four-foot way between two sets of car rails to allow a car to pass, and that her dress was caught by a stay that projected beneath the car and she was thrown down and run over. She maintained that had the car been provided with side guards, as it should have been, the accident would not have happened. The defenders pleaded contributory negligence, their case being that the pursuer, not looking where she was going, had herself walked into the car. Held that, if the pursuer's own negligence was a *causa proxima* of the accident, the fact that there might also have been contemporaneous negligence on the part of the defenders which affected the accident did not render them liable. Gibb v. Edinburgh and District Tramways Co., Limited, p. 541.*

Negligence—Contributory negligence—Accident—Proximate cause—Tramway.

14. *A passenger who had alighted from a northward bound car, and who had passed immediately behind it with the object of crossing to the farther side of the street, was knocked down and injured by a southward bound car at the moment when she reached the nearest rail of the line on which it was travelling. In an action for damages against the Tramway Company she admitted in evidence that she had not looked to see if any traffic was approaching from the north, but contended that the defenders were liable in respect that the driver of the southward bound car had neither sounded his bell nor slowed down in passing the stationary car, as he was bound to do. Held that the defenders were not liable, seeing that, even on the assumption that the driver was to blame as alleged, the pursuer's evidence showed that the accident was due to her own negligence in failing to take the ordinary precaution of looking for approaching traffic, it being clear that the southward bound car must have been so close to the pursuer when she stepped into the danger zone that neither sounding the bell nor slowing down could have prevented the accident. Macleod v. Edinburgh and District Tramways Co., Limited, p. 624.*

Negligence—Contributory negligence—Patting unknown dog.

15. *In an action of damages brought against the owner of a dog for personal injuries caused by its biting the pursuer, the defender maintained that the pursuer had been guilty of contributory negligence in that he, although the dog was unknown to him, had patted it. Held that this did not amount to contributory negligence, and damages awarded. Gordon v. Mackenzie, p. 109.*

REPARATION—*Continued.**Solatium—Unauthorised post-mortem examination.*

16. The widow and children of a deceased miner brought an action against a medical man in which they averred that the defender had made an unauthorised post-mortem examination of the deceased, and in respect thereof claimed a sum of damages. *Held* that the pursuers had set forth a relevant ground of action, and that the appropriate form of trial was trial by jury. *Hughes v. Robertson*, p. 394.

Damages for personal injury—Title to sue—Executor.

17. *Held* that the executor of a party who had, prior to his death, intimated a claim for damages for personal injury, had a title to sue for such damages. *Observations* on the maxim *actio personalis moritur cum persona*, and on the use of the phrase *actio injuriarum* as a *nomen juris* in Scots law. *Leigh's Executrix v. Caledonian Railway Co.*, p. 838.

Damages—Excess of damages—Damages for personal injury.

18. *Circumstances* in which the Court *refused* to set aside, on the ground of excess of damages, the verdict of a jury awarding £4000 to a farmer (the profit of whose farm amounted to about £350 a year) in respect of personal injuries sustained by him in a railway accident. *Thoms v. Caledonian Railway Co.*, p. 804.

REPETITION. *Sale—Extent of subjects sold—Error in fact innocently induced by seller—Repetition of price—Interest.*

In 1902, by a minute of sale, a firm of quarrymasters, who had a lease of a quarry, sold the goodwill of their business, their interest in the lease, and the buildings on the ground "in so far as belonging to" the sellers "or for which they are entitled to receive value or allowances at the termination of their occupancy." The sellers believed that certain buildings on the ground belonged to them or that they were entitled to receive allowances therefor at the termination of the lease, and they represented this to the purchasers. The purchasers accepted the representation without inquiry, the price of the buildings was adjusted by a valuator and paid accordingly, and the purchasers entered into, and continued in, possession of the whole subjects. At the termination of the purchasers' occupancy in 1908, it was ascertained that some of the buildings included in the valuation belonged to the landlord, and that nothing was payable to the tenants in respect thereof. In an action at the instance of the purchasers against the sellers for repetition of the price paid for these buildings, *held* that the pursuers were entitled to repetition (with interest at 3 per cent from the date of payment), in respect that the money had been paid by the pursuers under an error in fact induced by the defenders. *Duncan, Galloway, & Co., Limited, v. Duncan, Falconer, & Co.*, p. 265.

RES JUDICATA. *Finding in arbitration under Workmen's Compensation Act, 1906—Finality—Bar to subsequent action of damages at common law.*

In an application under the Workmen's Compensation Act, 1906, to end or diminish compensation payable to a minor workman, the arbitrator found that the workman had agreed to accept compensation at a certain rate, and reduced the amount. The workman having thereafter brought an action against his employers for damages for his injury at common law and for reduction, on the ground of minority and lesion, of the arbitrator's finding that he had agreed to accept compensation, the defenders,

RES JUDICATA—Continued.

on the ground that the arbitrator was final on questions of fact, pleaded that the matter was *res judicata* in respect of his decision. The Court *repelled* the plea. *M'Feetridge v. Stewarts & Lloyds, Limited*, p. 773.

RETENTION. Factor's right to retain estate documents in security of debt due by estate—Law-agent.

Held that the factor on a landed estate had, as against a bondholder desirous of appearing as a party to proceedings in the Land Court, no right to retain the leases or documents in security of a debt due to him by the estate. *Observed* by the Lord President that the only person who has such a right of retention available against everyone is a law-agent. *Macrae v. Leith*, p. 901.

See *Bankruptcy*, 2.

REVENUE. Estate-duty—Deductions allowable as incumbrances—“Incumbrances created by a disposition made by the deceased”—“Disposition taking effect out of the interest of the deceased”—Provisions for widow and children—Relief—Finance Act, 1894, secs. 7 (1) (a), and 22 (2) (b).

1. A executed a trust-disposition and settlement by which he directed his trustees to pay an annuity out of his estate to B, and also, should B request them to do so, to burden the estate with provisions for B's wife and family. On the death of B the fee of the estate was directed to be conveyed to C. After A's death his trustees paid the annuity to B during his life, and also, at B's request, burdened the estate with bonds of provision for his widow and children. On B's death the estate was conveyed to C, who, in adjusting estate-duty with the Inland Revenue, sought to make deductions in respect of the provisions to B's widow and children. The Inland Revenue refused to allow the deductions, and C paid duty on the whole estate. A question having arisen as to C's right to recover from the widow and children the estate-duty paid in respect of their provisions, *held* that, as these incumbrances were not “created by a disposition made by” B in the sense of sec. 7 (1) (a) of the Finance Act, 1894, and did not take effect “out of the interest of” B in the sense of sec. 22 (2) (b), they were deductible; and, accordingly, that C could not recover from the beneficiaries this estate-duty which he ought not to have paid. *Colquhoun's Trustees v. Abercromby*, p. 874.

Income-tax—Profits—Deduction of expense incurred in earning profits—Property and Income-Tax Act, 1842, sec. 100, Schedule D—Income-Tax Act, 1853, sec. 2, Schedule D.

2. A lady made a profit by letting her furnished house for two months, and, when assessed for income-tax thereon, claimed to deduct the rent of another house which she had taken to reside in during that period. *Held* that this rent was not an expense necessarily incurred in earning the profit, and accordingly that the deduction should be disallowed. *Wylie v. Inland Revenue*, p. 16.

Income-tax—Profits of trade—Deductions—Hire of wagons with option of purchase—Deduction of part of payments representing hire.

3. Under a hire-purchase agreement, between a coal company and a wagon company, the latter agreed to let on hire to the former a number of wagons for a fixed period of years in return for an annual payment, an option being conferred on the coal company to purchase the wagons at the end of the period at a nominal price. *Held* that the portion of the annual payments which represented

REVENUE—*Continued.*

the hire of wagons, but not the portion which represented the price of the option to purchase, fell to be allowed as a deduction in arriving at the assessable profits of the coal company for the purpose of income-tax. *Darngavil Coal Co., Limited, v. Inland Revenue*, p. 602.

Income-tax—Profits of trade—Deductions—Money wholly expended for purpose of trade—Income-Tax Act, 1842, sec. 100, Schedule (D), First Case, First Rule applying to First and Second Cases.

4. The funds of the Fife and Clackmannan Coalowners' Association were derived from voluntary subscriptions or "levies," collected by the association from its individual members, and were expended, *inter alia*, on the following objects, viz.:—(1) Expenses of the Conciliation Board, (2) Subscriptions to the Mining Association of Great Britain, and (3) Experiments on the explosive properties of coal dust made at the request of the Government. *Held* that an individual member of the Association in stating the profits of his business for the purpose of income-tax, was entitled to deduct that proportion of the levy paid by him to the association which effeired to the first of the above objects, but not the proportions thereof effeiring to the second or third, in respect that a payment towards the first of these objects was, whereas a payment to either of the latter was not, one which, had it been made by the individual member directly, could have properly been deducted by him as money wholly expended for the purpose of his trade. *Lochgelly Iron and Coal Co., Limited, v. Inland Revenue*, p. 810.

Inhabited House Duty—Separate tenements—Customs and Inland Revenue Act, 1878, sec. 13 (1).

5. A large building, once occupied as a hotel, was let to a number of tenants, each tenant occupying premises consisting of one or more rooms. These premises all entered from a central staircase or from passages leading therefrom. All the premises were occupied for business purposes with the exception of two—a caretaker's house on the top flat and an eight-roomed dwelling-house which entered from a passage on the second floor leading from the central staircase. *Held* that the premises were "divided into, and let in, different tenements" in the sense of sec. 13 (1) of the Customs and Inland Revenue Act, 1878, and that each separate tenement had to be considered by itself for the purpose of inhabited house duty. *Cotton's Trustees v. Farmer*, p. 1126.

Duties on Land Values—Valuation—"Assessable site value"—Minus value—Finance (1909-10) Act, 1910, sec. 25 (4).

6. *Held* that under sec. 25 (4) of the Finance (1909-10) Act, 1910, the "assessable site value" of land may be a minus quantity. *Herbert's Trustees v. Inland Revenue*, (H. L.) p. 34.

Duties on Land Values—Increment Value Duty—Site Value on occasion of sale—Method of ascertainment—Deductions—Meaning of "like" deductions—Deduction in respect of goodwill and matters personal to parties—Finance (1909-1910) Act, 1910, secs. 2, 25.

7. A valuation of a tenement under the Finance (1909-1910) Act for the purposes of duties on land values, fixed the following values as at 30th April 1909:—(1) Original total value, £400, (2) original assessable site value (got by deducting £380 for buildings), £20. In June 1911 the tenement was sold by the owner for £650 to a purchaser, who had for many years occupied the tenement as a tenant, and had carried on a draper's business there as well as used it as his dwelling-house. Nothing had occurred between

REVENUE—*Continued.*

1909 and 1911 to add to the value either of the site or buildings. The Commissioners of Inland Revenue, for the purposes of increment value duty, fixed the site value on the occasion of the sale at £270, by deducting from the purchase price of £650 the sum formerly deducted as the value of the buildings, viz., £380. An appeal was taken to a referee, who fixed the site value at £70, a figure which he arrived at in the following way :—Being of opinion that the property had not altered in value since the original valuation, but that the figures in that valuation were too low, he fixed the value of the buildings at £400, and deducted from the purchase price of £650 (1) under sec. 25 (4) (a) the value of the buildings, viz., £400, and (2) under sec. 25 (4) (d) a sum of £180, being the portion of the price paid which was, in his opinion, attributable to goodwill or personal considerations. The Commissioners of Inland Revenue contended (1) that under sec. 25 (4) (a) the deduction for buildings should have been £380, the same amount as had been deducted in the original valuation, in respect that the expression “like deductions” in sec. 2 (2) (a) was equivalent to “same deductions”; (2) that, in the circumstances, no deduction for goodwill or personal considerations under sec. 25 (4) (d) fell to be allowed. *Held* (1) that the referee had rightly revalued the deduction to be made in respect of buildings, the expression “like” not being equivalent to “same”; (2) (*dis.* Lord Cullen) that the referee was entitled to attribute £180 to goodwill or personal considerations, and to deduct that sum; and, accordingly, that the site value on the occasion of the transfer was £70. *Opinions* that where property consisting of lands and buildings increases or decreases in value the increase or decrease does not necessarily fall to be attributed to the site, but may be attributed in whole or in part to the buildings. *Inland Revenue v. Walker*, p. 719.

Stamp-duty—“Deed”—Stamp Act, 1891, First Schedule.

8. The First Schedule to the Stamp Act, 1891, includes, among stamp-duties payable on instruments, a duty of 10s. on “Deed of any kind whatsoever not described in this Schedule.” *Held* that a minute of acceptance of office by trustees, engrossed upon a trust-disposition and settlement and signed by the trustees before two subscribing witnesses, was not a “deed” within the meaning of the Schedule, and was not chargeable with a stamp-duty of 10s., or with any stamp-duty. *Henderson’s Trustees v. Commissioners of Inland Revenue*, p. 987.

See *Justiciary Cases*, 20.

RIGHT IN SECURITY. *Heritable security—Bondholder in possession under decree of maills and duties—Right to delivery of leases and other estate documents—Factor’s right to retain estate documents in security of debt due by estate—Law-agent.*

1. *Held* that a bondholder in possession of a landed estate under a decree of maills and duties was entitled to obtain delivery of the leases and other estate documents showing the contractual relations between the landlord and his tenants, for the purpose of enabling the bondholder to appear as a party to proceedings in the Land Court; and that the factor on the estate had no right to retain the leases or documents in security of a debt due to him by the estate. *Observed* by the Lord President that the only person who has such a right of retention available against every-one is a law-agent. *Macrae v. Leith*, p. 901.

RIGHT IN SECURITY—Continued.

Bond and disposition in security—“Default in payment”—Notice requisite to constitute default and justify action of maills and duties—Titles to Land Consolidation (Scotland) Act, 1868, sec. 119, Sched. FF (1) (2).

2. The creditor under a bond and disposition in security in the statutory form given in Schedule FF (1) of the Titles to Land Consolidation Act, 1868, served upon the debtor a schedule of intimation, requisition, and protest in the form given in Schedule FF (2) of the Act, which stated that “payment is now required” of the principal sum due under the bond with interest to date, and that if after the expiry of three months the sums “of which payment is now required” should not be paid, then the creditor “may proceed to sell” the lands disposed in security. Ten days later he brought an action of maills and duties to obtain possession of the lands and to uplift the rents. The debtor was not in arrear with interest. *Held* that the schedule of intimation was a demand for immediate payment; that the debtor not having paid instantly was in “default in payment” within the meaning of sec. 119 of the Titles to Land Consolidation Act, 1868; and that accordingly the action was competent. *M’Ara v. Anderson*, p. 931.

Bond fraudulently discharged handed to innocent purchaser of property—Right of purchaser to retain bond.

3. The purchaser of a certain property, burdened with a bond, paid the full price of the property, and received along with the disposition the bond and a forged discharge thereof from the seller’s agent, who was also agent for the bondholders and had custody of the bond. On the agent’s death it was found that he had embezzled the sum in the bond. In an action by the bondholders against the purchaser of the property for delivery of the bond, *held* that the pursuers were entitled to delivery of the bond in respect (1) that the bond was not one of the property titles carried to the defender by the assignation of writs, (2) that the pursuers, having given their agent no authority to discharge the bond, were not liable for his fraudulent discharge thereof. *Bowie’s Trustees v. Watson*, p. 326.

ROAD. *Extraordinary expenses—Recovery by road authority—Requisites of surveyor’s certificate—Road of less than statutory width—Roads and Bridges (Scotland) Act, 1878, sec. 57.*

In an action to recover the expense of repairing damage done to a road by extraordinary traffic from the person responsible for the traffic, *held* that it was not essential that the surveyor’s certificate required under sec. 57 of the Roads and Bridges (Scotland) Act, 1878, should bear to have been framed, or should in fact have been framed, with regard to the average expense of repairing highways in the neighbourhood; but *observed* that it was the duty of the road authority, before bringing the action, to have regard to such average expense. *Opinion (per Lord Salvesen)* that a road authority is not barred from recovering damage done to a road by extraordinary traffic merely because the road is of less than the width prescribed by statute. *Highland District Committee of Perth County Council v. Rattray*, p. 794.

See *Burgh*, 4.

SALE. *Extent of subjects sold—Error in fact innocently induced by seller—Repetition of price.*

1. In 1902, by a minute of sale, a firm of quarrymasters, who had a

SALE—Continued.

lease of a quarry, sold the goodwill of their business, their interest in the lease, and the buildings on the ground "in so far as belonging to" the sellers "or for which they are entitled to receive value or allowances at the termination of their occupancy." The sellers believed that certain buildings on the ground belonged to them or that they were entitled to receive allowances therefor at the termination of the lease, and they represented this to the purchasers. The purchasers accepted the representation without inquiry. At the termination of the purchasers' occupancy in 1908, it was ascertained that some of the buildings belonged to the landlord, and that nothing was payable to the tenants in respect thereof. *Held* that the purchasers were entitled to repetition from the sellers of the price paid for the buildings in respect that the money had been paid under an error in fact induced by the latter. *Duncan, Galloway, & Co., Limited, v. Duncan, Falconer, & Co.*, p. 265.

Disconformity to contract—Rejection—Transference of property—Sale of Goods Act, 1893, secs. 11 (2), 17, and 18, Rule 5 (1)—Contract for building yacht—Passing of property on payment of first instalment—Right to reject completed yacht as disconform to contract.

2. A firm of shipbuilders contracted to build a yacht to the satisfaction of the designer (who was to superintend the work), the builders undertaking to put right within the time stipulated for the vessel's completion anything considered by him to be unsatisfactory. A clause in the contract provided that "the right of property in the yacht will pass from the contractors to the owner on payment of the first instalment of the price." The first instalment was paid; but repeatedly, during the progress of construction, complaints were made of defects in the workmanship. These the builders undertook to put right, but they failed to do so; and, when the yacht was completed, it was, on account of these defects, disconform to contract. The purchaser thereupon rejected the yacht and brought an action against the builders for repayment of the instalment paid and for damages. The builders maintained that as, by the terms of the contract and the provisions of the Sale of Goods Act, the property had passed on payment of the first instalment the purchaser was barred from rejecting the yacht. *Held*, in the circumstances, that the purchaser had never accepted the yacht or any part of it as conform to contract, and, accordingly, was not barred from rejecting it. *Observed* that the provisions of the Sale of Goods Act with regard to the passing of property in goods sold did not destroy in any way the existing rights under Scots law of rejection for disconformity to contract, which was preserved unimpaired by sec. 11 (2). *Observed* further that property might pass consistently with the existence of a right of rejection before final acceptance. *Nelson v. William Chalmers & Co., Limited*, p. 441.

Sale of heritage—Assignment of Writs—Bond fraudulently discharged handed to innocent purchaser of property—Right of purchaser to retain bond.

3. The purchaser of a certain property, burdened with a bond, paid the full price of the property, and received along with the disposition the bond and a forged discharge thereof from the seller's agent, who was also agent for the bondholders and had custody of the bond. On the agent's death it was found that he had embezzled the sum in the bond. In an action by the bondholders against the purchaser of the property for delivery of the bond,

SALE—Continued.

held that the pursuers were entitled to delivery of the bond in respect (1) that the bond was not one of the property titles carried to the defender by the assignation of writs, (2) that the pursuers, having given their agent no authority to discharge the bond, were not liable for his fraudulent discharge thereof. *Bowie's Trustees v. Watson*, p. 326.

SCHOOL. *Powers of School Board—“ Medical examination and supervision ” of pupils—Provision of medical or dental treatment—Education (Scotland) Act, 1908, secs. 4 and 6.*

Held that the power conferred on school boards by sec. 4 of the Education (Scotland) Act, 1908, to provide, out of the school fund under their administration, for the medical “ examination and supervision ” of pupils attending school, did not authorise them to provide medical or dental “ treatment.” *Glasgow School Board v. Allan*, p. 370.

See *Rates and Assessments*, 3.

SHERIFF. *Jurisdiction—Sending postcards inviting to bet—Jurisdiction of Sheriff in Sheriffdom where cards received—Summary Jurisdiction (Scotland) Act, 1908, sec. 10 (4).*

1. *Held* that the Sheriff-substitute at Dundee had jurisdiction to try a Glasgow bookmaker charged with a contravention of the Betting Acts by sending by post to persons in Dundee cards inviting them to bet. *Lipsey v. Mackintosh*, (J.) p. 104.

Jurisdiction—Reconvention—Sheriff Courts (Scotland) Act, 1907, sec. 6 (h)—Foreigner suing as executor.

2. *Held* that the institution of an action in a Sheriff Court by a foreigner suing as an executor did not, under sec. 6 (h) of the Sheriff Courts (Scotland) Act, 1907, give that Court jurisdiction in a counter action against him as an individual. *Ponton's Executors v. Ponton*, p. 598.

Process—“ Cause ”—Petition—Sheriff Courts (Scotland) Act, 1907, First Schedule, Rule 50.

3. In a petition in the Sheriff Court, under sec. 10 of the Conveyancing Act, 1874, for completion of title to lands belonging to a deceased person by his heir-at-law, objections were lodged by the executor and general disponee of the deceased under a will executed by him. The petitioner in answer sought to set aside the will, averring that it had been impetrated by the objector from the deceased by fraud and circumvention. *Held* that the petition and answers constituted a “ cause ” within the meaning of Rule 50 of the First Schedule to the Sheriff Courts (Scotland) Act, 1907. *Donald v. Donald*, p. 274.

Process—Proof—Summary cause—Sheriff Courts Act, 1907, First Schedule—Rules of procedure regulating proof in ordinary Court—Application of rules to summary causes.

4. *Opinion*, per the Lord President, that the rules with regard to proof appended to the Sheriff Courts Act, 1907, are rules for regulating procedure in the ordinary Court and have no application to summary causes. *Park v. Coltness Iron Co., Limited*, p. 1163.

Process—Challenge of validity of will ope exceptionis—Sheriff Courts (Scotland) Act, 1907, First Schedule, Rule 50.

5. In a petition in the Sheriff Court, under sec. 10 of the Conveyancing Act, 1874, for completion of title to lands belonging to a deceased person by his heir-at-law, objections were lodged by the executor and general disponee of the deceased under a will executed by him. The petitioner in answer sought to set aside the will, averring

SHERIFF—Continued.

that it had been impetrated by the objector from the deceased by fraud and circumvention. *Held* that, notwithstanding the terms of Rule 50 of the First Schedule of the Sheriff Courts (Scotland) Act, 1907, the will could not, even so far as constituting a bar to the granting of the petition, be competently set aside by way of exception in that process; and process *sisted* to allow the petitioner to bring an action of reduction. *Donald v. Donald*, p. 274.

Expenses—Sheriff Court expenses awarded on appeal in Court of Session—Scale of taxation—Time for determination of scale—C. A. S., 1913, M. ii.

6. The C. A. S., 1913, M. ii., provides that, in actions for damages in the Sheriff Court, expenses shall be taxed on a higher or a lower scale according to whether or not the sum decreed for exceeds £50, unless the Sheriff shall direct otherwise. In an action of damages in the Sheriff Court the pursuer was awarded £100, but on appeal to the Court of Session that sum was reduced to £50 with expenses. The Auditor of the Court of Session having taxed the Sheriff Court expenses on the lower scale, *held* that he was right, and *observed* that, if the pursuer desired taxation on the higher scale, he should have moved for an instruction to the Auditor to that effect at the time when he obtained his award of expenses. *Mickel v. M'Coard*, p. 1036.

Expenses—Counsel—Interlocutor of Sheriff incidentally allowing fees recalled on appeal to Court of Session and expenses awarded—Right of Auditor to allow fees.

7. The allowance of fees to counsel made by the Sheriff in the interlocutor in which he answered the questions of law in a stated case *held* to warrant the Auditor in allowing counsel's fees in the Sheriff Court to the party found entitled to expenses on appeal to the Court of Session although the Court of Session had recalled the Sheriff's interlocutor. *Taylor v. Steel-Maitland*, p. 978.

Small-debt procedure—Appeal—Malice and oppression—Deviations from statutory form—Incompetency—Hearing of incompetent evidence—Small Debt (Scotland) Act, 1837, sec. 31.

8. *Held* that under sec. 31 of the Small Debt (Scotland) Act, 1837, no appeal was competent unless in a case where there had been a denial of justice owing to a failure of duty on the part of the Sheriff. *Held* further (1) that "malice and oppression" meant malice and oppression in the ordinary signification of the terms, and pointed to something done by the Sheriff from wrong or capricious motives of his own; (2) that the expression "deviations in point of form from the statutory enactments" covered any case in which the Sheriff had denied justice by not allowing the parties a hearing; (3) that "incompetency" referred exclusively to the entertainment by the Sheriff of a cause which he might not competently entertain. *Circumstances* in which the Court *held* that an appellant had failed to establish "incompetency" or "malice and oppression." *Robson v. Menzies, (J.)* p. 90.

See *Expenses*, 3, 6—*Justiciary Cases*, 28—*Poor's Roll—Process*, 16-18.

SHIP. Maritime lien—Form of process for making effective maritime lien.

1. Where one vessel owing to her faulty navigation has damaged another vessel, the maritime lien over the former available to the owner of the latter cannot be made effective by arrestment of the vessel on the dependence of an action against her owner concluding for a sum of damages and *separatim* for declarator of lien and for warrant to sell. So *held* in an action for the recall of

SHIP—Continued.

an arrestment so used. *Opinion* (per the Lord President) that the maritime lien could be made effective by arrestment of the vessel upon special application, *e.g.*, in the Bill Chamber, after citation of all parties interested. *Clan Line Steamers, Limited, v. Earl of Douglas Steamship Co., Limited*, p. 967.

Bill of Lading—Exemptions—Seaworthiness—Exemption in bill of lading from liability for latent defect—Effect of incorporation in bill of lading of Australian Sea Carriage of Goods Act, 1904.

2. A bill of lading contained a stipulation that "any latent defects in the hull and tackle shall not be considered unseaworthiness, provided the same did not result from want of due diligence of the owner . . . or manager." By a "clause paramount" it was provided that the bill of lading was "to be read and construed as if every clause therein contained which is rendered illegal or null or void by the [Australian] Sea Carriage of Goods Act, 1904, had never been inserted therein." By that Act it is provided that in every bill of lading a warranty of seaworthiness shall be implied, and that any clause in a bill of lading, whereby any obligation to exercise due diligence, and to properly equip the ship, to make her seaworthy, and to make the ship's hold fit for cargo, is lessened or avoided, shall be null and void. *Held* that the incorporation of that Act in the bill of lading did not render the stipulation as to latent defects null and void; and that it was open to the ship-owners, sued for damages to the cargo arising from unseaworthiness due to defects in the ship, to establish as a defence that the defects were latent and did not result from want of due diligence on their part. *Charlton & Bagshaw v. Law & Co.*, p. 317.

Bill of Lading—Exemptions—Condition exempting ship from responsibility for marking on goods—Liability for unmarked goods—Apportionment among consignees of unmarked goods not identifiable as part of any particular consignment—Commisio.

3. *Bales of jute, consigned to various consignees and specifically marked, were shipped under bills of lading bearing that the bales were received "marked and numbered as per margin," that the number of packages signed for was to be binding on the shipowners unless error or fraud were proved, but that "the weight, measure, quality, contents, and value" were unknown, and that the ship was not to be liable for "inaccuracies, obliteration or absence of marks." On the discharge of the ship 14 bales were amissing, and 11 bales were found to be, through some unknown cause, without marks and could not be identified as belonging to any particular consignment. It was not disputed that these 11 bales formed part of the jute shipped at the port of loading; but the consignees—four in number—who did not receive their full consignments refused to accept any of these bales. In an action for freight brought by the shipowners against one of the four consignees, who had received 6 bales less than his full consignment, the pursuers, while expressing their willingness to account to the four consignees for the value of the 14 missing bales in proportion to their respective shortages, maintained that the 11 bales ought to be allocated among them in like proportion. Held (rev. judgment of the Second Division, reported p. 19) that the terms of the bills of lading did not exoner the pursuers from their obligation to deliver the identical goods consigned for shipment, and that, as they had failed to show that any of the 11 bales were part of the defender's consignment, the defender was not bound to accept any proportion of the 11 bales, and that the pursuers were liable to the defender for the full value of the 6 bales. *Tyzack & Branfoot Steamship Co., Limited, v. Sandeman & Sons, (H. L.)* p. 84.*

SHIP—Continued.

Demurrage—Exceptions—Strikes—Failure of charterers to take reasonable measures to ensure timeous delivery of cargo.

4. A charter-party for the carriage of a cargo of coal, which stipulated for the completion of the loading within a certain period, contained a clause exempting the charterers from liability for time lost through "strikes," or any unavoidable accidents beyond their control, "preventing or delaying the working, loading, or shipping of the said cargo." In an action for demurrage against the charterers they pleaded that the delay had been caused by a strike. It was proved (1) that a strike of coal-trimmers had caused the colliery company, with whom the charterers had contracted for delivery of the coals, to restrict their output, and they did not deliver the coals in time for the loading which, but for the strike, they would probably have done; but (2) that the contract between the charterers and the colliery company contained no clause binding the company to deliver the coals in time for the loading; and (3) that it would not have been impossible for them to deliver the coals in time had they been bound to do so. *Held* that the defenders were liable in demurrage, in respect that—even if the strike were the direct cause of the delay, which was not proved—the failure of the charterers to contract for the timeous delivery of the coal excluded them from the benefit of the exception in the charter-party. *Dampskibsselskabet Danmark v. Poulsen & Co.*, p. 1043.

Salvage—Alteration of award of Lord Ordinary.

5. *Circumstances* where a Lord Ordinary's award of £700 for salvage services was increased to £1200. *Steel & Bennie, Limited, v. Evangelista*, p. 1107.

SLANDER. See *Reparation*, 2-7—*Expenses*, 4.

SMALL HOLDINGS. See *Lease*, 6-8.

STAMP DUTY. See *Revenue*, 8.

STATUTE. *Applicability to Scotland—Advertising Stations (Rating) Act, 1889.*

1. *Opinions reserved* upon the question whether the Advertising Stations (Rating) Act, 1889, applied to Scotland. *A. J. Wilson & Co., Limited, v. Assessor for Kincardineshire*, p. 704.

Desuetude—Partial desuetude—Act for staying unlawful conventions (Act 1606, cap. 17).

2. The Act 1606, cap. 17, has fallen into desuetude. *Observations* on the extent to which a statute may fall into partial desuetude. *M'Ara v. Magistrates of Edinburgh*, p. 1059.

Repeal—Effect of Public Act on rights created by previous Private Act—North British Railway Act, 1888, sec. 47—Railway Companies (Accounts and Returns) Act, 1911, sec. 4 (1).

3. The North British Railway Company, in exercise of powers conferred by a private Act of 1888, created certain preferred and deferred ordinary stocks, the terms of the Act providing that a non-cumulative dividend of 3 per cent should be payable out of the available profits of each half year to the preferred stockholders, and that the balance of such profits should go to the deferred stockholders. By the Railway Companies (Accounts and Returns) Act, 1911, every railway company was relieved of any obligation to prepare or submit to their shareholders or auditors accounts or balance-sheets oftener than once a year. *Held* that the later Act

STATUTE—*Continued.*

did not relieve the railway company of the duty of calculating the dividends due to the preferred and deferred stockholders on the basis of the profits of each half year. *North British Railway Co. v. Wingate*, p. 1092.

STATUTES.

Act 1581, cap. 128, p. 1066.

Act 1606, cap. 17, p. 1059.

Act 1661, cap. 32, p. 83.

Act 1696, cap. 5, p. 509.

Act 1696, cap. 25, p. 1054.

36 *Geo. III. cap. 8* (*Seditious Meetings Act*, 1795), p. 1068.

39 and 40 *Geo. III. cap. 94* (*Criminal Lunatics Custody Act*, 1800), p. (J.) 7.

39 and 40 *Geo. III. cap. 98* (*Thellusson Act*, 1800), p. 1211.

48 *Geo. III. cap. 55* (*House Tax Act*, 1808), p. 1130.

57 *Geo. III. cap. 25* (*House Tax Act*, 1817), p. 1129.

5 *Geo. IV. cap. 83* (*Vagrancy Act*, 1824), p. (J.) 59.

5 *Geo. IV. cap. 87* (*Aberdeen Act*, 1824), p. 34.

1 and 2 *Will. IV. cap. 32* (*Game Act*, 1831), p. (J.) 1.

1 and 2 *Will. IV. cap. 37* (*Truck Act*, 1831), p. (J.) 34.

2 and 3 *Will. IV. cap. 68* (*Game (Scotland) Act*, 1832), pp. (J.) 18, 114.

7 *Will. IV. and 1 Vict. cap. 41* (*Small Debt (Scotland) Act*, 1837), p. (J.) 90.

5 and 6 *Vict. cap. 35* (*Property and Income Tax Act*, 1842), pp. 16, 810.

8 *Vict. cap. 17* (*Companies Clauses Consolidation (Scotland) Act*, 1845), pp. 1095, 1167.

8 and 9 *Vict. cap. 83* (*Poor Law (Scotland) Act*, 1845), p. 120.

11 and 12 *Vict. cap. 118* (*Excise Act*, 1848), p. (J.) 1.

13 and 14 *Vict. cap. 36* (*Court of Session (Scotland) Act*, 1850), p. 890.

13 and 14 *Vict. cap. 83* (*Abandonment of Railways Act*, 1850), p. 855.

16 and 17 *Vict. cap. 34* (*Income Tax-Act*, 1853), pp. 16, 811.

16 and 17 *Vict. cap. 119* (*Betting Act*, 1853), p. (J.) 68.

17 and 18 *Vict. cap. 91* (*Lands Valuation (Scotland) Act*, 1854), pp. 704, 712.

18 *Vict. cap. 23* (*Intestate Moveable Succession (Scotland) Act*, 1855), p. 478.

18 and 19 *Vict. cap. 111* (*Bills of Lading Act*, 1855), p. 23.

19 and 20 *Vict. cap. 58* (*Registration of Voters (Scotland) Act*, 1856), p. 711.

19 and 20 *Vict. cap. 79* (*Bankruptcy (Scotland) Act*, 1856), p. 743.

23 and 24 *Vict. cap. 90* (*Game Licences Act*, 1860), p. (J.) 1.

26 and 27 *Vict. cap. 65* (*Volunteer Act*, 1863), p. 133.

28 and 29 *Vict. cap. cccviii.* (*North British and Edinburgh and Glasgow Railway Act*, 1865), p. 1097.

29 and 30 *Vict. cap. 36* (*Revenue Act*, 1866), p. 811.

29 and 30 *Vict. cap. 126* (*Railway Companies Securities Act*, 1866), p. 1095.

29 and 30 *Vict. cap. cclxxiii.* (*Glasgow Police Act*, 1866), p. 1012.

30 and 31 *Vict. cap. 126* (*Railway Companies (Scotland) Act*, 1867), p. 1095.

31 and 32 *Vict. cap. 84* (*Entail Amendment (Scotland) Act*, 1868), p. 34.

31 and 32 *Vict. cap. 100* (*Court of Session Act*, 1868), pp. 890, 925.

31 and 32 *Vict. cap. 101* (*Titles to Land Consolidation (Scotland) Act*, 1868), pp. 209, 931.

31 and 32 *Vict. cap. 119* (*Regulation of Railways Act*, 1868), p. 1095.

34 and 35 *Vict. cap. 112* (*Prevention of Crime Act*, 1871), p. (J.) 59.

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- 35 and 36 Vict. cap. 62 (*Education (Scotland) Act*, 1872), p. 120.
 36 and 37 Vict. cap. 48 (*Railway and Canal Traffic Act*, 1873), p. 1166.
 37 and 38 Vict. cap. 15 (*Betting Act*, 1874), p. (J.) 68.
 37 and 38 Vict. cap. 37 (*Powers of Appointment Act*, 1874), p. 176.
 37 and 38 Vict. cap. 94 (*Conveyancing (Scotland) Act*, 1874), p. 275.
 38 and 39 Vict. cap. 61 (*Entail Amendment (Scotland) Act*, 1875), p. 144.
 39 and 40 Vict. cap. 75 (*Rivers Pollution Prevention Act*, 1876), p. 307.
 41 and 42 Vict. cap. 15 (*Customs and Inland Revenue Act*, 1878), p. 1126.
 41 and 42 Vict. cap. 28 (*Entail Amendment (Scotland) Act*, 1878), p. 144.
 41 and 42 Vict. cap. 51 (*Roads and Bridges (Scotland) Act*, 1878), p. 794.
 42 and 43 Vict. cap. cxxxii. (*Edinburgh Municipal and Police Act*, 1879), pp. 1066, (H.L.) 27.
 43 and 44 Vict. cap. 47 (*Ground Game Act*, 1880), p. (J.) 114.
 48 and 49 Vict. cap. 69 (*Criminal Law Amendment Act*, 1885), p. (J.) 61.
 51 and 52 Vict. cap. clxiii. (*North British Railway Act*, 1888), p. 1092.
 52 and 53 Vict. cap. 27 (*Advertising Stations (Rating) Act*, 1889), p. 704.
 52 and 53 Vict. cap. 50 (*Local Government (Scotland) Act*, 1889), p. (J.) 76.
 52 and 53 Vict. cap. 63 (*Interpretation Act*, 1889), p. (H.L.) 47.
 53 and 54 Vict. cap. 21 (*Inland Revenue Regulation Act*, 1890), p. (J.) 26.
 54 and 55 Vict. cap. 39 (*Stamp Act*, 1891), p. 987.
 55 and 56 Vict. cap. 55 (*Burgh Police (Scotland) Act*, 1892), pp. 6, 52, (J.) 61, 76.
 56 and 57 Vict. cap. 71 (*Sale of Goods Act*, 1893), p. 441.
 57 and 58 Vict. cap. 30 (*Finance Act*, 1894), pp. 31, 874.
 57 and 58 Vict. cap. 44 (*Heritable Securities (Scotland) Act*, 1894), p. 933.
 57 and 58 Vict. cap. lvi. (*Edinburgh Corporation Stock Act*, 1894), p. (H.L.) 4.
 58 and 59 Vict. cap. 41 (*Lands Valuation (Scotland) Amendment Act*, 1895), p. 704.
 59 and 60 Vict. cap. 25 (*Friendly Societies Act*, 1896), p. 991.
 59 and 60 Vict. cap. 28 (*Finance Act*, 1896), p. 35.
 59 and 60 Vict. cap. ccxxiv. (*Edinburgh Improvement and Tramways Act*, 1896), p. (H.L.) 4.
 60 and 61 Vict. cap. clxxxiii. (*Midland Railway Act*, 1897), p. 1097.
 60 and 61 Vict. cap. ccxxi. (*Newburgh and North Fife Railway Act*, 1897), p. 1096.
 61 and 62 Vict. cap. 21 (*Poor Law (Scotland) Act*, 1898), p. 13.
 63 and 64 Vict. cap. cxxxiii. (*Edinburgh Corporation Act*, 1900), p. (H.L.) 27.
 2 Edw. VII. cap. 11 (*Immoral Traffic (Scotland) Act*, 1902), p. (J.) 100.
 3 Edw. VII. cap. 25 (*Licensing (Scotland) Act*, 1903), pp. 636, 696.
 3 Edw. VII. cap. 33 (*Burgh Police (Scotland) Act*, 1903), pp. 6, 52, (J.) 76.
 3 Edw. VII. cap. 36 (*Motor Car Act*, 1903), p. (J.) 13.
 3 Edw. VII. cap. 46 (*Revenue Act*, 1903), p. 1130.
 4 Edw. VII. (*Sea Carriage of Goods (Australia) Act*, 1904), p. 317.
 4 Edw. VII. cap. 15 (*Prevention of Cruelty to Children Act*, 1904), p. 371.
 5 Edw. VII. cap. 12 (*Churches (Scotland) Act*, 1905), p. 36.

STATUTES—Continued.

- 6 *Edw. VII. cap. 38 (Statute Law Revision (Scotland) Act, 1906)*, p. 1070.
- 6 *Edw. VII. cap. 58 (Workmen's Compensation Act, 1906)*; pp. 217, 227, 246, 331, 346, 358, 364, 387, 400, 457, 534, 538, 549, 593, 613, 619, 653, 659, 662, 773, 892, 921, 959, 975, 1003, 1007, 1024, 1038, 1103, 1120, 1155, 1163, (H.L.) 8, 66.
- 7 *Edw. VII. cap. 29 (Patents and Designs Act, 1907)*, p. (J.) 8.
- 7 *Edw. VII. cap. 51 (Sheriff Courts (Scotland) Act, 1907)*, pp. 274, 307, 473, 548, 598, 675, 1163.
- 8 *Edw. VII. cap. 57 (Coal Mines Regulation Act, 1908)*, pp. (J.) 30, 45.
- 8 *Edw. VII. cap. 59 (Prevention of Crime Act, 1908)*, p. (J.) 6.
- 8 *Edw. VII. cap. 63 (Education (Scotland) Act, 1908)*, p. 370.
- 8 *Edw. VII. cap. 64 (Agricultural Holdings (Scotland) Act, 1908)*, pp. 562, 910, 919.
- 8 *Edw. VII. cap. 65 (Summary Jurisdiction (Scotland) Act, 1908)*, pp. 1067, (J.) 8, 13, 53, 100, 104, 114.
- 8 *Edw. VII. cap. 69 (Companies (Consolidation) Act, 1908)*, pp. 105, 456, 661.
- 9 *Edw. VII. cap. 49 (Assurance Companies Act, 1909)*, p. 999.
- 10 *Edw. VII. and 1 Geo. V. cap. 8 (Finance (1909-1910) Act, 1910)*, pp. 719, (H.L.) 34.
- 10 *Edw. VII. and 1 Geo. V. cap. 31 (Jury Trial Amendment (Scotland) Act, 1910)*, pp. 521, 624.
- 1 and 2 *Geo. V. cap. 34 (Railway Companies (Accounts and Returns) Act, 1911)*, p. 1092.
- 1 and 2 *Geo. V. cap. 49 (Small Landholders (Scotland) Act, 1911)*, pp. 907, 916, 919.
- 1 and 2 *Geo. V. cap. 50 (Coal Mines Act, 1911)*, p. (J.) 84.
- 1 and 2 *Geo. V. cap. 51 (Burgh Police (Scotland) Amendment Act, 1911)*, p. (J.) 76.
- 1 and 2 *Geo. V. cap. 53 (House Letting and Rating (Scotland) Act, 1911)*, p. 119.
- 1 and 2 *Geo. V. cap. 55 (National Insurance Act, 1911)*, pp. 607, 751 (J.) 120.
- 2 and 3 *Geo. V. cap. 20 (Criminal Law Amendment Act, 1912)*, p. (J.) 100.

STOCK EXCHANGE. "Redeemable" Municipal Stock.

A corporation issued corporation stock "redeemable at par after Whitsunday 1927." Held, in the circumstances, that the Corporation were not bound, on the application of the holders, to redeem the stock at par at Whitsunday 1927, but had merely an option of so doing. *British Linen Bank v. Magistrates of Edinburgh*, (H. L.) p. 4.

STREET. See *Burgh*, 5-7.SUCCESSION. *Legitim—Extent of Legitim Fund—Unrevoked donation inter virum et uxorem—Husband and Wife.*

1. Held that an unrevoked *inter vivos* gift of moveables made *bona fide* by a husband to his wife was subject to a claim for legitim, in respect that such claim could only be excluded by a gift which was absolute and irrevocable, whereas the gift in question was revocable as a *donatio inter virum et uxorem*. *Fann v. M'Donald*, p. 937.

Heritable and Moveable—Jus Relictæ—Bond of trust company—Ex facie absolute assignation of bond in security of advances—Nature of cedent's reversionary interest.

2. A bond or deed of security of a trust company for £4000 bore that this sum was payable to A "or to his executors or assignees" at a

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term five years after its date, and that interest was to be paid by the company till repayment of the capital. A assigned this bond to the extent of £2500 to a bank; the assignation being *ex facie* absolute, but in reality (though there was no back-letter) in security of advances by the bank. On A's death his trustees paid up these advances, amounting to £1000, and obtained a re-assignation of the bond. In an action to enforce her *jus relictæ* A's widow maintained that the bond was moveable; or, if this were not so, that *quoad* the £2500 A had, after the assignation, merely a claim for an accounting against the bank for the balance of that sum, and that this balance was therefore moveable. *Held* that the widow was not entitled to *jus relictæ* to any extent out of the sum secured by the bond, in respect (1) that the bond was heritable *quoad* her claim; and (2) that the assignation to the bank did not alter the character of A's interest in the sum secured by the bond or any portion of it. *Heath v. Grant's Trustees*, p. 78.

Testament—Precatory Trust.

3. A testator bequeathed his moveable estate to his widow, and stated in his will his "desire" that at her death some part of the estate should go to his brothers' and sisters' families—"In particular, I should like not less than £50 sterling left to" his brother's widow, "and I desire that my wife may make a settlement providing for this." The testator's widow having died intestate, *held* that her executor was not bound to give effect to the testator's request. *Garden's Executor v. More*, p. 285.

Testament—Revocation by later testamentary deed—Competency of extrinsic evidence—Re-execution of prior will—Effect on validity of intervening codicil.

4. A testatrix by her will, dated 13th January 1904, *inter alia* directed her trustees to pay the income of £5000 to her daughter, and on her daughter's death to pay £500 thereof to a granddaughter, "to pay a further sum of £1500 thereof in the manner to be afterwards directed by me in any writing or writings to be hereafter executed by me," and to pay the remainder, £3000, to certain grandchildren. The will contained a clause revoking "all previous testamentary writings." The testatrix left no writing dated after 13th January 1904 dealing with the sum of £1500, but there was found in her repositories after her death a holograph document dated 21st December 1903, by which she bequeathed the £1500 to certain beneficiaries. The will of 13th January 1904 was in its main provisions the same as a previous will executed by her on 16th December 1903, but contained certain alterations, one of them being the provision with regard to the sum of £1500 which was not contained in the previous will. *Circumstances in which held* (1) that the will of 13th January was not a mere re-execution of the will of 16th December, (2) that extrinsic evidence (consisting chiefly of correspondence between the testatrix and her law-agents) was not competent for the purpose of establishing that she intended, notwithstanding the clause of revocation in the will of later date, that the document of 21st December should form part of her testamentary writings, and accordingly (3) that the document of 21st December, having been revoked by the will of 13th January, was inoperative as a testamentary writing. *Hannay's Trustees v. Keith*, p. 482.

Mutual settlement—Revocation.

5. A husband and wife executed a mutual settlement in which each bequeathed to the other, on survival, the whole of his or her estate

SUCCESSION—*Continued.*

for that other's liferent use, and subject to certain burdens and directions which were identical in each case. In addition, the wife conveyed a heritable property to the husband in liferent and to certain of her own blood relations in fee. The settlement contained a clause reserving power of revocation by mutual consent during the joint lifetimes of the spouses, and declaring its finality unless so revoked, but reserving to the survivor a power of disposal over "all his or her own means and estate to be made and acquired after the decease of the first of us." *Held* that the provisions of the mutual settlement with regard to the wife's heritable property were contractual, and that she was not, after the death of her husband, entitled to revoke the destination thereof. *Lawrie's Executor v. Haig and Others*, p. 1159.

Testament—Construction—Admissibility of extrinsic evidence—Ambiguity in designation of beneficiary.

6. A Scotsman living in Scotland left, among other legacies to charities all of which were Scottish, a legacy to "The National Society for the Prevention of Cruelty to Children." In a competition between "The National Society for the Prevention of Cruelty to Children" (London) and "The Scottish National Society for the Prevention of Cruelty to Children" (Edinburgh), *held* that the designation in the will was ambiguous, and proof allowed of extrinsic facts to show which of the Societies the testator meant. *Nasmyth's Trustees v. National Society for Prevention of Cruelty to Children*, p. 412.

Testament—Construction—Words importing gift of heritage—Titles to Land Consolidation (Scotland) Act, 1868, sec. 20.

7. A testatrix, by her holograph testamentary disposition, on the narrative that she had "resolved to provide for the settlement of my affairs," appointed a "trustee and executor"; and after making bequests which were all of moveable property, declared "that if there be any residue after all expenses and legacies are paid, I bequeath the said residue to" three nieces, reserving her "life use of the whole estate and effects hereby conveyed." *Held* that the testatrix's heritable property was not carried by this deed, but passed to her heir-at-law. *Bryden v. Cormack*, p. 209.

Testament—Construction—Provision to daughter of "liferent use and enjoyment" of house—Incidence of burdens—Insurance premiums—Interest on bonds.

8. A testator directed his trustees "to retain for the liferent use and enjoyment of my unmarried daughter or daughters" two residences, and to pay out of the income of the estate an allowance "at the rate of £400 per annum towards the upkeep" of these residences. *Held* that his only unmarried daughter occupying the residences was liable, not only for feu-duties, landlord's taxes, and repairs, but also for the annual interest on bonds and the premiums on insurance over the residences. *Held* also that, in the event of there not being in any year sufficient revenue to pay the allowance in full, payment of arrears fell to be made up out of the income of future years. *Glover's Trustees v. Glover*, p. 115.

Testament—Construction—Liferent or right of occupancy of house—Incidence of burdens—Fee and liferent.

9. A testator, in bequeathing the residue of his estate in shares to his son in fee and to his daughters and their issue in liferent and fee respectively, expressed the desire that his children so long as they remained unmarried should live together in his house; and directed

SUCCESSION—*Continued.*

his trustees when either his son or all his daughters should be married, whichever of these events should first occur, to convey the house to his son. He also declared that, as his unmarried daughters would on the son's marriage be deprived of a residence, the son should thereupon pay to each unmarried daughter an annuity of £50, terminable on marriage. *Held* that the unmarried children had a mere right of occupancy, and not a life interest, of the house; and therefore were not liable in payment of any annual burdens and charges thereon beyond those payable by a tenant occupier. *Montgomerie-Fleming's Trustees v. Carre*, p. 1018.

Testament—Construction—Fee or life interest—Gift of fee—Direction that fee should be alimentary—Repugnancy.

10. By his settlement a testator directed his trustees to realise his whole estate, "and thereafter (subject always to the discretionary power vested in my trustees hereinafter mentioned) to divide" the proceeds thereof equally among his children and the issue of predeceasing children. There followed a declaration that, "notwithstanding the power of division above mentioned," the trustees should have the most absolute discretionary power to retain any of these shares instead of paying them over, and to pay over the annual income only derived from the share or shares so retained, or to pay the capital thereof by such instalments, and at such times, as they might determine; and a further special declaration "that the whole provisions hereunder in favour of my son J. W. are purely and strictly alimentary, and the same shall not be attachable by the debts or deeds of the said J. W., nor attachable by the diligence of his creditors," and that any share retained by the trustees under their discretionary power should be subject to this declaration. There was no ulterior destination of the shares of residue. In a special case, in which the trustees stated that they saw no occasion to exercise their discretionary power, and were prepared to hand over J. W.'s share to him, if they had power to do so, *held* (1) that under the direction to divide the estate among the testator's children a right of fee was conferred on J. W., which was not withdrawn by the subsequent declarations; (2) that, this being so, the declaration that the provision to J. W. should be alimentary was ineffectual; and, accordingly, that the trustees were entitled to pay over to him his share of residue. *Watson's Trustees v. Watson*, p. 1133.

Bequest in lieu of conventional provision—Marriage-contract provision to children—Bequest to children with conditional institution of their issue—Deduction of marriage-contract provision from share falling to issue.

11. A testator by his settlement bequeathed the residue of his estate to his children equally, "the issue of any of them predeceasing taking the parent's place and share," vesting being postponed till the occurrence of a particular event. This bequest was declared to be in satisfaction of a provision to the children already made in the testator's marriage-contract. A son of the testator survived him, and thus became entitled to claim a share of the marriage-contract provision, but died before the term of vesting of the residuary bequest, leaving issue. On his death his share of the marriage-contract provision was claimed by his executor; his share of the residuary bequest, on the other hand passed to his issue. *Held* that the amount of the marriage-contract provision payable to the son's executor fell to be charged exclusively against the share of the residue falling to his issue, and not against the whole residuary estate. *Scott v. Graham*, p. 467.

SUCCESSION—*Continued.**Legacy—Condition—Purification—Undertaking to satisfy condition.*

12. A testator bequeathed the liferent of the residue of his estate to his widow, and directed the payment of certain legacies on his death. He further provided that his widow might consent to the payment of any or all of the legacies during her life, and that, should she surrender her liferent, his trustees might make payment of the legacies, in whole or in part, on such surrender. One of the legacies was to the University of Glasgow, for the endowment of a chair, and was made subject to the declaration that "should either I or my wife endow any chair in the Glasgow or other University before the death of the survivor, then this bequest shall fall." The testator's widow surrendered the liferent and other provisions of the settlement, elected to take her legal rights, and executed a formal deed in which she confirmed this election and surrender, and consented, so far as she competently could, to the immediate payment of the whole legacies, and further bound herself "not to endow any chair in the Glasgow or other University now or at any time hereafter." *Held* that the condition attached to the legacy had not been satisfied, and that payment thereof could not be made until after the death of the widow. *Jacks's Trustees v. Jacks*, p. 816.

Destination to testator's "heirs in mobilibus"—Period at which heirs ascertained—Object of gift.

13. A testator by his testamentary settlement directed his trustees to hold a portion of the residue of his estate in equal shares for his son and daughter in liferent, and for their issue respectively in fee, vesting in the issue being suspended till their parent's death. It was declared that, if either child died without leaving issue, the share liferented by him or her should fall to the testator's "heirs in mobilibus," and that neither of the testator's children should "have any vested right in the capital." Both of the testator's children survived him, and thereafter the daughter died without issue, but leaving a will. *Held* that the testator's heirs in mobilibus fell to be ascertained at his death and not at the death of the daughter, and accordingly that the share liferented by the daughter fell to be divided equally between the son and the daughter's executor. *Hannay's Trustees v. Graham*, p. 476.

Destination to "heirs and executors"—Period at which heirs ascertained—Vesting—Marriage-contract.

14. Under an antenuptial marriage-contract the trustees were directed to pay the income of the funds settled by the wife to her husband during his life should he survive her and, on the death of the survivor of the spouses, to pay these funds (1) to the children of the marriage if and when they attained majority; or (2) should the wife predecease her husband without leaving issue, or should issue survive her but predecease her husband without attaining majority, to such persons as the wife might appoint, and failing appointment, "to her heirs and executors whomsoever." The wife died (without having made any such appointment), survived by her husband and by one child. The child died in infancy during the lifetime of the husband. On the death of the husband the funds were claimed (1) by his testamentary trustees, on the ground that the child, being also the wife's heir, had acquired a vested right therein, which had passed to the husband as its heir, and (2) by relatives of the wife as her heirs, at the date of (a) the child's death, or (b) the husband's death. *Held* on a construction of the terms of the marriage-contract that the funds fell to be paid to the heirs of the

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wife as ascertained at the death of the husband. *Muirhead's Trustees v. Torrie*, p. 85.

Destination to "heirs, executors, and assignees"—Mutual settlement.

15. A husband and wife executed a mutual settlement by which, "for the mutual love and affection which we bear to each other," the husband assigned and disposed to his wife, "in case she shall survive me, and to her heirs, executors, and assignees whomsoever," the whole estate of which he should die possessed, and the wife assigned and disposed to her husband, "in case he shall survive me, and to his heirs, executors, and assignees whomsoever," the whole estate of which she should die possessed. The spouses reserved power "to us and each of us during our joint lives to alter or revoke these presents." In exercise of this reserved power the husband made a will, in which, after providing for certain legacies, he bequeathed his whole moveable estate to his wife. The wife made no further testamentary disposition. The husband died first, and after the wife's death a question arose as to the destination of her property, which consisted solely of the estate which she had taken under her husband's will. *Held* that the bequest by the wife in the mutual settlement to her husband, and to his heirs, executors, and assignees, was conditional upon his survivance of her, and that, as he had predeceased, the destination did not take effect, and her property fell to her heirs *in mobilibus ab intestato*. *Garden's Executor v. More*, p. 285.

Conditions—Clause of forfeiture in the event of gift being impugned—Impugning—Statement of contentions in special case that conditions of gift invalid.

16. A deed of appointment containing both valid and invalid provisions concluded with a forfeiture clause, which declared that any of the appointees who impugned the appointment "in any manner of way" should forfeit all interest, "to the same effect" as if they had been expressly excluded from any share in the appointed fund. *Held* that parties to a special case, brought to determine the validity of the deed, who were appointees under the deed, and who had stated contentions questioning the validity of provisions and conditions affecting their shares, would not thereby, under the forfeiture clause, have forfeited their right to benefit under the deed had the deed been valid. *Collins's Trustees v. Collins*, p. 588.

Faculties and Powers—Validity of exercise of power—Power to appoint fund among children—Appointment of liferent of part of the fund to one object of the power, and whole fee to the other object.

17. By a contract of marriage it was provided that the trustees should hold the capital of the trust funds "as a provision for behoof of the child or children" of the marriage, divisible "in such shares and proportions" as the spouses jointly or the survivor might appoint, and failing appointment, then equally. The husband died survived by his wife and by a son and a daughter. *Held* that a deed executed by the surviving wife, whereby she appointed a liferent interest only in part of the trust fund to her son, and the fee of the whole fund to her daughter or the daughter's heirs, was a valid exercise of the power. *Pringle's Trustees v. Basta*, p. 172.

Faculties and Powers—Validity of exercise of power—Separation of valid and invalid provisions—Clause of forfeiture in the event of deed of appointment being impugned—Effect of clause on validity of deed.

18. A deed of appointment containing both valid and invalid provisions concluded with a forfeiture clause, which declared that any of the appointees who impugned the appointment "in any manner of

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way " should forfeit all interest, " to the same effect " as if they had been expressly excluded from any share in the appointed fund. In a special case brought to determine the validity of the deed of appointment, *held* that the effect of the forfeiture clause was to bind the conditions of the deed so closely together that (apart from other considerations) it was impossible to separate the valid provisions from those which were *ultra vires*, and that accordingly the deed was wholly invalid, and that the fund fell to be divided as if there had been no deed. *Collins's Trustees v. Collins*, p. 588.

Accumulations—Thellusson Act—Election—Equitable compensation—Applicability of Thellusson Act to accumulation for equitable compensation.

19. By his trust-disposition and settlement a testator directed his trustees to hold his estate for his only child, a daughter, in *liferent*, and, on her death, to convey the fee to her issue, whom failing, to other persons named. The daughter having claimed and received *legitim*, the trustees retained and accumulated the income of the estate. On the expiry of twenty-one years from the testator's death the daughter brought an action against the trustees concluding for payment to her of the future income of the estate on the ground that further accumulation was prohibited by the Thellusson Act and that the income fell to her as her father's heir. In defence it was averred that the accumulated income had not sufficed to replace the capital withdrawn by the pursuer in name of *legitim*; that under the principle of equitable compensation the income fell to be accumulated till the capital was so replaced; and that accumulation for this purpose was not within the operation of the statute. *Held* (by the Lord Ordinary, Hunter) that further accumulation of the income was prohibited by the Thellusson Act, and decree pronounced in favour of the pursuer. *Hutchison v. Grant's Trustees*, p. 1211.

Vesting—Direction to convey at postponed period—Issue to take predeceasing parent's share—Whether gift to issue subject to conditions affecting parent's share.

20. A testator directed his trustees to hold a share of the residue of his estate for his eldest son in *liferent* and his issue, if any, in fee, declaring that in the event of the death of that son without issue, the capital of his share should fall and belong to the testator's two other sons and his three daughters " equally among them, and the survivors and survivor of them, the issue of any of them predeceasing being entitled equally among them, if more than one, to their deceased parents' share." The *liferenter* died without issue predeceased by two of his sisters, who, however, left issue, some of whom, though surviving their parent, predeceased the *liferenter*. *Held* that, as the issue were called in place of their deceased parents and not as original legatees, the gift to them was subject to the same conditions as the gift to their parents; and accordingly that no vesting had taken place in the issue who predeceased the *liferenter*. *Addie's Trustees v. Jackson*, p. 681.

Vesting—Legacy—Legacies conditional and unconditional payable on death of liferentrix—Surrender of liferent—Acceleration of payment.

21. A testator in his settlement directed his trustees to pay to his widow the income of the residue of his estate in full of her rights, but with power to her " to consent to payment of all or one or more of the legacies " thereafter bequeathed, " . . . so as to admit of payment thereof during her life." He then directed the payment of a number of legacies " upon the death of my said wife,

SUCCESSION—*Continued.*

or should she surrender her life-estate over any part thereof so as to admit of payment, then for payment of such part on such surrender." Some of the legacies were unconditional, others were bequeathed subject to a clause of survivorship and conditions in favour of the issue of the legatees. He also directed that any surplus of residue after payment of legacies should be at the disposal of the trustees to apply in augmenting all or any of the legacies, or in helping institutions akin to those to which legacies had been given. After the husband's death the widow elected not to accept the provisions of the settlement in her favour, and claimed her legal rights, and thereafter executed a formal deed in which she confirmed this election and surrendered her whole rights under the settlement, and consented, so far as she competently could in exercise of the power conferred upon her in the settlement, to the immediate payment of the whole of the legacies. *Held* (1) that the widow, having surrendered the whole of the provisions of the settlement in her favour, was debarred from exercising the power of consent; (2) that the unconditional legacies having vested indefeasibly at the death of the testator, were, owing to the surrender of the life-estate, payable immediately, provided the trustees had sufficient funds to pay all the other legacies; (3) that the contingent legacies, in which vesting was postponed until the death of the widow, were not payable until that event, the period of vesting being in no way accelerated by the surrender of the life-estate. *Jacks's Trustees v. Jacks*, p. 815.

Vesting—Fee or life-estate—Direction to "divide" residue among children—Restriction of child's share to life-estate with fee to issue—Repugnancy.

22. By his settlement a testator directed his trustees "to divide" the residue of his estate "equally among" his children, and "with regard to the portion of residue which may effeir or belong to" one of his sons, he appointed his trustees to "hold and invest the same in their own names" for the son and the son's widow in life-estate alienably and for the son's issue in fee. The son having died unmarried, *held* that his share of residue had vested in him in fee. *Cowan's Trustee v. Jardine*, p. 927.

Election—Effect of election—Approbate and Reprobate—Provision of life-estate to widow, with power to accelerate payment of legacies—Jus relictæ claimed and life-estate surrendered—Right thereafter to exercise power of accelerating.

23. A testator in his settlement directed his trustees to pay to his widow the income of the residue of his estate in full of her legal rights but with power to her "to consent to payment of all or one or more of the legacies" thereafter bequeathed, "... so as to admit of payment thereof during her life." He then directed the payment of a number of legacies "upon the death of my said wife, or should she surrender her life-estate over any part thereof so as to admit of payment, then for payment of such part on such surrender." Some of the legacies were unconditional, others were bequeathed subject to a clause of survivorship and conditions in favour of the issue of the legatees. After the husband's death the widow elected not to accept the provisions of the settlement in her favour, and claimed her legal rights, and thereafter executed a formal deed in which she confirmed this election and surrendered her whole rights under the settlement, and consented, so far as she competently could in exercise of the power conferred upon her in the settlement, to the immediate payment of the whole of the legacies. *Held* (1) that the widow, having surrendered the whole

SUCCESSION—*Continued.*

of the provisions of the settlement in her favour, was debarred from exercising the power of consent. *Jacks's Trustees v. Jacks*, p. 815.

Election—Equitable compensation—Provision "in full of" jus relictæ—Claim for jus relictæ—Right of widow to revert to testamentary provisions on amount of jus relictæ being restored to estate.

24. By a general settlement a husband made certain provisions for his wife which he declared should be "in full of all her claims of terce, *jus relictæ*, and others legally competent to her" against his estate, but there was no declaration that the provisions should be forfeited if she claimed her legal rights. *Question* whether her election not to accept the provisions of the settlement in her favour, but to claim her legal rights, resulted in her forfeiting her testamentary provisions finally, or merely gave rise to a claim of equitable compensation to the estate. *Jacks's Trustees v. Jacks*, p. 815.

See *Executor*, 2—*Trust*, 3.

TACIT RELOCATION. See *Lease*, 7.

TENDER. See *Expenses*, 4, 6, 7.

TESTAMENT. See *Succession*.

THELLUSSON ACT. See *Succession*, 19.

TITLE AND INTEREST TO SUE AND DEFEND. *Damages for personal injury—Executor.*

1. Held that the executor of a party who had, prior to his death, intimated a claim for damages for personal injury, had a title to sue for such damages. *Leigh's Executrix v. Caledonian Railway Co.*, p. 838.

Private prosecutor—Title to prosecute—Unregistered person describing himself as patent agent.

2. The Chartered Institute of Patent Agents has an interest, and therefore a title, to prosecute, with the concurrence of the procurator-fiscal, a summary complaint charging an accused with contravening the Patents and Designs Act, 1907, sec. 84, by describing himself as a patent agent without being registered. *Lockwood v. Chartered Institute of Patent Agents*, (J.) p. 8.

Wife of tenant of house on common stair injured owing to defect in stair.

3. Held (by the Lord Ordinary, Hunter) that the wife of the tenant of a house on a common stair had a good title to sue the landlord for damages sustained by her through an accident due to a defect in the stair. *Mellon v. Henderson*, p. 1207.

Entail—Obligation by heir in possession to repay improvement expenditure undertaken by tenant of entailed subjects—Action by tenant's executors against succeeding heir in possession for repayment.

4. Sir A. M., an heir of entail in possession, granted a lease of the mansion-house and policies on the entailed estate, and entered into agreements with his tenant in terms of which the latter undertook to execute certain improvements upon the subjects let, Sir A. binding himself and the heirs of entail succeeding him (and *subsidiarie* his heirs, executors, and representatives whomsoever) to repay to the tenant, at the date of Sir A.'s death, a proportion of the certified cost of these improvements, the amount payable not to exceed a certain fixed sum. The tenant executed improvements, the certified cost of which exceeded the fixed sum, and predeceased Sir A. After the death of the latter the tenant's executors brought an action against the heir succeeding Sir A. in possession of the entailed estate in which, founding on sec. 1 of the Entail

TITLE AND INTEREST TO SUE AND DEFEND—*Continued.*

Amendment (Scotland) Act, 1878, they claimed payment from him of the whole of the fixed sum. *Held* that the pursuers had a good title to sue the defender directly and to recover from him a sum equal to that which Sir A. could have charged upon the estate. *Shepherd's Executors v. Mackenzie*, p. 144.

See *Justiciary Cases*, 27.

TITLE TO HERITAGE. See *Property*, 1, 2.

TRAMWAY. See *Justiciary Cases*, 21—*Reparation*, 13, 14.

TRUCK ACT. See *Justiciary Cases*, 22.

TRUST. *Proof of trust*—"Deed of trust"—*Deposit-receipt*—Act 1696, cap. 25—*Proof*.

1. A deposit-receipt is not a "deed of trust" within the meaning of the Act 1696, cap. 25; and accordingly parole proof *allowed* in an action by a party for declarator that the sum contained in a deposit-receipt in the names of others truly belonged to him. *Cairns v. Davidson*, p. 1054.

Trustees—Resignation—New trustees—Appointment of Canadian trust company as trustees.

2. The trustees acting under a Scotch antenuptial contract of marriage and an English marriage-settlement, made on the marriage of a Scotsman to an Englishwoman, were the same parties, viz., the spouses themselves, who had left Scotland and settled in Canada, and two other persons who resided in England. The trustees presented a petition to the Court to appoint as trustees, in place of the petitioners, a Canadian trust company incorporated by special Act of Parliament of the Dominion, and having power, *inter alia*, to undertake the office of trustee; and to authorise the petitioners to transfer the trust funds to the company and to resign. The company entered into a formal obligation, in the event of their appointment, to submit to the jurisdiction of the Court of Session in all matters relating to the trust and to obey all orders of the Court thereanent, and assigned the chambers of a firm of Glasgow writers as their domicile of citation. The Court *refused* the prayer of the petition. *Stewart's Trustees*, p. 647.

Termination of trust—Discretionary power to trustees to continue trust till estate cleared of debt—No reasonable prospect of debt being paid—Right of fiar to terminate trust—Succession—Testament—Construction.

3. A truster declared it to be his wish and intention that the trust should continue for ten years after his death and such further period as his trustees might consider necessary and expedient for carrying out the "ultimate object" of the trust (viz., the freeing of the heritable estate from debt) "in so far as this may reasonably be attained." Thirty-five years after the truster's death the estate had not been freed from debt, and the person who, if the period for distribution had arrived, was entitled to the fee demanded that the trustees should denude in his favour. Certain annuities charged on the estate were still current, and, as the fiar was alleged to be financially embarrassed, it was suggested that, if the trustees denuded in his favour, payment of the annuities might be endangered. *Circumstances* in which *held* that, as the trustees admitted that there was no prospect that the estate could be freed of debt within any time that could be specified, they were bound to denude in favour of the fiar. *Sinclair's Trustees v. Sinclair*, p. 178.

TRUST—Continued.

Liability of trustees—Negligence of original trustee—Action by assumed trustees—Alleged delay and contributory negligence of pursuers—Right to maintain action for behoof of beneficiaries—Mora.

4. *One of the original trustees acting under a trust-disposition and settlement died in 1887, and in the same year two new trustees were assumed, one of whom was also a beneficiary under the trust. In 1909 these new trustees, suing in their capacity as trustees, brought an action against the representatives of the deceased trustee for recovery of funds which they alleged had been lost to the trust-estate through his negligence. The defenders pleaded that the pursuers were barred by mora, and by the fact that they had themselves been guilty of negligence which had contributed to the loss. Held that, as the pursuers were suing as trustees for behoof of the beneficiaries whom they represented, the plea of bar stated against them was unavailing. Lees's Trustees v. Dun, (H. L.) p. 12.*

Administration—Powers of trustees—Power of investment limited by trust-deed—Application to nobile officium of the Court for enlarged power.

5. *A testator by his trust-settlement, after directing that a hospital should be endowed with the residue of his estate, stated it to be his "particular desire" that the money devoted to this purpose should be, and remain, invested in landed property, and provided that if any portion of such property should be sold, the proceeds should be invested in the purchase of other land. The trustees presented a petition to the nobile officium of the Court for power to sell a portion of the estate, and to invest the proceeds in "approved trust securities," by which method of investment they stated that a considerably larger income would be obtained than by the purchase of land. The Court refused the petition, holding that they had no power to grant a relaxation of the specific restrictions on investment contained in the trust-deed. Scott's Hospital Trustees, p. 289.*

Administration—Allocation of trust funds by Churches (Scotland) Act Commissioners—Effect of allocation—Churches (Scotland) Act, 1905, sec. 1 (3), First Schedule, head 4.

6. *A trust fund was administered by private trustees, in terms of a trust-deed which directed them to expend the annual income of the residue of the trust-estate upon the "Home Mission" in connection with the Free Church of Scotland. Circumstances in which held that the effect of the Churches (Scotland) Act, 1905, and of an Order of the Commission appointed under the Act had been to alter the administrative powers of the trustees and to render it necessary that the income of the trust should be administered through the Free Church. Free Church of Scotland v. MacKnight's Trustees, p. 36.*

See Interest, 2—Succession, 3.

ULTRA VIRES. *See Railway, 1.*

USAGE. *See Custom.*

VALUATION ACTS. *Subjects—Advertisement board—Whether board a heritable erection falling to be entered in roll—Lands Valuation (Scotland) Amendment Act, 1895, sec. 4.*

1. *Opinions reserved upon the question whether an advertisement board erected on a piece of vacant ground was a "heritable erection," within the meaning of sec. 4 of the Lands Valuation*

VALUATION ACTS—*Continued.*

(Scotland) Amendment Act, 1895, falling to be entered in the Valuation-roll. *A. J. Wilson & Co., Limited, v. Assessor for Kincardineshire*, p. 704.

Subjects—Advertisement board—Site of board—Contract permitting erection of board—Whether owner of land or owner of board the “occupier” of site—Statute—Applicability to Scotland—Lands Valuation (Scotland) Act, 1854, secs. 1 and 6—Advertising Stations (Rating) Act, 1889, sec. 3.

2. The owner of hotel premises entered into an agreement with a firm of billposters by which, for an annual payment of 10s. 6d., he permitted them to affix an advertisement board for tyres to a part of his premises to be afterwards determined. The permission was to remain in force for three years and thereafter to be ended by three months' notice from either party. The agreement provided that the firm should have reasonable access to the premises for purposes connected with the board, and also that no other advertisement of a tyre was to be displayed on the premises. Following on this agreement a board was erected on a strip of vacant ground in front of the hotel and the “site” of the board was entered by the Assessor in the Valuation-roll at the yearly rent or value of 10s. 6d. and the firm of billposters as “tenants” and “occupiers.” In an appeal at their instance they contended that they should not have been entered as tenants or occupiers in respect (1) that the agreement was not a lease but a licence, (2) that under sec. 3 of the Advertising Stations (Rating) Act, 1889, the owner of the land being the person who “permitted” the ground to be used for advertisement must be deemed to be the “occupier.” *Held* that the entry was correct under the Lands Valuation Acts in respect that the agreement was in effect an ordinary lease of a portion of land at a yearly rent, and that the Act of 1889 (if applicable to Scotland, as to which *opinions reserved*) in no way altered the prescribed mode of making up the Valuation-roll under the Valuation Acts. *A. J. Wilson & Co., Limited, v. Assessor for Kincardineshire*, p. 704.

Subjects—Sewers and purification works in burgh—“Lands and heritages”—Value—Method of valuation.

3. *Held* that sewers and sewerage purification works in a burgh were “lands and heritages” within the meaning of the Lands Valuation (Scotland) Act, 1854, and as such fell to be entered in the Valuation-roll at their true and not at a merely nominal value. *Observations* on the principles upon which their yearly value should be determined. *Assessor for Aberdeen v. Magistrates of Aberdeen*, and *Assessor for Lanark v. Magistrates of Lanark*, p. 712.

Value—Harbour—Revenue principle—Revenue—Sum paid by tenant as penalty for failure to implement condition of lease.

4. The commissioners of a harbour leased a portion of the subjects belonging to them under a condition that, if the lessees had not, by a certain date, formed a company for the purpose of constructing a graving dock thereon, the lease should be null and void, and the lessees should forfeit a certain sum to the lessors. The lessees failed to form the company, and paid the forfeit. *Held* that the Assessor, in determining the yearly value of the harbour undertaking for the following year upon the revenue principle, was not entitled to include in revenue the sum paid as forfeit to the harbour commissioners. *Burntisland Harbour Commissioners v. Assessor for Burntisland*, p. 697.

See *Revenue*, 6, 7.

VOLUNTEER FORCES. See *Crown*.

WORKMEN'S COMPENSATION ACT, 1906. *Arbitration—Procedure—Preliminary defences—Duty of arbitrator to dispose of whole case.*

1. Where an arbitrator had allowed a separate proof on preliminary defences and had issued findings thereon without having heard the case as a whole, *opinions* that, there being no exceptional circumstances calling for the procedure followed, the arbitrator ought to have heard and disposed of the case as a whole. *Ellis v. Fairfield Shipbuilding and Engineering Co., Limited*, p. 217.

Agreement by workman to take compensation—Reduction on ground of minority and lesion.

2. A minor, injured by an accident in the course of his employment, agreed, without consulting his father, to accept compensation under the Workmen's Compensation Act, 1906. After compensation had been paid for some time he brought an action of damages for his injury at common law, in which he averred that he had accepted the statutory compensation in ignorance of his common law claim; and contended that, being a minor, he was not bound by the agreement, and that, in any event, it should be reduced on the ground of minority and lesion. *Held* that the pursuer was entitled to an inquiry into the facts. *M'Feetridge v. Stewarts & Lloyds, Limited*, p. 773.

Sec. 1 (1)—"Accident"—Death due to heart failure.

3. In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator found that a farm labourer, apparently in good health, died suddenly while engaged, in the course of his ordinary work, in lifting baskets of corn to feed a bruising machine; that the cause of death was "failure of the heart"; and that "a contributing cause of the failure of the heart's action was the strain arising from the exertion made by the deceased in repeatedly stooping to fill the basket with corn and then lifting it when full up to the level of his shoulders in order to feed the bruiser." *Held* that there were no facts stated from which the arbitrator could competently infer that the death was due to injury by accident within the meaning of the Workmen's Compensation Act, since there was no particular event or occurrence to which the death could be attributed. *Ritchie v. Kerr*, p. 613.

Sec. 1 (1)—"Accident"—Pneumonia following upon chill—Chill due to partial immersion in water accumulating in a mine through breakdown of a pump.

4. During the working time in a coalpit, which was a wet pit, water began to accumulate owing to a defect in the pump; and the pump being stopped for repair, the water accumulated still further. When the miners found the water rising they decided to leave the pit, and hastened to the pit bottom, where they were kept waiting for twenty minutes, during which time they were severely chilled by the water which rose to their knees, and by exposure to the current of cold air descending the shaft. One of these miners on reaching the pit head lingered there for at least twenty minutes, and on arriving at his home complained of chill, and next day suffered from a cough, hoarseness, and pains, but went to his work. After several days—on three of which he worked at the pit—he was found to be suffering from pneumonia, of which he ultimately died. *Held* that the occurrence in the mine on the day in question was an "accident," and that there was evidence on which the arbitrator might competently find that the deceased's pneumonia was due to that occurrence. *Drylie v. Alloa Coal Co., Limited*, p. 549.

WORKMEN'S COMPENSATION ACT, 1906—*Continued.*

Sec. 1 (1)—“ Accident ”—Pneumonia following upon chill—Chill due to standing in a draught while waiting to be raised from a mine.

5. During the working time in a coalpit the miners, owing to a wreck in the shaft of the mine, were ordered to ascend to the surface, and proceeded, in obedience to instructions, to the downcast shaft, where they were compelled to wait at a mid-landing for an hour and a half. During this period the miners, who had been sweating at their work, were exposed to a very strong draught from the air passing down the shaft for the ventilation of the mine, and on reaching the surface one of them complained of a chill. On this chill pneumonia supervened, and resulted in the death of the miner. *Held* that there was no evidence on which it could competently be found that the deceased's death was due to an “injury by accident.” *Brown v. John Watson, Limited*, p. 593.

Sec. 1 (1)—“ Accident ”—Pleurisy following upon chill.

6. A collector and canvasser, who had contracted pleurisy, claimed compensation from his employers, averring that in order to finish his work timeously one day he had to over-exert himself in climbing the stairs of a tenement; that he became “sweated” and contracted a chill which developed into pleurisy; and that he thus sustained an accident in the course of his employment. The arbitrator, without allowing a proof, dismissed the application as irrelevant, holding that the workman had failed to aver an “accident” within the meaning of the Act. In an appeal, *held* that the arbitrator was right. *M'Millan v. Singer Sewing Machine Co., Limited*, p. 346.

Sec. 1 (1)—“ Accident ”—Deafness following upon chill—Chill due to voluntarily waiting in water accumulated in mine through breakdown of a pump.

7. A miner, about to ascend to the surface at the end of his shift, in order to be among the first to obtain a place in the cage, stood for upwards of thirty minutes in a pool of water which had accumulated in the pit bottom owing to a defect in the pump. Had he waited his turn upon dry ground, as he might have done, he could have reached the cage comparatively dry. Owing to the wetting he contracted a chill which produced deafness, causing incapacity. *Held* that the incapacity was not due to injury by accident in the sense of the Workmen's Compensation Act, 1906. *M'Luckie v. John Watson, Limited*, p. 975.

Sec. 1 (1)—“ Out of and in the course of the employment ”—Prohibited act outwith employment—Cleaning machinery in motion.

8. A workman was employed in a factory as underman at a mangle. His duties were to carry the cloth to and from the mangle and to assist the headman in putting it on to the rollers. It was no part of his duty to be inside the rail fencing the mangle or to interfere with the mangle while working. Cleaning machinery while in motion was prohibited, but on two days in each week the machinery was stopped in the early morning for cleaning, and it was the duty of the workman to assist the headman to clean the mangle at these times. While the machinery was in motion, and in the absence of the headman, the workman, without orders, went inside the rail and attempted to clean a part of the mangle, and was injured. *Held* that the accident did not arise out of and in the course of his employment. *M'Diarmid v. Ogilvy Brothers*, p. 1103.

Sec. 1 (1)—“ Out of and in the course of the employment ”—Miner taking upon himself duty not entrusted to him.

9. A repairer was engaged in making repairs on an air course in a mine, and it was necessary for him to bring wood to that place for the

WORKMEN'S COMPENSATION ACT, 1906—*Continued.*

purpose. This could be done by hauling the wood up the air course, or by taking it up in hutches by a wheel brae, and the repairer was directed to take it by the air course and not by the wheel brae. He elected, however, to take it by the latter, and in the absence of the person in charge he loaded the empty hutch in an unskilful manner with the result that the chain broke, and he was struck by the descending full hutch and killed. *Held* that the repairer was killed while arrogating to himself a duty which he was neither engaged nor entitled to perform, and accordingly that the accident did not arise out of his employment. *Burns v. Summerlee Iron Co., Limited*, p. 227.

Sec. 1 (1)—"Out of and in the course of the employment"—*Breach of rule—Miner doing shot-firer's work contrary to rule.*

10. The use of explosives in a mine was regulated by statutory rules, which provided that every charge should be fired by a specially appointed shot-firer, and that, where the firing was done by electricity, it was the duty of the shot-firer himself to connect the charge with the cable, and thereafter to connect the cable with the firing apparatus, after seeing that all persons in the vicinity had taken shelter. A duly appointed shot-firer was in the habit of getting the miners to connect the charges with the cable, and on one occasion he handed the cable to a miner for the purpose of having it so connected, and, without waiting till this had been done and without ascertaining that all persons in the vicinity had taken shelter, coupled the cable to the firing apparatus. He then fired the shot, and the miner, who had attached the cable to the charge and had not had time to retire to a place of safety, was injured by the explosion. *Held* that the accident to the miner would not have happened but for his undertaking a duty which he was neither engaged nor entitled to perform, and accordingly that it did not arise out of and in the course of his employment. *Smith v. Fife Coal Co., Limited*, p. 662.

Sec. 1 (1)—"Out of and in the course of the employment"—*Workman killed while returning from work.*

11. A workman, employed underground in a coal mine, on finishing his day's work returned to the surface and was proceeding home by a track along the side of a private branch railway line, the property of his employers, when he was knocked down and killed by an engine at a point 400 yards distant from the mouth of the pit. *Held* that the accident did not arise out of and in the course of his employment. *Graham v. Barr & Thornton*, p. 538.

Sec. 1 (1)—"Out of and in the course of the employment"—*Injury by falling slate during a gale.*

12. During a severe gale a carter in charge of a horse and lorry within his employer's yard was struck by a sheet of corrugated iron blown from the roof of an adjoining building. *Held* that the arbitrator was not entitled to find that the accident arose out of the employment. *Guthrie v. Kinghorn*, p. 1155.

Sec. 1 (1)—"Out of and in the course of the employment"—*Injury by falling slate during a gale.*

13. During a severe gale an engineer's fitter was engaged in erecting machinery in an open yard near to a building from the roof of which slates were being blown. While stooping to adjust a large piece of machinery he was struck on the head by a falling slate and injured. *Held* that the arbitrator was entitled to find that the accident arose out of the employment. *Adamson v. George Anderson & Co. (1905), Limited*, p. 1038.

WORKMEN'S COMPENSATION ACT, 1906—*Continued.*

- Sec. 1 (1)—“ Out of and in the course of the employment ”—Ship's carpenter burned by shavings accidentally set on fire by shore labourer.*
14. A ship's carpenter, working on the poop of a vessel lying in harbour, was severely burned owing to some shavings by which he was surrounded being ignited by a match carelessly thrown down by a shore labourer. The carpenter's trousers happened to be saturated with inflammable oil which had leaked from a barrel he had shifted in the course of his work, and thus readily caught fire from the shavings. *Held* that he was injured by an accident arising out of and in the course of his employment. *Manson v. Forth and Clyde Steamship Co., Limited*, p. 921.
- Sec. 1 (1)—“ Out of and in the course of the employment ”—Unexplained death—Seaman found drowned—Inference from proved facts.*
15. In a claim for compensation by the dependants of a ship steward, who was last seen alive in his bunk, and was found drowned next day in the harbour near to the place where his ship had been lying, the arbitrator awarded compensation. *Circumstances* in which the Court recalled the award of the arbitrator, *holding* that there was no evidence to justify the inference that the accident which caused death arose out of the employment. *Lendrum v. Ayr Steam Shipping Co., Limited*, p. 331.
- Sec. 1 (3), First Schedule (17), Second Schedule (9)—“ Agreement ”—Agreement in settlement of claim for compensation—Liability denied but claim settled as though compensation due.*
16. *Held* that an agreement between a workman and his employers for the settlement of a claim for compensation by payment of a lump sum may be an “ agreement ” in the sense of the Workmen's Compensation Act (and so recordable) even though the employers dispute liability to pay compensation, if, in fact, they have agreed to the amount of the payment being fixed as though they were liable under the Act. *M'Guire v. Paterson & Co.*, p. 400.
- Sec. 1 (3) and First Schedule (17)—Agreement for redemption of compensation by payment of lump sum—Reduction of agreement—Mutual error as to extent of injury.*
17. A workman, with the advice of his law-agent, agreed with his employers to accept a lump sum in settlement of a claim for compensation due to him in respect of injuries caused by an accident, and a memorandum of the agreement was recorded. In a subsequent action for reduction of the memorandum he averred that both parties were in error as to the extent of his injuries at the time when the agreement was made, both being under the belief that he would recover in a few weeks, whereas, as it turned out, he was permanently incapacitated. *Held* that these averments did not disclose a relevant ground for setting aside the agreement. *M'Guire v. Paterson & Co.*, p. 400.
- Sec. 1 (3)—Arbitration—Competency—“ Question ” as to duration of compensation—Act of Sederunt, 26th June 1907, (2).*
18. The employers of a workman, who had been totally incapacitated by an accident, admitted liability under the Workmen's Compensation Act, tendered the amount of compensation due (as to which there was no dispute), and requested the workman to sign a receipt which contained this clause :—“ At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week when application for payment is made.” The workman objected to this clause on the ground that he was entitled to have an unqualified admission of

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- liability, refused to sign the receipt, and initiated arbitration proceedings. Held that there was a question between the parties as to the duration of the compensation which had not been settled by agreement, and, accordingly, that the arbitration was competent. Freeland v. Summerlee Iron Co., Limited, (H. L.) p. 8.*
- Sec. 1 (3), Second Schedule (9)—Act of Sederunt, 26th June 1907, secs. 11 (1) and 12—Arbitration to obtain award of compensation—Simultaneous application for warrant to record memorandum of agreement—Conjunction—Competency.*
19. A workman presented an application in the Sheriff Court for warrant to record a memorandum of agreement for payment of compensation under the Workmen's Compensation Act, 1906, in respect of an accident. The genuineness of the memorandum was disputed by his employers. While the application was pending he initiated arbitration proceedings to obtain an award of compensation under the Act in respect of the same accident. *Held* that the two proceedings could not competently be conjoined, and that the arbitration should be sisted until the application for the warrant had been determined. *King v. Arniston Coal Co., Limited, p. 892.*
- Sec. 2 (1)—Delay in giving notice and making claim—"Mistake or other reasonable cause."*
20. *Held* that, where a delay of more than six months in giving notice and claiming compensation was due to the workman's ignorance of the serious nature of his injury, it was occasioned by "mistake or other reasonable cause," within the meaning of sec. 2 (1) of the Act, and so was not a bar to the maintenance of proceedings for compensation. *Ellis v. Fairfield Shipbuilding and Engineering Co., Limited, p. 217.*
- Sec. 13—"Dependants"—Persons not in receipt of support but with legal right and prospect of enforcing—Children deserted by their father and maintained chiefly by their brothers—Competence of appeal on question of dependency.*
21. *Held* that a person may be dependent upon a workman at the time of his death within the meaning of the Workmen's Compensation Act, and so entitled to compensation, although he was in fact receiving at the time no support from the workman, provided that he had at the time a legal right to support, and that there was also a reasonable prospect of his being able to enforce and of his enforcing the right to a greater or less extent at some future period. Observed that the question of dependency is one of fact upon which the decision of the arbitrator is final, unless there is no evidence to support it, or unless he has misdirected himself upon a question of law. Circumstances in which held that there was evidence to justify the finding of an arbitrator that two pupil children were wholly dependent on their father's earnings at the time of his death in April 1911, and accordingly entitled to compensation under the Workmen's Compensation Act, although they had received practically no support from him since March 1907. *Young v. Niddrie and Benhar Coal Co., Limited, (H. L.) p. 66.*
- Sec. 13, and First Schedule (1) (a) (ii.)—"Dependants"—Children deserted by father—Prospects of future support.*
22. Dependency is always a question of fact; and, even where children have been deserted by their father for three years before his death and have received no support from him during that time, they may still be held to be partially dependent upon him if there was a reasonable probability that, had he lived, he would in the future

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have contributed to their support. *Dobbie v. Egypt and Levant Steamship Co., Limited*, p. 364.

First Schedule (1) (a)—Where death "results" from the injury—Death from disease following on an accident.

23. A workman had a fall from a ladder whereby his ankle was injured, and he also suffered from general pain and shock, which lasted until, about a month after the accident, he was seized with violent internal pains and died from appendicitis peritonitis. In an arbitration upon a claim by his widow for compensation, in which two doctors were examined for each side, there was a conflict of medical evidence, one doctor, for the pursuer, saying that probably the workman "would have been alive now had he not met with the accident," the other that the condition of which the workman died "was consequent, indirect if you will, of the accident," and that "in all probability" he "would not have died but for the accident." The two doctors examined for the defenders could see no connection between the accident and the cause of death. *Held* that there was evidence to support the arbitrator's finding that death was the result of the accident. *Euman v. Dalziel & Co.*, p. 246.

First Schedule (1) (a)—Where death "results" from the injury—Death from operation not confined to injury caused by accident.

24. A workman accidentally ruptured himself and was obliged to undergo an operation for hernia. In the course of the operation he was discovered to be suffering also from another old hernia and both were operated upon. He subsequently died from heart weakness and degeneracy "set up by the strain of the operation." *Held* that there was evidence to justify the arbitrator in finding that death was the result of the accident. *Thomson v. Mutter, Howey, & Co.*, p. 619.

First Schedule (1) (b)—Where incapacity "results" from the injury—Refusal to undergo surgical operation.

25. A workman accidentally injured in the foot and thereby incapacitated, refused to undergo a simple operation which, it was reasonably certain, would have cured him. He acted on the advice of his own doctors, who were of opinion that the operation, though safe, would be useless. *Held* that he was precluded from claiming a continuance of compensation. *O'Neil v. John Brown & Co., Limited*, p. 653.

First Schedule (1) (b)—When incapacity "results" from the injury—Supervening aneurism.

26. A miner strained his back on 7th December 1911 and in consequence became incapacitated for work, but on 27th May resumed and continued at full work until 15th August when he became totally incapacitated owing to dilation of the heart caused by an aneurism of the aorta. He did not feel pain in the cardiac region or show any symptoms of heart trouble until July. *Held* that the arbitrator, who was of opinion that the aneurism was caused by the miner being engaged between May and August at work which was beyond his physical powers, was entitled to find that his present incapacity was not due to the accident of 7th December. *Paton v. William Dixon, Limited*, p. 1120.

First Schedule (1) (b) and (2) (c)—Average weekly earnings—Grade of employment—Change of grade—Appointment to work higher class machine dealing with finer material.

27. A girl in a rope and sailcloth factory, employed at a weekly wage of 7s. 6d. to work a drawing machine dealing with hemp which was

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afterwards spun into rope, was promoted to work, at a weekly wage of 8s., a drawing machine dealing with tow, a finer material which was afterwards woven into sailcloth. Five weeks after the change she was accidentally injured. *Held* that the change was a change in the "grade" of her employment within the meaning of the Workmen's Compensation Act, 1906, First Schedule (2) (c), and that compensation fell to be calculated on the basis of her average weekly earnings for these five weeks. *Dalgleish v. Edinburgh Roperie and Sailcloth Co., Limited*, p. 1007.

First Schedule (3)—Amount of compensation—Partial recovery—Review of weekly payments—Arbitrator's discretion.

28. When a workman, who has been totally incapacitated and has been receiving full compensation in terms of the Workmen's Compensation Act, partially recovers and is earning a wage, a *prima facie* case arises for reducing his compensation: but it is open to him to prove circumstances which will warrant the arbitrator, in the exercise of his discretion, in refusing to diminish the compensation. The circumstance that the compensation he has been receiving together with the wage he is earning does not equal his average weekly earnings before the accident does not by itself justify a refusal to diminish. *Pryde v. Moore & Co.*, p. 457.

First Schedule (15)—Remit to medical referee—Ambiguous report—Competency of arbitrator sending report back to medical referee for explanation.

29. The report of a medical referee, to whom a remit has been made under the Workmen's Compensation Act, 1906, First Schedule (15), may competently be sent back to him by the arbitrator for explanation, if it is ambiguous or unintelligible. *Kennedy v. William Dixon, Limited*, p. 659.

First Schedule (15)—Remit to medical referee—Finality of referee's report—Proof as to wage-earning capacity.

30. In an application to end the compensation payable to a miner who had received an injury to his eye, the question of his condition and his fitness for employment was referred to a medical referee under paragraph (15) of the First Schedule to the Act. The medical referee reported that "his condition is such that I consider he ought now to be fit to resume his ordinary work as a miner below ground." The miner having lodged answers in which he averred that he had not yet recovered from the effects of the accident and that his earning capacity was not restored, the Court allowed a proof as to the miner's wage-earning capacity, but excluded all evidence with regard to his physical condition and physical fitness for his ordinary work as a miner below ground, as on those points the medical referee's certificate was final. *Cruden v. Wemyss Coal Co., Limited*, p. 534.

First Schedule (16)—Review of weekly payments—Industrial disease—Recovery—Susceptibility to recurrence—Question whether susceptibility due to original attack—Onus of proof.

31. In an application by employers for the ending or diminishing of a weekly payment of compensation it was proved that the workman, after being duly certified as suffering from miner's nystagmus (an industrial disease), was awarded compensation, that he had "now completely recovered from this attack," but that he was susceptible to a recurrence of the disease. It was not proved whether the susceptibility was due to the original attack or to constitutional predisposition, the evidence being inconclusive. *Held* that, as the workman had recovered from the original attack, and as he

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had failed to discharge the onus which lay on him of proving that his susceptibility to recurrence of the disease was due to that attack, the compensation fell to be ended. *Darroll v. Glasgow Iron and Steel Co., Limited*, p. 387.

First Schedule (16)—Review—Minor workman—Probable earnings at date of review—General rise in wages—Agreement fixing probable earnings at prior date—Rise in wages between date of agreement and date of review.

32. The compensation payable to a minor workman was fixed by agreement at a weekly sum representing half the amount which, in the opinion of the parties, he would have been earning at the date of the agreement had he remained uninjured. Some months afterwards, in consequence of a general rise in wages, he applied to the Sheriff to have the compensation increased. *Held* that the fact that there had been a general rise in wages between the date of the agreement and the date of the application did not *per se* entitle the workman to an increase, but that it was merely one of the items to be taken into consideration by the Sheriff in determining for himself under paragraph 16 of the First Schedule to the Act the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured. *Malcolm v. Thomas Spowart & Co., Limited*, p. 1024.

Second Schedule (9)—Recording of memorandum—Terms of memorandum differing from terms of agreement—Agreement to pay compensation in terms of the Act.

33. An injured workman and his employers verbally agreed that compensation should be paid to the former at the rate of 15s. 1d. per week. The workman thereafter signed a number of receipts, each of which bore to be for "weekly compensation to date under the Workmen's Compensation Act, 1906, under which I claim for personal injury by accident sustained by me." Thereafter the employers objected to the recording of a memorandum which bore that the agreement was to pay compensation at the foresaid rate "until the same is ended, diminished, redeemed, or suspended in terms of" the Act, on the ground that the memorandum was not genuine, because it differed in terms from the agreement which contained no obligation as to future payments. *Held* that the arbitrator, who had granted warrant to record the memorandum, was right in so doing, in respect that the agreement was an agreement to pay compensation in terms of the Act, and that the memorandum merely set forth those terms. *Pearson v. Babcock & Wilcox, Limited*, p. 959.

Second Schedule (9)—Recording of memorandum—Genuineness—Written agreement—Terms of memorandum differing from terms of agreement.

34. A workman, who had been totally incapacitated by an accident, received weekly payments of 10s. from his employers, for which he granted receipts bearing that the payments were accepted "as the weekly compensation payable during the period of total incapacity for work as the result of the accident." He subsequently applied for warrant to record a memorandum which bore that the parties had agreed "that compensation be paid by" the employers to the workman "in terms of the Workmen's Compensation Act, at the rate of 10s. per week from" the date of the accident. *Held* that the memorandum was not genuine, in respect of the omission of the qualification "during the period of total incapacity." *Pryde v. Moore & Co.*, p. 457.

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Second Schedule (9) (d)—Agreement for redemption of compensation by payment of lump sum—Application to record—Duty of Sheriff-clerk to inquire into circumstances of agreement.

35. The Second Schedule (9) (d) of the Workmen's Compensation Act, 1906, provides that a Sheriff-clerk to whom a memorandum of agreement for the redemption of a claim for compensation by payment of a lump sum is brought, may refuse to record it if, "on any information which he considers sufficient," it appears to him that, by reason of the inadequacy of the sum or the means by which the agreement was obtained, the agreement should not be recorded. *Held* that the Sheriff-clerk is not bound in every case *ex proprio motu* to inquire into these matters before proceeding to record. *Observations* on the duties of the Sheriff-clerk in such a case. *M'Guire v. Paterson & Co.*, p. 400.

Second Schedule (9) (d)—Act of Sederunt, 26th June 1907, sec. 12—Application to record memorandum—Agreement for redemption of weekly payment—Minute by workman objecting to adequacy of sum agreed on and to means by which agreement obtained—Reference by Sheriff-clerk to Sheriff—Competency of procedure.

36. *Held* that where, upon a minute lodged by a workman objecting to the recording of a memorandum of an agreement as to the redemption of a weekly payment on the grounds mentioned in paragraph (9) (d) of the Second Schedule, the matter was referred by the Sheriff-clerk to the Sheriff, it was the duty of the latter to determine the questions thus raised, notwithstanding that the minute was lodged by the workman and not by the Sheriff-clerk. *Burns v. William Baird & Co., Limited*, p. 358.

Second Schedule (17) (b)—A. S. 26th June 1907, sec. 17 (h)—Application for order on arbitrator to state case—Arbitrator's refusal to state question whether his findings in fact supported by the evidence led—Whether question one of law or fact.

37. A workman, dissatisfied with the arbitrator's statement of a case on appeal under the Workmen's Compensation Act, 1906, presented a note for an order upon the arbitrator to state a case, averring that certain facts, other than those stated by the arbitrator, had been proved, and that certain of the arbitrator's findings were contrary to the evidence, and proposing as one of the questions of law the question "Whether there was evidence led before the Sheriff-substitute which could competently support his findings of fact?" He did not aver that there was no evidence before the arbitrator upon which he could proceed to a decision of the case. The Court *refused* the note, *holding* that it was in effect a request for the allowance of appeal upon a pure question of fact, upon which, under the Act, the arbitrator was final. *Nelson v. Allan Brothers & Co. (United Kingdom), Limited*, p. 1003.

Second Schedule (17) (b)—Remit to arbitrator for further statement of fact—Power of arbitrator to hear further evidence.

38. In a case stated for appeal against the decision of a Sheriff-substitute acting as arbitrator in proceedings under the Workmen's Compensation Act, 1906, in the course of which proceedings proof had been led, the Court remitted to the Sheriff-substitute to find whether the workman had given statutory notice of his accident as soon as practicable thereafter. The Sheriff-substitute reported that he had himself re-examined the doctor who attended the workman during his illness, and made a finding in answer to the question put by the Court. This report was objected to on the ground that it proceeded on evidence which had been taken after

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the proof had been closed. *Held* that the Sheriff-substitute was entitled, under the remit, to take further proof, and objection *repelled*. *Park v. Coltness Iron Company, Limited*, p. 1163.
See Res Judicata.

WRIT. Deletions—Holograph testament—Authenticity of deletions.

1. A testatrix left certain holograph testamentary writings which were found in a locked desk in a chest of drawers in her house. The writings were contained in a closed envelope, which was addressed in the testatrix's handwriting to her brother, whom she appointed her executor. The writings contained a number of bequests, some of which had been scored through in ink. *Held* that the bequests deleted had been duly revoked, in respect that the inference to be drawn from the deletions themselves, and from the circumstances in which the writings were found, was that the deletions had been made by the testatrix herself with the intention of revoking the bequests. *Milne's Executor v. Waugh*, p. 203.
“*Deed*”—*Minute of acceptance of office by trustees—Stamp Act, 1891, First Schedule.*
2. *Held* that a minute of acceptance of office by trustees, engrossed upon a trust-disposition and settlement and signed by the trustees before two subscribing witnesses, was not a “*deed*” within the meaning of the First Schedule to the Stamp Act, 1891. *Henderson's Trustees v. Commissioners of Inland Revenue*, p. 987.
“*Deed of trust*”—*Deposit-receipt—Act 1696, cap. 25—Proof.*
3. *Held* that a deposit-receipt is not a “*deed of trust*” within the meaning of the Act 1696, cap. 25. *Cairns v. Davidson*, p. 1054.

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